INQUESTS ARISING FROM THE DEATHS
IN THE LONDON BRIDGE / BOROUGH MARKET
TERROR ATTACK OF 3 JUNE 2017

OPEN RULING ON THE CLAIM FOR PUBLIC INTEREST IMMUNITY BY THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Introduction

1. Eight victims lost their lives in the terror attack which was carried out at London Bridge and Borough Market on the evening of 3 June 2017. The three attackers were confronted by police officers, both armed and unarmed. Each of the three was shot and died from his injuries. These Inquests concern those eleven deaths.

2. One of the attackers, Khuram Butt, is known to have been investigated by the Security Service prior to the attack. He was the subject of an MI5 priority investigation commencing in 2015. The Security Service gathered intelligence about him during the period from 2015 to 2017, but did not identify the activity leading up to the attack. A second attacker, Youssef Zaghba, was the subject of a foreign law enforcement agency's inquiry to the Secret Intelligence Service in 2016. It will be clear to any informed observer that the Security Service and its partners therefore hold material which is both relevant to the Inquests and very likely to be security-sensitive.

3. On 20 March 2019, the Secretary of State for the Home Department ("the Secretary of State") signed a certificate on behalf of the Crown. The certificate states that there is a volume of material in respect of which he is under a duty to claim Public Interest Immunity ("PII").

4. On 12 April 2019 I held OPEN and CLOSED hearings to determine this application for PII. Counsel present in the CLOSED hearing were counsel to the Inquests ("CTI") and those representing the Secretary of State and the Metropolitan Police Service.

5. I received and heard OPEN and CLOSED submissions from the Secretary of State and from CTI. I received and heard OPEN submissions on behalf of the families of the victims,

represented by two separate legal teams. Other Interested Persons chose not to make any submissions.

6. For reasons given in more detail below, I have upheld the claim for PII made by the Secretary of State on the basis that the public interests relied upon justify withholding the material to which the claim relates. I announced that decision at the end of the CLOSED hearing, with reasoned rulings to follow. In summary, I am satisfied that, without the material being disclosed or deployed in evidence, I can properly discharge my statutory duties in these Inquests. There is no need for me to consider asking the Secretary of State to establish a public inquiry (under the Inquiries Act 2005) to take the place of the Inquests.

7. This OPEN document records my conclusions on matters of legal principle, the only submissions on which were heard in OPEN. I also give a summary of my reasons for upholding the PII claim, to the extent that they can be revealed in the public domain. In a separate CLOSED document I record my fuller reasons for upholding the claim.

Background

8. To set this application in context, I shall describe the procedure which has been adopted by the Inquests Team and the Security Service. This procedure has been followed with my involvement and approval, and Interested Persons have been updated at each preliminary hearing.

9. From the early stages of their appointment, the three developed-vetted members of the Inquests Team engaged in a comprehensive review of potentially relevant material held by the Security Service. The Security Service accepted responsibility for disclosure of any relevant material held by it and/or other agencies of the United Kingdom Intelligence Community. Each member of my team (Jonathan Hough QC, Siân Jones and Aaron Moss) reviewed the documents independently and each was involved at every stage.

10. A series of meetings was held between my team and the Security Service (with its lawyers). During these meetings, further questions were posed to the Security Service and additional documents were requested. Leading counsel to the Inquests said in the OPEN hearing that without exception, my team's questions had been answered and their requests complied with.

11. Using the report of Lord Anderson QC as a starting point for what was already in the public domain, the Inquests Team identified to the Security Service a list of topics in respect of which the report did not provide all information potentially relevant to the Inquests. A list of documents of potential relevance to the Inquests was then prepared and provided to the Security Service.

12. The Security Service then produced a draft statement of Witness L, the Security Service's current Head of International Counter-Terrorism, Policy, Strategy and Capability. Substantial parts of that statement were intended to serve as a gist of the material / information identified as relevant (to the extent that the material / information could be revealed openly). That witness statement went further than the Anderson Report on a number of relevant topics, but did not provide all potentially relevant contents of the documents identified by the Inquests Team.

13. The Inquests Team made comments to the Security Service on the sufficiency of the gist in Witness L's statement. Further meetings were held with the Security Service and its lawyers. Some changes were made to Witness L's statement, as a result of which additional information was included.

14. The final version of the witness statement was signed on 4 March and disclosed to Interested Persons on 6 March. Between paragraphs 94 and 147 it details the Security Service's investigations into the attackers, and both what was and is known about them.

The Application

15. The Secretary of State submitted that Witness L's statement goes as far as the Security Service is able to go in providing the information identified as potentially relevant without giving rise to real risks of serious harm to national security. The Secretary of State's certificate was served with a CLOSED "Sensitive Schedule" describing the nature of the risks. Those risks were further explained in the CLOSED written submissions prepared by leading counsel on behalf of the Secretary of State. I am grateful for the care which has obviously gone into the preparation of those materials. They demonstrate that a very rigorous assessment has been undertaken.

16. CTI responded to the Secretary of State's CLOSED submissions with a CLOSED document, addressing the various aspects of the PII claim and testing the position of the

Secretary of State. The Secretary of State then provided CLOSED submissions in reply, answering number of points that had been raised by CTI.

17. The Secretary of State identified four categories of national security damage which may arise in an application such as this. The Secretary of State expressly neither confirmed nor denied (in OPEN material) whether any particular category applies to the PII material that is the subject of this ruling. I adopt the same approach. The categories are:

    a. Damage to capabilities and operations;

    b. Damage to persons providing information;

    c. Damage to liaison relationships; and

    d. Information likely to be of interest to hostile actors.

18. The Secretary of State's overarching submission was that the assessment of national security damage is "cogent and detailed" and accordingly should be accepted by the Court. It was submitted that there is no other method, beyond the gisting which has already been carried out in the form of Witness L's statement, which might allow disclosure of the material whilst properly protecting the identified public interests.

Legal Principles

19. A coroner may require a person to provide evidence or produce documents and other material under Paragraph 1 of Schedule 5 to the Coroners and Justice Act 2009 ("CJA"). Paragraph 2(1) of the Schedule provides that: "A person may not be required to give, produce or provide any evidence or document under paragraph 1 if – (a) he or she could not be required to do so in civil proceedings in any court in England and Wales…" Paragraph 2(2) adds that: "The rules of law under which evidence or documents are permitted or required to be withheld on grounds of public interest immunity apply in relation to an investigation or inquest under this Part as they apply in relation to civil proceedings in a court in England and Wales".

20. Disclosure in an inquest is a staged process. At the first stage, material is provided to the coroner and not to Interested Persons. The second stage is for the coroner to determine whether there will be onward disclosure to interested persons. Different considerations of

PII arise at each stage of the disclosure process. Following the provision of material to the coroner, as explained by Baker J in the context of a PII application (*Worcestershire County Council and another v HM Coroner for the County of Worcestershire* [2013] EWHC 1711 (QB) at [92vii]):

> "the question of any further disclosure is a matter for HM Coroner, having taken into account any further argument in favour of non-disclosure and subject to the supervisory jurisdiction of this court; thus maintaining sufficient safeguards to those properly seeking non-disclosure of these documents."

21. A public authority is under a duty to assert PII where the public interest requires it. Where a judge has been nominated to conduct an inquest in which security-sensitive material is likely to be relevant, the public authority will normally provide that material to the judge and raise any objection to proposed onward disclosure by making a PII claim in an application (*SSHD v HM Senior Coroner for Surrey* [2017] 4 WLR 191 at [41] – [48]). Where the claim is upheld, the nominated judge will refuse to give disclosure of otherwise relevant material to Interested Persons on the ground that there is a statutory or legal prohibition on disclosure, under rule 15 of the Coroners (Inquests) Rules 2013.

22. The principles governing PII in civil proceedings (which, by virtue of paragraph 2(2) of Schedule 5 to the CJA apply directly in an inquest) are well established, as set out in *Conway v Rimmer* [1968] AC 910 at 952 and *R v Chief Constable of West Midlands Police, Ex Parte Wiley* [1995] 1 AC 274. Consideration of PII requires a balance to be found between competing public interests; in a case such as this, the public interest in avoiding harm to national security weighed against the public interest in the Inquests being heard with all potentially relevant evidence being available to Interested Persons.

23. In *R (Mohamed) v Secretary of State for Foreign and Commonwealth Affairs (No. 2)* [2009] 1 WLR 2653 (Div Ct) at [34], Thomas LJ formulated a four-stage process of analysis for considering PII applications:

    a. Is there a public interest in bringing the material for which PII has been claimed into the public domain?

    b. Will disclosure of that material bring about a real risk of serious harm to an important public interest, and if so, which interest?

c. Can the real risk of serious harm to the important public interest be protected by other methods or more limited disclosure?

d. If the alternatives are insufficient, where does the balance of the public interest lie?

24. It is for the Minister to provide an assessment of the injury which would be caused to the public interest, as summarised in *Al Rawi v Security Service and Others* [2012] 1 AC 531 at [147] – [149]. But it is a decision for the Court as to whether the claim to PII is properly justified (*Conway* at 985 and *Wiley* at 289). It is important that the Court should exercise independent judgment and should not simply salute a ministerial flag (*Mohamed v Secretary of State for the Home Department* [2014] 3 All ER 760 at [20]). It is also important that the Court keep in mind that the open justice principle applies to inquests, and that allowing a PII claim entails some restriction on open justice.

25. In reaching its independent conclusion on the evidence and submissions about the existence and nature of claimed risks to national security, the Court should recognise two important considerations. First, Ministers have access to a broad range of evidence, experience and expertise on matters of national security, which informs their judgments. Secondly, the doctrine of separation of powers entrusts judgments about national security primarily to Ministers rather than to the judiciary. See for example *CCSU v Minister for the Civil Service* [1985] AC 374 at 402 and 412; *Secretary of State for the Home Department v Rehman* [2003] 1 AC 153 at [50] – [53]; *R (Mohamed) v Secretary of State for Foreign and Commonwealth Affairs (No. 2)* [2011] QB 218 (CA) at [129] – [135].

26. As submitted by the Secretary of State, there are a series of statements at the highest level of authority to the effect that disclosure should not usually be made if it would cause significant harm to national security. Any real risk to national security must weigh very heavily in any balancing exercise.

27. Applying these general principles of PII to the coronial jurisdiction, the specific public interests served by inquest proceedings must be taken into account. In *R (Amin) v Secretary of State for the Home Department* [2004] 1 AC 653 at [31], Lord Bingham famously characterised the objectives of an inquest as:

> "to ensure so far as possible that the full facts are brought to light; that culpable and discreditable conduct is exposed and brought to public notice; that

suspicion of deliberate wrongdoing (if unjustified) is allayed; that dangerous practices and procedures are rectified; and that those who have lost their relative may at least have the satisfaction of knowing that lessons learned from his death may save the lives of others."

28. Nine points of principle were articulated by Goldring LJ in *Secretary of State for Foreign and Commonwealth Affairs v Assistant Deputy Coroner for Inner North London* [2013] EWHC 3724 (Admin), an application for judicial review arising from the *Litvinenko* inquest:

a. "[It] is axiomatic… 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." [53]

b. The context of the *Wiley* balancing exercise is critical. An exercise which balances national security against the proper administration of justice raises its own particular considerations which may not apply in cases where the interest is not that of national security. [54]

c. "[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." [55]

d. "[If] there is such evidence and its disclosure would have a sufficiently grave effect on national security, that would normally be the end of 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." [56]

e. "[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." Otherwise, the balancing exercise must be carried out on the basis that the Secretary of State's view of the nature and extent of damage to national security is correct. [57]

f. It is usually a given that the Secretary of State knows more about national security than the coroner, whereas the coroner knows more about the proper administration of justice than the Secretary of State. [58]

g. "[A] real and significant risk of damage to national security will generally, but not invariably, preclude disclosure." The decision is for the coroner, not the Secretary of State. [59]

h. For a coroner to reject a PII claim backed by a ministerial Certificate, he/she must conclude "that the damage to national security as assessed by the Secretary of State [is] outweighed by the damage to the administration of justice by upholding the Certificate." [60]

i. It is incumbent on a coroner to explain how he/she arrives at such a decision, particularly if ordering disclosure in the knowledge that doing so entails a real and significant risk to national security. [61]

29. There is no power in an inquest to hold CLOSED material procedures such as may be carried out in some civil proceedings and in a public inquiry. Any evidence taken into account by the coroner (or a jury) in an inquest must have been provided to Interested Persons.

30. Where a PII application is upheld, a coroner must put the evidence out of his or her mind insofar as it would form the basis of any determinations and conclusions. However that is not to say that a coroner should ignore the material entirely. The Divisional Court in *R (Secretary of State for the Home Department) v Inner West London Assistant Deputy Coroner* [2011] 1 WLR 2564 upheld the approach of Dame Heather Hallett, sitting as coroner, in the Inquests into the London Bombings of 7 July 2005. That approach had been to uphold an application for PII whilst making clear that the coroner could use the material to ensure that no question was subsequently asked which would be misleading or based on a premise known (from the CLOSED material) to be false. HH Judge Hilliard QC, sitting as coroner in the Inquest into the death of Alexander Perepilichnyy, adopted the same approach.

Discussion

The PII Application

31. This application was heard a little more than three weeks before 7 May 2019, the date on which I commenced the hearing of these Inquests. Although I noted the public interest in the Inquests not being delayed, that is not a factor which I took into account either in reaching my conclusions on this application or in deciding whether it was possible for me to perform the relevant statutory functions. If for any reason it had been necessary for the Inquests to be delayed, I would have made such a decision, notwithstanding the difficulties which would have been caused.

32. I have approached the application by first considering the relevance of material in respect of which the Secretary of State claims immunity, and then considering the risk of harm which would be caused should that material be disclosed to Interested Persons. With those considerations in mind, I undertook the task set out in the authorities. Before the OPEN and CLOSED hearings, I had read the entirety of the material for which PII was claimed and studied the CLOSED submissions. During the CLOSED hearing, I considered at length both the categories of material for which PII was claimed and many of the individual documents. The hearings on PII took the better part of a day of Court time, despite all the considerable detail of the written submissions and my extensive pre-reading.

33. For reasons given in more detail in a CLOSED document, I decided to uphold the application for PII. In my judgment, the application was properly made and the risks of harm identified by the Secretary of State in the Sensitive Schedule are real: his reasoning was apparently cogent at each stage of the application. Furthermore, I am satisfied that there is no means for more of the relevant material to be provided (beyond what is in Witness L's statement) in a way which properly mitigates the risks. On balance, I conclude that the public interest requires that the material is not disclosed to Interested Persons or otherwise deployed in evidence within the Inquests.

34. It is possible in this OPEN document to say very little as to the relevance of the particular material which I have considered. A version of that same difficulty has been experienced by counsel for the families in making submissions to me on this application. It is not a straightforward task to make submissions on the relevance of material without knowing

what that material is. I was however greatly assisted by the submissions made by both counsel for the families at levels of general principle.

35. In considering this application, I have had very much in mind the importance of ensuring that the families achieve the most thorough examination of the tragic events and their background as is possible. As Ms Ailes (counsel for a number of the families) made clear, the families were and remain understandably keen that the Inquests should explore what the authorities knew of the attackers before the attack and should test whether anything could have been done to thwart their murderous designs. Ms Ailes also rightly pointed out that the Inquests should serve the public interest of examining the conduct of public authorities and preventing future deaths, and that that interest is best served by a full and open inquiry.

36. In assessing the relevance of the material for which PII is claimed and in performing the necessary balancing exercises, I have taken into account both the material which is already in the public domain (most importantly the report of Lord Anderson QC) and that which has been produced for these Inquests and disclosed to Interested Persons (particularly the statement of Witness L, on behalf of the Security Service, and Witness M, on behalf of the Metropolitan Police Service, as to what those organisations knew prior to the attack).

37. Both counsel representing the bereaved families in the OPEN hearing submitted that there is value in contemporaneous documents from an MI5 investigation, and that these may provide a better basis for questioning than a gist. I accept that in some cases contemporaneous documents may be superior to a gist for that reason. However, as submitted by CTI, a gist can sometimes be more informative than the disclosure of a heavily redacted contemporaneous document. Moreover, the form of investigation documents may yield information about how MI5 conducts investigations or assesses risks in a way that would be harmful to national security interests.

38. As to the other side of the *Wiley* balance, I accept as a general proposition that a real risk of harm to national security, if cogently explained, will weigh very heavily and will rarely be outweighed by the public interest in the administration of justice. This principle is reinforced by the option which exists for the Government to establish a public inquiry where an inquest would not be able to discharge its statutory function without public deployment of security-sensitive material.

39. For each of the four categories of national security interest cited by the Secretary of State, I shall make some general observations. In doing so, I intentionally say nothing as to whether or not these generic concerns do arise in relation to any particular material in these Inquests. Each of the four categories of interest is capable, on particular facts, of giving rise to a considerable risk of harm to national security.

40. Damage to capabilities and operations: It is clear that counter-terrorism agencies, and public authorities targeting serious crime, rely upon tactics which are effective because they are not known to the subjects of their operations. Descriptions as to what operational tactics and techniques the Security Service uses, and in what circumstances they do so, could enable subjects of interest to change their behaviour so as to avoid detection. In such circumstances, the risk of serious harm of national security may be significant. Even where a specific tactic or technique is widely known, the way in which it is used and its particular capacities and limitations may be highly sensitive. I am familiar with that point from my experience as a judge in criminal cases.

41. Damage to persons providing information: The Security Service is known to make use of human intelligence, including from informants. Public knowledge of whether an informant was used in a particular operation could give rise to a direct threat to that informant (should they be identified). It could also lead other informants to be reluctant to assist the Security Service in the future. These are public interests of a high order. See: *Re Scappaticci JR* [2003] NIQB 56 at [19] and *A v Secretary of State for the Home Department* [2003] 1 All ER 816 at [87].

42. Damage to liaison relationships: There are two ways in which the disclosure of information revealing the existence or nature of foreign liaison relationships could harm the public interest. First, there is a public interest in the preservation of such relationships, which are an important part of the nation's protection against crime and terrorism. Secondly, exposure of assistance from foreign organisations may adversely affect diplomatic relations with other states.

43. Information likely to be of interest to hostile actors: As submitted by CTI, this is a residual category which covers information not falling under other categories. It is not possible to say any more about this category in an OPEN document and without dealing with any specific examples.

Adequacy of investigation

44. A PII application within an inquest is only necessary where the subject material is relevant (or potentially relevant) to the inquiry to be undertaken. It follows that, having upheld the PII application, I had to consider whether I could still carry out a sufficient inquiry into how those who died met their deaths. At the end of the CLOSED hearing, I announced that I considered that I could carry out a sufficient inquiry having upheld the PII claim, and that I would again give reasons in writing.

45. If I were not satisfied that the Inquests would allow me to discharge this statutory duty, the proper course would be for me to invite the Secretary of State to establish a public inquiry under the Inquiries Act 2005. Such an investigation could receive material in closed session where appropriate. This would be the course to take if the investigation would be seriously incomplete and/or potentially misleading without the deployment of material properly subject to PII (*R (Litvinenko) v Secretary of State for the Home Department* [2004] HRLR 6 at [62] – [63]). Of course, as counsel for the Secretary of State submitted, closed material hearings do not leave the bereaved families any better informed.

46. I am satisfied that the Inquests can properly proceed and that I can continue to fulfil my statutory duty in hearing these Inquests. Both CTI and counsel for the Secretary of State submitted that I could do so. Counsel for the Metropolitan Police, who had read the CLOSED submissions and attended the CLOSED hearing, did not suggest otherwise. My reasons for reaching this conclusion are as follows:

    a. The material which will not be disclosed is not directly relevant to the question of how the attacks were perpetrated and how the deceased persons died. It is relevant to the attackers' backgrounds and the knowledge of the authorities prior to the attacks. Although those are matters within the scope of the Inquests and are of understandable interest to the bereaved families, they are not central to the means and circumstances of death.

    b. It was always clear that the Inquests would in any event receive a significant volume of evidence about the attackers' backgrounds, including through officers of Operation Datival who undertook a very thorough post-attack investigation and through evidence of friends and family of the attackers.

c. Arrangements were also made for the Inquests to receive considerable evidence of what was known to the authorities about the attackers, primarily through the statements and oral evidence of Witness L and Witness M. The Inquest process allows both those witnesses to be questioned in some detail about their evidence. I am satisfied that the written evidence each witness has provided to the Inquests is wholly consistent with the withheld material.

d. There is nothing in the withheld material which would give reason to alter the scope of the Inquests.

e. The primary relevance of the knowledge of the authorities, prior to the attack, is to whether they could have prevented the attacks. At this stage, I have reached no concluded view on that issue, as I shall need to consider all the evidence and submissions at the Inquests hearing. However, two points which were made in submissions strike me as relevant. First, even now both police and MI5 say that it is uncertain whether anyone other than the attackers knew that the attack was to take place and that there is no evidence that anyone knew the time, date, place or method of attack. Secondly, all the evidence of Khuram Butt's movements in the period before the attack gives no suggestion that he did anything in public which clearly suggested attack preparation (at least until the final hours before the attack).

Conclusions

47. For the reasons given above and in the CLOSED ruling, I decided to uphold the application for PII made on behalf of the Secretary of State and I considered that the Inquests could proceed as planned. I have kept, and shall continue to keep, both issues under review as the Inquests proceed, as both CTI and counsel for the Secretary of State accepted I should.

HH Judge Lucraft QC

Chief Coroner of England and Wales

10 June 2019