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*Judgment: approved by the court for handing down (subject to editorial corrections)**	*Delivered:* **25/08/2022**

IN THE CORONER'S COURT IN NORTHERN IRELAND

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IN THE MATTER OF AN INQUEST INTO THE DEATHS OF LAWRENCE JOSEPH McNALLY, ANTHONY PATRICK DORIS AND MICHAEL JAMES RYAN

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OPEN RULING ON THE CLAIM FOR PUBLIC INTEREST IMMUNITY

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HUMPHREYS J

Introduction

[1] The inquest relates to the deaths of Lawrence Joseph McNally, Anthony Patrick Doris and Michael James Ryan which occurred on 3 June 1991 at Coagh, Co Tyrone. All three men, who were active members of the Provisional IRA, were shot dead by British Army soldiers. A vehicle in which the three deceased were travelling entered a car park in Coagh around 7.30am where they expected to find their target, an off-duty Ulster Defence Regiment (UDR) soldier. Instead, members of a specialist military unit opened fire and all three were killed.

[2] The Ministry of Defence (MOD) and the Police Service of Northern Ireland (PSNI) have both applied to the court to withhold from disclosure evidence which would otherwise have to be disclosed on the grounds of public interest immunity ('PII'). A PII Certificate was signed by The Rt Hon Ben Wallace MP, Secretary of State for Defence, on 10 June 2022. This Certificate relates to a number of documents which contain sensitive information about military units and intelligence matters. The PII claim is made in respect of parts of the documents identified in an Annex to Certificate and also extends to oral evidence relating to the information in question.

[3] This is the OPEN ruling in respect of the PII application. For reasons which will be apparent, the reasoning of the court in respect of the matter cannot be disclosed in full but will be the subject of an additional CLOSED ruling.

The Legal Principles

[4] By virtue of section 17B(3) of the Coroners Act (Northern Ireland) 1959 ('the 1959 Act'), the rules of law governing the withholding of evidence on the grounds of

PII apply to inquests as they apply to civil proceedings in a court in Northern Ireland.

[5] The principles which govern the application of PII in civil proceedings are well established – see *R v Chief Constable of West Midlands Police ex parte Wiley* [1995] 1 AC 274. The task faced by a judge or coroner is to perform a balancing exercise between two important and potentially competing aspects of the public interest. The public interest in all relevant evidence being available to Properly Interested Persons (PIPs) and the decision maker is central to the proper and transparent administration of justice. This must be weighed against the public interest in preventing harm being caused to national security. The court is the ultimate arbiter on this issue.

[6] In *Secretary of State for Foreign and Commonwealth Affairs v Assistant Deputy Coroner for Inner North London* [2013] EWHC 3724 (Admin), which arose out of the death of Alexander Litvinenko, Goldring LJ set out a number of applicable principles:

> "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.
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> 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.
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> 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.
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> 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.
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> 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.
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> 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.
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> 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.
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> 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.
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> 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."

[7] It must also be noted that there is no power for a Coroner to consider a closed material procedure application under the Justice and Security Act 2013. The absence of such a procedure in inquests means that any evidence which is considered by a coroner or jury must be disclosed to Properly Interested Persons (PIPs). A coroner who has sight of unredacted material for the purpose of a PII application, when the claim is upheld, must put such material out of his or her mind in the decision making process.

[8] I propose therefore to consider the following questions in relation to the material in respect of which PII is claimed:

(i) Is the threshold for disclosure passed?

(ii) Is there a real risk that disclosure of the material would cause serious harm to the public interest?

(iii) Can the real risk of serious harm be mitigated or prevented by other means or by some restricted disclosure?

(iv) If not, is public interest in non-disclosure outweighed by public interest in disclosure for purposes of doing justice in the proceedings?

[9] In doing so, I bear in mind the observations of Lord Neuberger MR in *R (Mohamed) v Secretary of State for Foreign and Commonwealth Affairs (No 2)* [2011] QB 218:

> "131. While the question of whether to give effect to the certificate is ultimately a matter for the court, it seems to me that, on the grounds of both principle and practicality, it would require cogent reasons for a judge to differ from an assessment of this nature 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 roles of the Government, namely the defence of the realm and the maintenance of law and order, indeed ultimately, to the survival, of the state. As a matter of principle, decisions in connection with national security are primarily entrusted to the executive, ultimately to Government ministers, and not to the judiciary…In practical terms the Foreign Secretary has unrestricted access to full and open advice from his experienced advisers, both in the Foreign Office and the intelligence services. He is accordingly far better informed, as well as having far more relevant experience, than any judge for the purpose of assessing the likely attitude and actions of foreign intelligence services as a result of the publication of the redacted paragraphs, and the consequences of any such actions so far as the prevention of terrorism in this country is concerned."

The PII Application

[10] Having considered all the material, I have concluded that it all meets the relevance test and therefore would be subject to disclosure under section 17A of the 1959 Act.

[11] The Minister accepts that the material is relevant but asserts that there is a real risk of serious harm which would be caused by disclosure. On his analysis, the balancing exercise comes down in favour of non-disclosure.

[12] The evidence of the Minister is that the threat of terrorist violence remains. The current threat level remains at 'substantial' throughout the United Kingdom which means that an attack is likely and may occur without warning. There is a pressing need for the UK to be able to counter terrorism and those who hold Ministerial office cannot allow these operational abilities to be compromised.

[13] The Minister also stresses that the soldiers involved in the Coagh shootings were members of a specialist military unit. Revelation of their identities and appearances would cause real risk of harm to them as individuals and to their families. As a result, the application for PII entails a claim that the military witnesses should enjoy anonymity and screening.

[14] The applicants identify the following public interests as being in play in the PII application:

A. Source Protection – information relating to persons providing information or assistance in confidence to Agencies. The failure to protect their identities may cause harm to personal safety, a loss of confidence in state agencies and lack of willingness to co-operate in the future.

B. Information relating to identity of members of agencies, the revelation of which is likely to cause harm to personal security and to undermine confidence.

C. Operations of Agencies. Information in relation to operational capability and strategy would, if disclosed, potentially cause harm to future operations.

D. Methodology – disclosure could undermine operational capability and jeopardise safety of personnel.

E. Information relating to organisation of and roles within agencies, disclosure of which would impair ability of agencies to perform functions.

[15] Having considered the materials in detail, and received submissions in both open and closed hearings, I am satisfied that disclosure of the names and reference numbers (however described) of military personnel and intelligence sources would give rise to a real risk of serious harm to the public interest, particularly those at A, B and E above. There is no basis for any disclosure of such information in an alternative manner, such as 'gisting.' Having then carried out the balancing exercise, I have determined that this public interest is not outweighed by the public interest in favour of disclosure for the purpose of doing justice.

[16] Since PII attaches to information rather than documentation, it follows that the military witnesses will be entitled to special measures such as anonymity and screening in order to protect the disclosure of their identities. I will hear counsel further on the precise logistics of the application of these measures.

[17] I am also satisfied that the disclosure of information relating to the precise dates and grades of intelligence information would, for the reasons given in closed proceedings, cause a real risk of serious harm to the public interest, all those interests identified at A to E being relevant. Again, there is no alternative method for the provision of this information. The balancing exercise comes down in favour of non-disclosure.

[18] I am satisfied, from my scrutiny of the unredacted material, that the redactions in the three files of documents before the court are set at the minimum level necessary to protect the identified aspects of the public interest. I therefore rule that such material is not disclosed to PIPs nor will it otherwise be adduced in evidence at the inquest

The Location of Soldier H

[19] The applicants seek to prevent the disclosure of any information in relation to the precise location of one of the military witnesses, Soldier H, at or about the time of the shootings. It is said that the information itself would cause a real risk of serious harm to the public interest.

[20] For the reasons which I have set out in the CLOSED ruling, I reject this application. At paragraph [55] of his judgment in the *Litvinenko* case, Goldring LJ makes it clear that there must be evidence to support such an assertion, else the claim 'falls at the first hurdle'. There is no evidence in this case to sustain the applicants' claim for PII in respect of the location of Soldier H.

[21] Again, for the reasons set out in the CLOSED ruling, I have determined that the location of Soldier H is relevant to the issues which fall for determination at the inquest hearing. I therefore make a direction, pursuant to section 17A of the 1959 Act, that all documents relating to the location of Soldier H at or about the time of shootings be disclosed and that the inquest will receive evidence on this issue.

The Voice Distortion Issue

[22] As part of the application for PII, and in addition to anonymity and screening, the applicants ask that the voice of Soldier G be distorted whilst he is giving evidence in order to mitigate against the risk of him being identified.

[23] This is an unusual, if not unique, application. However, it was not contested that the coroner's court could, if circumstances demanded, make an order for special measures of such nature to be applied to a witness.

[24] For reasons which are detailed in the CLOSED ruling, I am satisfied that the threshold of "real and immediate risk" set down by *Re Officer L* [2007] UKHL 6 in relation to the engagement of Article 2 rights is met in respect of Soldier G. I have also determined that the risk would be materially increased if his identity were to become known.

[25] I have therefore concluded that not only should this witness be afforded anonymity and screening but, in addition, his voice should be modified or distorted electronically whilst he is giving evidence.

[26] I recognise that this represents a further intrusion on the principle of open justice which underpins this inquest. However, having carefully considered the evidence and submissions, I will make the order sought by the applicants.

[27] I am conscious that the technology has not been demonstrated and I will therefore hear counsel further on the logistics of this exercise and in relation to the giving of evidence more generally.

The Litvinenko Question

[28] Having found that certain materials ought not to be disclosed on the grounds of PII, it is incumbent on me to consider the *Litvinenko* question, namely whether I, as coroner, can still carry out a sufficient inquiry into how the deceased met their deaths. If I were not so satisfied, then the appropriate course of action would be to invite the Secretary of State to establish a public inquiry.

[29] Such a course should only be taken when the coronial investigation would be seriously incomplete or potentially misleading without the deployment of the material in question – see *R (Litvinenko) v Secretary of State for the Home Department* [2004] HRLR 6.

[30] I am quite satisfied that this inquest can properly proceed. There is nothing in the redacted material which would render the investigation incomplete or potentially cause the decision maker to be misled.

Conclusion

[31] With the exception of the material relating to the location of Solider H, the claim for PII is upheld. In accordance with the authorities, I propose to keep this issue under review as the inquest proceeds.