Neutral Citation No: [2024] NICoroner 18	***Ref:*** **KIN12456**
Judgment: approved by the court for handing down (subject to editorial corrections and proofing prior to publication)*	***Delivered*:** **04/03/2024**

IN THE CORONERS COURT FOR NORTHERN IRELAND

BEFORE THE CORONER MR JUSTICE KINNEY

IN THE MATTER OF AN INQUEST TOUCHING THE DEATH OF SEAN BROWN

OPEN RULING IN THE CLAIM FOR PUBLIC INTEREST IMMUNITY

Introduction

[1] This inquest involves an investigation into the death of Mr Sean Brown on 19 May 1997. Mr Brown was shot dead by loyalist paramilitaries. I do not need to rehearse the sad facts relating to that callous murder. The Brown family are present today and have the lived experience of almost 27 years waiting for justice. That they should still be waiting for the completion of an inquest into the death of their loved one is lamentable.

[2] The Ministry of Defence, the Security Service and the Police Service of Northern Ireland have made applications to withhold from disclosure evidence which would otherwise fall to be disclosed during the inquest on the grounds of public interest immunity.

[3] Agencies of the state are under an obligation to produce to a coroner potentially relevant documents in their possession relating to a death under investigation. In doing so there can be information within documents that the state agencies seek to protect for good reason.

[4] In the course of the extensive evidence gathering process for this inquest, various government ministers on behalf of the Ministry of Defence, the Security Service and the Police Service of Northern Ireland have applied to withhold certain material which they have in their respective possession. They make these applications on the grounds of public interest immunity through their provision of various public interest immunity (or PII) certificates.

[5] The principles regarding a request for PII are well established in law. That law applies to inquests in the same way as it applies to civil proceedings in any other

court. The judge or coroner dealing with a PII claim must consider a series of questions to determine whether to uphold the claims made in a PII certificate. If a PII claim is upheld, then the material to which it relates must be excluded from the proceedings and the information contained in that material cannot be taken into account by the coroner.

[6] The first step in the process is to consider whether the material for which PII is claimed is relevant to the inquest and would in the normal course be disclosed in the inquest. In this case I have, both directly and also through my counsel, examined the documents referenced in the PII applications and I am satisfied that they are relevant and would therefore fall to be disclosed if there was not a PII claim.

[7] I must then consider two important yet competing aspects of the public interest. One aspect of the public interest is ensuring that all relevant information is available to the inquest so that it may conduct its statutory inquiry. This is part of the principal of the open and transparent administration of justice. The second and competing aspect of the public interest is, in this case, that of preventing harm being caused to national security through the disclosure of relevant material to the inquest.

[8] The Divisional Court in England and Wales gave consideration to these competing interests when considering the PII process conducted during the inquest into the death of *Alexander Litvenenko (Secretary of State for Foreign and Commonwealth Affairs v Assistant Deputy Coroner for Inner North London)* [2013] EWHC 3724 (Admin). Goldring LJ said:

> "53. First, it is axiomatic, as the authorities relied upon by the PIPs demonstrate, and as the Coroner set out in his open judgment, that public justice is of fundamental importance. Even in cases in which national security is said to be at stake, it is for courts, not the Government, to decide whether or not PII should prevent disclosure of a document or part of a document.
>
> 54. Second, as I have said, the issues which we have had to resolve only concerned national security. The context of the balancing exercise was that of national security as against the proper administration of justice. Had the issues been such as have been touched upon by the PIPs in their submissions, different considerations might well have applied.
>
> 55. Third, when the Secretary of State claims that disclosure would have the real risk of damaging national security, the authorities make it clear that there must be evidence to support his assertion. If there is not, the claim

fails at the first hurdle. In this case there was unarguably such evidence. The Coroner did not suggest otherwise.

56. Fourth, if there is such evidence and its disclosure would have a sufficiently grave effect on national security, that would normally be an end to the matter. There could be no disclosure. If the claimed damage to national security is not "plain and substantial enough to render it inappropriate to carry out the balancing exercise," then it must be carried out. That was the case here.

57. Fifth, when carrying out the balancing exercise, the Secretary of State's view regarding the nature and extent of damage to national security which will flow from disclosure should be accepted unless there are cogent or solid reasons to reject it. If there are, those reasons must be set out. There were no such reasons, let alone cogent or solid ones, here. The Coroner did not seek to advance any. The balancing exercise had therefore to be carried out on the basis that the Secretary of State's view of the nature and extent of damage to national security was correct.

58. Sixth, the Secretary of State knew more about national security than the Coroner. The Coroner knew more about the proper administration of justice than the Secretary of State.

59. Seventh, a real and significant risk of damage to national security will generally, but not invariably, preclude disclosure. As I have emphasised, the decision was for the Coroner, not the Secretary of State.

60. Eighth, in rejecting the Certificate the Coroner must be taken to have concluded that the damage to national security as assessed by the Secretary of State was outweighed by the damage to the administration of justice by upholding the Certificate.

61. Ninth, it was incumbent on the Coroner to explain how he arrived at his decision, particularly given that he ordered disclosure in the knowledge that by doing so there was a real and significant risk to national security."

[9] In reaching my decisions on PII in this inquest I have also acknowledged the respective roles of the coroner and the relevant minister who has certified the material as being necessary for protection by the public interest immunity claim. In *R (Mohammed) v Secretary of State for Foreign & Commonwealth Affairs (No.2)* [2011] QB 218 Lord Neuberger said at paragraph 131:

> "131. It seems to me that, on grounds of both principle and practicality, it would require cogent reasons for a judge to differ from an assessment of this nature (i.e. in respect of PII) made by the Foreign Secretary. National security, which includes the functioning of the intelligence services and the prevention of terrorism, is absolutely central to the fundamental role of the government… As a matter of principle, decisions in connection with PII are primarily entrusted to the Executive … and not to the judiciary."

[10] This was echoed in the *Litvenenko* decision above where Goldring LJ said at paragraph 26:

> "…. The coroner failed to accord adequate respect to the assessment of the Secretary of State as to how the balance of the competing public interests should be struck; second, he failed properly to undertake the balancing exercise of the competing public interests by treating his desire to conduct what he considered to be a "full and proper" inquest as a "trump card" which overrode all other considerations and third, that he reached a decision on the merits of the claim which no reasonable coroner properly applying the correct legal principles to a decision of this nature, could have reached."

[11] I must consider the material the state agencies wish to withhold. Then I must determine if there is a real risk that disclosure of that material would cause serious harm to the public interest involved, in this case, various aspects of national security.

[12] If I am satisfied serious harm would be caused then I must consider whether the risk can be protected by other methods or more limited disclosure. Finally, if the alternatives are not sufficient then I must apply the balancing test. Is the public interest in non-disclosure outweighed by the public interest in disclosure for the purposes of doing justice in the proceedings.

The PII applications

[13] I am satisfied that the material contained in the documents which are covered by the various PII certificates is relevant to the investigation into the death of

Mr Brown. However, the relevant government ministers have asserted that disclosure of the information contained within the documents would cause a real risk of serious harm to an important public interest. Those interests are identified in this inquest as:

(1) Damage to personal security/information relating to:

    (a) persons providing or having provided information or assistance in confidence and

    (b) information relating to the identity, appearance, deployment or training of current and former members of the security forces and

    (c) information relating to the operations and the capabilities of the security forces.

(2) Damage to operational capability/information relating to operations and capabilities of the security forces and information relating to methods and techniques or equipment deployed by the security forces.

[14] Based on my consideration of the material and having received submissions from the parties in both open and closed hearings, together with the contents of the ministerial PII Certificates I am satisfied that these concerns can be amplified in this case as follows.

[15] Where protection is sought on the grounds of source protection it relates to information which may identify or assist in identifying individuals who currently or in the past have worked for or provided information and/or assistance to the security forces. The disclosure of this information would either risk endangering the persons concerned or other persons or would risk impairing the ability or willingness of such individuals to assist the security forces. It would also impair the ability of the security forces in retaining and recruiting other such individuals in the future.

[16] Failure to protect a source's personal information may jeopardise the safety of an individual, or indeed members of his or her family. It can also lead to misidentification of a different person who may be either connected or unconnected to the source. This may result in an increased risk of death or serious harm to those individuals. The mere passage of time does not provide an adequate answer to this risk.

[17] Identification of individuals would make it more difficult if not impossible for the recruitment of such sources by the security forces and lead to a loss of intelligence which would cause significant damage to national security.

[18] Members of the security services who have been or continue to be involved in sensitive terrorist related investigations remain open to significant risk should their identities be revealed.

[19] Finally, there is a need to protect the operational abilities of the security services and agencies concerned. If such information becomes known, it can damage both operational capability and strategy and both potentially cause harm to future operations and open risks to individuals.

The PII process.

[20] I wish to make some comments regarding the manner in which the PII process in this case unfolded. The actual process of producing sensitive material to the coroner investigating the death of Mr Brown actually began years ago. More and more material was produced over time. Questions relating to the material, as produced, were asked on my behalf by my office and by coroner's counsel. These went unanswered for an inordinate period. When the questions were finally answered a significant volume of further material was then produced.

[21] Various assurances were given about likely timelines for the provision of the sensitive material. Notwithstanding that this inquest dates back to 1997, stress was placed by the statutory agencies on the resource difficulties they experienced in trying to produce the required material within a reasonable timeframe. Assurances were given to me regularly at case management directions hearings, by those representing the state agencies, that the issues were receiving constant and consistent attention.

[22] The opening hearing of this inquest was in March 2023. It was clearly anticipated by all properly interested parties, including the state agencies, that the PII process would be complete by September 2023. I will not set out a detailed chronology. Despite directions given by me, supplemented by proposals given by the state agencies as to time limits, they said they could comply with, the PII process stuttered on and did not complete until last week. Although there were a considerable number of files identified, the number of papers which ultimately needed to be considered for redactions were in the end quite manageable.

[23] During this PII process I was informed of so many ongoing issues and obstacles by the state agencies that I had to take the unusual step of micromanaging the process at one stage by requiring daily updates from those carrying out the work on the materials in order to ensure that progress was actually being made. One example of the issues that arose was the potential inconsistency in approach between the various state agencies. I was advised that materials which I had understood to have been fully checked then had to be cross checked by other agencies in case there had been non-redaction or under redaction.

[24] The consequential delays in dealing properly with the materials disadvantaged all of the parties to the inquest in terms of their preparation. I have frequently recorded my dissatisfaction with the way in which this process was conducted by the state agencies. I can only describe the failure to properly assist the inquest as deplorable and frankly inexcusable. It should not have taken the time that it did.

[25] I am also conscious that these failings resonate with failings identified in other inquests in recent times. Inadequate resourcing does not provide an answer. Too much work was left too late. It is not acceptable that an apparent lack of communication between state agencies and the failure to carry out appropriate cross checks at a much earlier stage should be allowed to affect the integrity of the inquest process. It is undoubtedly the case that PII processes involve significant work for those involved and I do not doubt the industry of the lawyers representing the state agencies. However, it seems to me that some of that task has been made much more laborious than it needs to be. One obvious consequence is the additional pressure that both my office and in particular the representatives of the next-of-kin were then placed under, in what are clearly already very difficult and traumatic circumstances. The much greater consequence was the chronic and continuously unfolding delay in being able to progress the Inquest. It was listed for final hearing in January of this year, but those dates were lost because of the delay in the PII process.

Consideration

[26] The materials for which PII protection is sought have been considered in detail on several occasions both by me and by the very assiduous work of my staff and my counsel. It has involved four closed court hearing days. I have received submissions relating to the material both in open and in closed hearings and I am grateful to Mr Fahy, counsel for the next-of-kin, for the focused written submissions provided by him on the materials which the next-of-kin only see in redacted form.

[27] In considering the materials I have taken into account that PII attaches to information rather than to complete documents. I have considered during the closed hearings whether there are ways in which more of the information which is the subject of the PII claims could be disclosed in the inquest. It has been possible to achieve further disclosure of the information in some documents which were originally subject to a PII claim.

[28] I have reached the following decisions in determining that the applications for PII should be, in large part, upheld:

(1) Disclosure of names, reference numbers and other details relating to a number of named individuals who include military personnel, police personnel and other individuals will give rise to a real risk of serious harm to the public interest. Those individuals have been identified in some instances

by ciphers, and other material relating to them such as reference numbers have been redacted.

(2) I am satisfied that the disclosure of some dates and the grading of intelligence information should also be protected.

(3) Having said this I have agreed with the relevant agencies in closed hearings that there will be a rollback of claimed PII in respect of certain information. That means some material for which PII was originally claimed by the state agencies is now available. The relevant pages have been provided to all of the properly interested persons in the inquest by way of substitution of those pages in the bundles that have been disseminated.

(4) In those closed sessions I have also directed that the parties will be provided with a gist of certain information. That has now taken place.

[29] Disclosure of any further information that is the subject of the PII certificates would create a real risk of serious harm to the public interest in terms of damage to national security.

The Litvenenko question

[30] Having determined that certain relevant materials cannot be disclosed on the grounds of PII, the question then arises as to whether or not I, as coroner, can still carry out a proper and sufficient inquiry into how Mr Brown met his death. This is sometimes referred to as the *Litvenenko* question.

[31] The purpose of the inquest is to ascertain the circumstances in which Mr Brown died. It is essentially a fact-finding exercise to determine the answer to four important statutory questions. These are

- the identity of the deceased
- where the deceased died
- when the deceased died
- how the deceased came by his death.

[32] In circumstances in which article 2 of the European Convention on Human Rights is engaged, as it is here, that fourth question, as to how the deceased died, means not only by what means the deceased died, but also in what broad circumstances he met his death.

[33] I have excluded material from the inquest in accordance with my determination of the application for public interest immunity. The law does not

allow evidence to be taken or considered in closed session in an inquest. Therefore, the effect of upholding the PII claim is that sensitive material, including material relevant to the question of how and in what circumstances Mr Brown's death occurred, will be excluded from the inquest proceedings under the public interest immunity principle. It cannot be taken into account by me as coroner when I come to address the statutory questions.

[34] In consequence I am satisfied that my duty to carry out a full, fair and fearless investigation into Mr Brown's death is seriously compromised as issues of central importance to the death cannot be dealt with by the inquest process. I cannot investigate or make a proper analysis of material which is the subject of the PII certificates.

[35] In these circumstances, and with considerable regret, I have concluded that I cannot continue with this inquest. To do so would inevitably result in an inquest that would be incomplete, inadequate and misleading.

[36] I know this decision will cause further pain and anguish for the family of Mr Brown who have regularly and respectfully appeared before me at every hearing I have conducted since I was appointed the coroner for this inquest.

[37] I want to say to you that, from all the information placed before me, Sean Brown was an entirely innocent man who was the subject of a planned execution by LVF gunmen. His murder was senseless. I know that one of the questions that perplexes you as a family is why he was murdered. I cannot answer that question. I can say that nothing I have seen during this process to date provides a satisfactory answer to that question. And everything that I have seen simply confirms what I was told about Sean at the start of this inquest. He was a man who was at the heart of his family and his community. He was a man of whom his family are justifiably proud. He was the kind of person our society needs, and his loss is truly felt in that wider sense.

[38] You have fought for many years to try and establish the truth. I have no doubt you will continue. Your lives were horrifically and devastatingly changed forever by his murder. You have fought for truth and justice for almost three decades. The inquest process as it stands cannot provide what you desire or deserve.

[39] I have reached my decision that the inquest cannot proceed with great regret. I know there is little of comfort in what I have said today for the Brown family. I am sorry I cannot complete my work.

[40] It is my intention to write to the Secretary of State for Northern Ireland requesting that a public inquiry be established into the death of Sean Brown. Such an inquiry would allow evidence to be heard in closed session if required. Although a closed hearing is not in itself desirable, the national security issues in play in this

case mean that the sensitive material which has had to be excluded in this inquest could only be examined and tested in a closed hearing.

[41] A public inquiry appears to me to be the appropriate way to consider the circumstances of Mr Brown's murder. This echoes what the Chief Constable has already said and appears to me to resonate with the comments of the Minister of State at the Northern Ireland office, The Right Honourable Steve Baker MP, who took the unusual step of adding a handwritten postscript to the PII Certificate stating;

> "The extent of the redactions here strengthens the case for closed proceedings."

[42] Those closed proceedings are only available through a public inquiry.

[43] A public inquiry will also allow there to be a full examination of how the police conducted investigations into the murder, including as to why important information, that has unfortunately brought an end to this inquest, only appears to have been revealed for the first time in 2023, more than 26 years after Mr Brown's murder.

[44] In view of the inordinate delay in reaching this point, and in light of the materials now available to the Secretary of State for Northern Ireland, I will be asking that the Secretary of State provide his decision on the issue of whether a public inquiry is appropriate within four weeks of receipt of my letter.

[45] I consider the family deserve no less than an urgent and thorough determination of this matter.

[46] Thank you all for your participation and assistance and a particular thanks to the family of Sean Brown who have displayed determination, commitment and above all great dignity throughout this distressing process.