Michaelmas Term
[2025] UKSC 47
On appeal from: [2024] NICA 39

JUDGMENT

In the matter of an application by the Secretary of State for Northern Ireland for Judicial Review (Appellant)

before

Lord Reed, President
Lord Hodge, Deputy President
Lord Lloyd-Jones
Lord Sales
Lord Stephens

JUDGMENT GIVEN ON
17 December 2025

Heard on 11 and 12 June 2025

Appellant
Sir James Eadie KC
Tony McGleenan KC
Jason Pobjoy KC
Philip McAteer
Grant Kynaston
(Instructed by Crown Solicitor's Office (Belfast))

Respondent – Coroner Louisa Fee
Ian Skelt KC
Rachel Best KC
(Instructed by Legacy Inquest Unit of the Office of the Lady Chief Justice (Belfast))

Respondent – Eugene Thompson (Next of Kin)
Monye Anyadike-Danes KC
Sinead Kyle
(Instructed by Committee on the Administration of Justice Northern Ireland (Belfast))

Respondent – Chief Constable of the Police Service of Northern Ireland
Oliver Sanders KC
Suzanne Lambert
Paula Kelly
(Instructed by Crown Solicitor's Office (Belfast))

Special Advocates
David Heraghty KC
Paul Skinner
(Instructed by Office of the Advocate General for Northern Ireland (Belfast))

Advocates to the court
Neil Sheldon KC
Natasha Barnes
(Instructed by Government Legal Department (Litigation Group))

Intervener – Secretary of State for the Home Department, Advocate General for Northern Ireland, Secretary of State for Foreign, Commonwealth and Development Affairs and Secretary of State for Defence
Sir James Eadie KC
Tony McGleenan KC
Jason Pobjoy KC
Philip McAteer
Grant Kynaston
(Instructed by Crown Solicitor's Office (Belfast))

Intervener – Northern Ireland Human Rights Commission
Laura McMahon KC
(Instructed by Northern Ireland Human Rights Commission (Belfast))

LORD SALES AND LORD STEPHENS (with whom Lord Reed, Lord Hodge and Lord Lloyd-Jones agree):

Introduction

1. In these judicial review proceedings, the Secretary of State for Northern Ireland ("the Secretary of State") challenges the decisions of a coroner to disclose two gists of information contained in documents which are subject to a Public Interest Immunity ("PII") certificate. The appeal raises an important question as to the test to be applied when a court judicially reviews a decision by, for instance, a coroner which involves the coroner disclosing to properly interested persons (and thereby openly to the public) a gist of information over which PII is asserted by a Minister on behalf of the Crown. The question is whether the court is restricted to reviewing the decision on ordinary public law grounds so that the decision of the coroner stands unless, for instance, the decision was unlawful or was *Wednesbury* irrational (*Associated Provincial Picture Houses Ltd v Wednesbury Corpn* [1948] 1 KB 223) or there was some material procedural unfairness? Alternatively, does the PII assessment involving the balancing of vital aspects of the public interest, namely in the open administration of justice and in national security, as explained in *R v Chief Constable of West Midlands Police, Ex p Wiley* [1995] 1 AC 274 ("*Wiley*"), require a different or enhanced standard of review, and if so what standard?

2. These questions arise for consideration in relation to a PII certificate issued by Mr Steve Baker MP, the Minister of State for Northern Ireland ("the Minister"). The Minister certified on behalf of the Crown that the public interest in non-disclosure of certain documents, in order to prevent a real risk of serious harm being caused to national security, outweighed the public interest in open justice in an inquest by the disclosure of those documents. Louisa Fee ("the Coroner") upheld the PII certificate but nevertheless decided to disclose gists of information contained in those documents.

3. The Chief Constable of the Police Service of Northern Ireland (respectively "the Chief Constable" and "the PSNI") supported the application of PII in relation to the underlying documents covered by the Minister's certificate. However, a feature of this case is that as events have transpired the Secretary of State and the Chief Constable disagree about whether it is appropriate for the Coroner to require a gist of the information contained in those documents to be made public. To that extent the Secretary of State and the Chief Constable are now opposing parties adopting different positions in relation to the PII claim.

4. The Secretary of State commenced these judicial review proceedings challenging the Coroner's decision to disclose the gists. He contended that the gists breached the policy of neither confirming nor denying ("NCND") the involvement of informers because the gists would either confirm or deny the direct or indirect involvement of

informers in the events leading to the death which was the subject matter of the coronial investigation or reveal other sensitive secret information regarding the operations of agencies of the state. The Secretary of State certified that a breach of the NCND policy was contrary to the national security interest in countering the threat from terrorists.

5. Humphreys J ("the judge") in dismissing the judicial review proceedings applied ordinary public law review standards in relation to the decision-making by the Coroner. The majority in the Court of Appeal (Keegan LCJ and Horner LJ; McCloskey LJ dissenting), in dismissing the appeal, also applied ordinary public law review standards.

6. The Secretary of State now appeals to this court. The Secretary of State for the Home Department, the Advocate General for Northern Ireland, the Secretary of State for Foreign, Commonwealth and Development Affairs and the Secretary of State for Defence have all intervened to support the Secretary of State's appeal.

7. The next of kin of the deceased ("the next of kin") and the Chief Constable, both of whom are respondents, seek to uphold the decisions of the lower courts. The Northern Ireland Human Rights Commission intervenes and opposes the Secretary of State's appeal. Advocates to the court were also appointed following a direction from this court.

8. The Coroner, the judge and McCloskey LJ delivered both open and closed judgments. On the hearing of this appeal, the court considered closed material and heard submissions in a closed hearing. The next of kin and his legal representatives were excluded from the closed hearing but throughout both the open and closed hearings he was also represented by special advocates.

9. For the purposes of resolving the issues in this appeal it is not necessary for this court to provide a closed judgment.

Factual background, legal context and procedural history

(a) Peace lines in Northern Ireland and the peace line along the Springmartin Road, Belfast

10. Peace lines have been constructed in Northern Ireland, and particularly in Belfast, in response to violence, including terrorist violence, at urban interfaces between different communities. Peace lines, consisting of fences or walls, are separation barriers between predominantly Irish republican or nationalist Catholic neighbourhoods and predominantly British loyalist or unionist Protestant neighbourhoods. Their purpose is to minimise inter-communal violence.

11. Peace lines are of varying heights with some being eight metres high. They are also of varying lengths. Some peace lines have gates in them that allow passage during daylight but are closed at night. There are many such peace lines in Belfast and the total combined length of all of them is some 21 miles.

12. The factual background to this appeal involves a peace line along the Springmartin Road, Belfast which separates the nationalist Springfield Park neighbourhood from the unionist Springmartin Road area of West Belfast ("the peace line").

(b) An outline of the circumstances relating to the murder of Liam Paul Thompson

13. On 27 April 1994, at approximately 11.15 pm, gunmen from the Springmartin Road side of the peace line gained access to Springfield Park through a hole in the peace line. Having done so they shot and killed Liam Paul Thompson ("the deceased"). He was 25 years old at the time of his death.

14. The deceased was a front seat passenger in a taxi driven by his friend who was a driver for a taxi firm known as "Grab-a-Cab". The friend was giving the deceased a lift home but had been tasked to pick up a fare from a Springfield Park address close to the peace line. There is evidence that no one at that address had telephoned Grab-a-Cab so that the call may have been a deliberate decoy to lure the taxi to Springfield Park close to the peace line. When the taxi approached the end of the cul-de-sac in Springfield Park the gunmen fired several close-range shots at the front of the car. The driver was injured. The deceased suffered bullet wounds to his chest. He was pronounced dead at 00.09 am on 28 April 1994.

15. The loyalist paramilitary group the Ulster Freedom Fighters ("the UFF"), in a telephone call to the BBC, claimed responsibility for the killing.

16. At the time of the deceased's death Springfield Park was overlooked by the Henry Taggart Army barracks observation towers.

17. No one has ever been held accountable for the murder of the deceased. The Chief Constable acknowledges that to date there has still not been an effective official investigation, in accordance with article 2 of the European Convention on Human Rights ("the ECHR"), into the circumstances of the deceased's murder. He is sorry that the Royal Ulster Constabulary ("the RUC") and the PSNI have failed to deliver this. As the murder of the deceased is a serious Troubles-related offence and any offence connected to the deceased's murder is also a Troubles-related offence the Chief Constable is now prevented by legislation from continuing a criminal investigation: see sections 1 and 38 of the Northern Ireland Troubles (Legacy and Reconciliation) Act 2023 ("the 2023 Act").

At present an investigation into the deceased's murder and into connected offences could be conducted by a review undertaken by the Independent Commission for Reconciliation and Information Recovery: section 2 of the 2023 Act. Alternatively, there could be a public inquiry under the Inquiries Act 2005.

(c) The inquest into the deceased's death

18. The inquest into the deceased's death was opened in August 1995 but has been the subject of lengthy, egregious and profoundly disturbing delays. Eventually, hearings commenced on 3 April 2023 before the Coroner. The first and second modules of evidence were completed by 8 June 2023. The hearing of evidence in relation to the third and final module (concerned with "how" the deceased came to his death: see paras 22-23 below) was listed to commence on 26 February 2024 with a time estimate of three weeks. It was anticipated that this would conclude all the evidence, leaving only the Coroner's findings to be delivered.

19. The family of the deceased, the Northern Ireland Office ("the NIO") and the Chief Constable have the status of properly interested persons in the inquest: see rule 7 of the Coroners (Practice and Procedure) Rules (Northern Ireland) 1963; *Christopher Cummings v The Coroner in the Inquest into the Death of Seamus Dillon* [2023] NICA 44. The status allows those persons to participate more fully in the inquest by, for instance, making submissions to the Coroner. The Minister and the Secretary of State did not but could have applied to the Coroner for that status. Initially, as there was then no disagreement between the Minister, the Secretary of State and the Chief Constable as to the PII claim, there was no evident reason for the Minister or the Secretary of State to make that application.

(d) Public interest immunity claims and the absence of a closed material procedure

20. The rules of law governing the withholding of evidence or documents on the grounds of PII apply to inquests as they apply to civil proceedings in a court in Northern Ireland: section 17B(3) of the Coroners Act (Northern Ireland) 1959 ("the 1959 Act"). If a coroner upholds a PII claim then no evidence in relation to the matters which are the subject of the certificate in support of the claim may be admitted in the inquest. In certain other proceedings a closed material procedure under the Justice and Security Act 2013 may be available to enable a court to admit in evidence, consider and adjudicate upon confidential material which cannot be disclosed to all parties for public interest reasons. However, such a procedure is not available in an inquest.

(e) The time limit on the conclusion of the inquest into the deceased's death

21. Section 44(1) of the 2023 Act amended section 16 of the 1959 Act by introducing a time limit in section 16A on the ability of the Coroner to progress an inquest "into a death that resulted directly from the Troubles." She was prohibited from doing so on or after 1 May 2024 "unless, on that day, the only part of the inquest that remains to be carried out is the coroner … making … the final determination, verdict or findings, or something subsequent to that." The deceased's death was a death that resulted directly from the Troubles: see section 16C of the 1959 Act and section 1 of the 2023 Act. Therefore, for the Coroner to make a "final determination, verdict or findings" all the evidence had to have been heard by her before 1 May 2024. If the third module commenced on 26 February 2024 and concluded within the anticipated three weeks, then all the evidence would have been heard by the Coroner before the deadline of 1 May 2024.

(f) The factual questions for and the duty on the Coroner

22. The Coroner is required to conduct a fact-finding inquiry to establish reliable answers to four important factual questions, namely "who the deceased person was and how, when and where he came to his death": section 31(1) of the 1959 Act. In the context of the deceased's death, in order to comply with the procedural obligation under article 2 of the ECHR to carry out an effective official investigation into the circumstances of the death of the deceased, as given effect in domestic law by the Human Rights Act 1998, addressing "how" the deceased came by his death meant not only that the Coroner had the obligation to investigate "by what means" but also had the obligation to investigate "in what broad circumstances" the deceased came to his death: see *R (Middleton) v West Somerset Coroner* [2004] UKHL 10; [2004] 2 AC 182; *R (Maguire) v Blackpool and Fylde Senior Coroner* [2023] UKSC 20; [2025] AC 63 ("*Maguire*"), paras 8-28.

23. In addressing the four factual questions, including the question as to "how" the deceased came to his death, the Coroner's duty is "to ensure that the relevant facts are fully, fairly and fearlessly investigated": see *R v Inner West London Coroner, Ex parte Dallaglio* [1994] 4 All ER 139, 162 and *R v Coroner for North Humberside and Scunthorpe, Ex parte Jamieson* [1995] QB 1, 26. To do so she must set the scope or bounds of the inquiry.

(g) Factual issues identified by the Coroner concerning "how" the deceased came to his death

24. In a document entitled "Draft Scope" the Coroner identified the factual issues to be considered in relation to the question as to "how" the deceased came to his death. It was a draft because the Coroner stated that the list of "issues would remain under review

until the end of the inquest." The factual issues identified by the Coroner in relation to that question were:

> "5. Was the deceased killed by a member of a paramilitary organisation, and if so, which one?
>
> 6. How was the attack carried out?
>
> 7. Was a call made to the taxi company a deliberate decoy to lure a taxi to the location of the shooting?
>
> 8. Was information passed to the deceased's killer (or persons linked to the killer) by any person within the security forces?
>
> 9. How and when did the gap in the fence occur?
>
> 10. Who caused the gap in the fence?
>
> 11. Was the deceased's death reasonably preventable?
>
> 12. How visible was the gap in the fence? Was it visible from the nearby RUC/Military facility (known as Henry Taggart barracks)?
>
> 13. Had the gap in the fence been brought to the attention of the authorities in the period prior to the death? If so, who had been made aware?
>
> 14. If the authorities had been made aware of the gap in the fence, what was done in response to that knowledge?
>
> 15. What information was known to the security forces in the period before the death of any possible attack against Grab-a-Cab [Taxi firm] and/or its drivers?"

25. Under factual issue 8 "the security forces" include the RUC, so the coronial investigation included whether any information was passed to the terrorist organisation responsible for the deceased's death by a member of the RUC. Under factual issue 11 the coronial investigation would have included the question as to whether an informer, either in the terrorist organisation responsible for the murder or who associated with members of that organisation, had provided information to the security forces prior to and about the attack. If so, then what was the content of the information received by, for instance, the RUC and what if any action was taken in response to prevent the deceased's murder.

26. In relation to factual issue 13 it is suggested by the next of kin and by others in the Springfield Park community ("the community") that prior to the deceased's death, members of the community had been subjected to regular attacks conducted by loyalist paramilitaries who used breaches made in the peace line to gain access to and to escape from the area. Members of the community, including the next of kin, consider that the RUC and other state agencies, including the NIO, were aware of these attacks and the method by which these paramilitary groups entered and escaped Springfield Park. It is also asserted by members of the community that on 27 April 1994 they notified the RUC, the NIO and their Member of Parliament that they had seen men interfering with the peace line and that it had been compromised by the creation of a hole. They, including the next of kin, claim that no action was taken to repair the fence or provide security for the members of the community even though it was known that the area was subject to regular attacks by loyalist paramilitaries through the breached peace line. On this basis collusion is suspected between, for instance, the RUC and loyalist paramilitaries so that either no effective steps were taken by the RUC to prevent the attack on the taxi driver and on the deceased or alternatively the attack was facilitated by the RUC. The suspicion was to be investigated by the Coroner.

27. In relation to factual issue 15 it is suggested by the next of kin and others in the community that the taxi firm known as Grab-a-Cab was being monitored and targeted by loyalist paramilitaries to the knowledge of the RUC and the Army. They assert that days before the deceased's death, the RUC recovered a map of the Grab-a-Cab taxi depot in the locker of Derek Adgey, a Royal Marine, who was arrested for supplying information to the UFF. Furthermore, it is asserted that the journal of the loyalist informant Brian Nelson records that in the years prior to the killing, he had provided information to his Force Research Unit Army handler that he had been asked by loyalist paramilitaries to obtain a map of the Grab-a-Cab taxi depot. Again, on this basis collusion is suspected between, for instance, the RUC and loyalist paramilitaries so that either no effective steps were taken by the RUC to prevent the attack on the taxi driver or alternatively the attack was facilitated by the RUC. This suspicion was also to be investigated by the Coroner.

28. It was relevant to the coronial investigation under issues 8, 11, 13, and 15 to determine whether an RUC or Army informer was or was not either directly or indirectly involved in any of the events leading to the deceased's murder. An informer, otherwise known as a covert human intelligence source ("a CHIS"), who is within a terrorist

organisation or who associates with members of a terrorist organisation plays an essential role in the ability of a state to counter the threat from terrorism. It is in the national interest to encourage the provision of information from informers to protect the population and to save innocent lives. As Lord Judge CJ stated in *R (Mohamed) v Secretary of State for Foreign and Commonwealth Affairs (No 2)* [2010] EWCA Civ 65; [2011] QB 218, 232G ("*Mohamed*"), "It is difficult to exaggerate the value of good intelligence and its contribution to the safety and wellbeing of the nation."

(h) Public interest immunity and the neither confirm nor deny policy

29. The principles governing the exclusion of relevant evidence in legal proceedings on PII grounds were examined in the speech of Lord Woolf in *Wiley*. We discuss them in further detail below. PII comes into play if there is a relevant aspect of the public interest which indicates that relevant information should not be disclosed or placed in the public domain, for example in order to protect national security. In identifying whether there is such a dimension of the public interest in issue, the courts will expect to be provided with evidence about it from an appropriate public authority and, for constitutional reasons and reasons to do with relative institutional competence, will afford a significant degree of respect to the assessment of that authority. If there is such a dimension of the public interest in issue which points against disclosure of the information, the court has to balance that against the aspect of the public interest concerned with the due administration of justice in order to decide whether the evidence should be ordered to be admitted or should be excluded, and whether there is any partial disclosure which could be given, eg to convey the gist of the information (or part of it). The responsibility for making that judgment lies with the court, not the public authority which asserts PII: *Conway v Rimmer* [1968] AC 910; *Wiley*, pp 289-290 and 296; *Mohamed*, paras 132 and 229.

30. To encourage the provision of information the state relies on a NCND policy. The reasons for adopting and adhering to the NCND policy were set out by Carswell LCJ *In the Matter of an Application by Freddie Scappaticci for Judicial Review* [2003] NIQB 56 at para 15:

> "To state that a person is an agent would be likely to place him in immediate danger from terrorist organisations. To deny that he is an agent may in some cases endanger another person, who may be under suspicion from terrorists. Most significant, once the Government confirms in the case of one person that he is not an agent, a refusal to comment in the case of another person would then give rise to an immediate suspicion that the latter was in fact an agent, so possibly placing his life in grave danger .... If the Government were to deny in all cases that persons named were agents, the denials would become meaningless and would carry no weight. Moreover, if agents became uneasy

> about the risk to themselves being increased through the effect of Government statements, their willingness to give information and the supply of intelligence vital to the war against terrorism could be gravely reduced ..."

31. Two comments may be made. First, the usual context for application of the NCND policy is where an individual has been named or otherwise identified in the public domain and the suggestion is made that he or she is an informer or agent of the state. The *Scappaticci* case is an example of this. The context in the present case is different, in that no individual has been so named or identified in conjunction with a suggestion that he or she was an informer or a state agent. The issue is one concerning the application of the basic PII principles which themselves underpin the NCND policy, but extend more widely. Under PII principles, the public interest in non-disclosure of sensitive information is not limited to the risk of exposure of the identity of informers or state agents, but may also include matters such as secret surveillance methodologies deployed against terrorists, where disclosure might lead to changes in their behaviour with the result that intelligence acquired by such means would dry up. However, the parties and the courts below framed the issue as one concerned with the application of the NCND policy so we will do the same, bearing in mind that what is really in issue is the application of general PII principles.

32. The question regarding the admission of either of the gists into evidence, therefore, is concerned with the test to be applied by the Coroner regarding the existence and (if relevant) the extent of any risk to national security and the legitimacy of the claims made by the Secretary of State that the NCND policy is applicable and that the principles governing PII lead to the conclusion that no information derived from the underlying documents (in particular, in the form of either of the gists) should be admitted into evidence in the inquest. These issues are thrown into sharp relief because of the difference of view between the Secretary of State and the Chief Constable regarding the applicability of the NCND policy and the extent of the risks involved.

33. Secondly, the point made by Carswell LCJ in the final sentence quoted above, about agents becoming uneasy about supplying information if they feel there is any risk of their exposure, is a general one. It is not simply a question of how a CHIS who may have worked or may work for the RUC, PSNI, Army or one of the intelligence agencies in Northern Ireland might feel about disclosure of information of a certain kind, it is also a question of how a CHIS for the British state in other contexts (say, in dangerous circumstances in a foreign country) might feel if they saw that the British state was liable to disclose such information in such a case, and what inference they might then draw about the risks they would be running if they supply secret intelligence to their own handlers. This concern is one reason why intelligence agencies, not themselves directly or primarily concerned with Northern Ireland, have intervened to support the Secretary of State in this appeal. Neither the Secretary of State nor the Chief Constable has a monopoly in terms of practical experience and expertise in running CHISs in the field and

assessing their likely reactions to learning that the British state may have been unduly careless in risking the exposure of the identities of other informants or agents. Furthermore, wider aspects of the public interest protected by PII, as alluded to above, may similarly be matters within the experience and expertise of a number of agencies, each of which might have relevant information to contribute where appropriate.

34. As explained in *Wiley*, and as we discuss further below, where a proper assessment of the public interest leads to the conclusion that evidence should not be admitted in some legal proceeding, it is a matter of obligation arising from the general law that the evidence must be excluded. There is no element of choice about it: the assertion of PII is a matter of duty, not right (see *Wiley*, pp 295-296 and 298 per Lord Woolf, citing the speech of Lord Simon of Glaisdale in *R v Lewes Justices, Ex p Secretary of State for the Home Department* [1973] AC 388 – "*Lewes Justices*" – at p 407).

35. However, in assessing whether there is a public interest which is potentially of sufficient importance to justify or require the non-admission of relevant material, a court will generally rely on evidence adduced by the public authority which is best placed to identify that aspect of the public interest which is at stake, and (where appropriate) the court will expect that authority to have consulted with other relevant stakeholders who are in a position to provide information bearing on an assessment of that aspect of the public interest. If the overall conclusion arrived at by the public authority (after due consultation) is that there is no sufficient public interest to justify non-admission of the material, the court will (save in exceptional circumstances) act on "the evidence of those best able to assess the importance of the public interest involved in making disclosure" (*Wiley*, p 297) and will accept that conclusion, meaning that the court will not have to conduct any balancing exercise, since in those circumstances the aspect of the public interest in the due administration of justice will necessarily prevail: *Wiley*, pp 297-298 (Lord Woolf). On the other hand, if the relevant public authority contends that the public interest requires that the material should not be disclosed or admitted in evidence, the court will accept the authority's assessment as to the existence and extent of the risk posed to the aspect of the public interest which is relied upon, such as national security as in this case (unless that assessment is irrational, is unsupported by any evidence or the authority has failed to take relevant matters into account); but it is for the court to determine whether that aspect of the public interest outweighs the competing aspect of the public interest involved with the due administration of justice.

36. This discussion in *Wiley* is relevant in the present case. In the opinion of the Chief Constable there is no sufficient public interest to set against the general interest in the due administration of justice which could justify non-disclosure of the second gist prepared by the Coroner. The Secretary of State, on the other hand, says that there is. So which of them, at this stage of the analysis, is in the best position to identify what the national security interest involves? Who is "best able to assess the importance of the public interest involved in making disclosure", to use the language of Lord Woolf in *Wiley*?

37. In our view there is no doubt about this. In forming his opinion the Chief Constable has not consulted with other relevant public authorities with an interest and expertise who are capable of making a material contribution to the overall assessment of the national security aspect of the public interest in this case, let alone obtained an endorsement of his view from such authorities. His view is in direct conflict with that of the Secretary of State. The Secretary of State in a case such as this has ready means of consultation as appropriate with all the relevant public authorities and has made use of these here. In general terms, the Secretary of State is in the best position to act as the clearing house to draw upon, consider and weigh up the views of relevant public authorities (which may be in conflict) so as to arrive at a final overall view of the national security aspect of the public interest which can be put before the court.

38. Further, the Secretary of State has the political authority and responsibility to make that assessment. In assessing national security, it is the Secretary of State who has the democratic authority and institutional competence to make the relevant assessment and the degree of respect due to be given to his assessment by a court has to take account of this: see *R (Begum) v Special Immigration Appeals Commission* [2021] UKSC 7; [2021] AC 765 ("*Begum*"), paras 69-70; *U3 v Secretary of State for the Home Department* [2025] UKSC 19; [2025] 2 WLR 1041, paras 65-82; *Shvidler v Secretary of State for Foreign, Commonwealth and Development Affairs* [2025] UKSC 30; [2025] 3 WLR 346 ("*Shvidler*"), paras 127-129.

39. This explains statements in the authorities on PII which indicate that a court will generally respect and accept an assessment of this aspect of the public interest by a Secretary of State within the scope of his or her departmental authority, if his or her conclusion is that the public interest is not sufficient to justify exclusion of the evidence: see *Wiley*, p 296 (Lord Woolf: "[i]f a Secretary of State on behalf of his department as opposed to any ordinary litigant concludes that any public interest in documents being withheld from production is outweighed by the public interest in the documents being available for purposes of litigation, it is difficult to conceive that, unless the documents do not relate to an area for which the Secretary of State was responsible, the court would feel it appropriate to come to any different conclusion from that of the Secretary of State"). This context also explains statements in the authorities that if, conversely, a Secretary of State is of the view that disclosure of particular evidence would undermine the public interest to a significant extent, particularly national security, a court should accord that judgment considerable respect and weight: see, eg, *Lewes Justices*, p 400 (Lord Reid): "[a] Minister of the Crown is always an appropriate and often the most appropriate person to assert this public interest, and the evidence or advice which he gives to the court is always valuable and may sometimes be indispensable", cited with approval in *Wiley*, pp 290-291; see also *Lewes Justices*, pp 405 (Lord Morris of Borth-y-Gest), 406 (Lord Pearson), 407 (Lord Simon) and 412 (Lord Salmon); and *Conway v Rimmer*, pp 952 (Lord Reid), 955-956 (Lord Morris), 980 and 988 (Lord Pearce) and 993 (Lord Upjohn); *Mohamed*, paras 131-132 and 135 (Lord Neuberger of Abbotsbury MR) and 262 and 285 (Sir Anthony May P).

40. In this case, at the stage prior to determination of the question of admissibility, the PSNI had an obligation to disclose documents to the Coroner which are relevant or potentially relevant to all the factual issues within the scope of the inquest. The obligation to disclose is not limited to the issue as to whether a CHIS was or was not involved either directly or indirectly in any of the events leading to the deceased's murder; nor is it limited to other aspects of the national security public interest capable of being subject to PII, such as the use of secret methodologies for gathering intelligence. Therefore, the fact of disclosure by the PSNI to the Coroner of the documents in what have been called folders 1-7, as discussed below, cannot be taken as indicating one way or the other whether a CHIS was or was not directly or indirectly involved in any of those events, nor whether any secret methodology for gathering intelligence might have been used in relation to the events.

41. The PII claim in relation to folders 1-7 was upheld by the Coroner, but she decided that a gist of information contained in folder 7 should be disclosed and admitted as evidence in the inquest. The Chief Constable objected to a first version of the proposed gist ("gist 1"), but after debate with the Coroner he agreed that a revised version of the gist ("gist 2") could be disclosed and admitted in evidence without any material harm to national security. The Secretary of State, however, on the basis of national security, maintains the position that it should be neither confirmed nor denied in any gist of the information in folder 7 that any CHIS was or was not directly or indirectly involved in any of the events leading to the deceased's murder or that the information might have been derived from use of any secret methodology. The Secretary of State further maintains that on proper application of PII principles, no gist should be ordered to be disclosed.

(i) The public interest immunity claims by the Parliamentary Under-Secretary of State for Defence, People and Families and by the Minister of State for Northern Ireland

42. The Ministry of Defence ("the MOD") held documents relevant or potentially relevant to the factual issues within the scope of the inquest. On 10 January 2024, Dr Andrew Murrison MP, Parliamentary Under-Secretary of State for Defence, People and Families, signed a PII certificate on behalf of the Crown in relation to those documents and in relation to any evidence relating to the matters covered by the documents. On 4 March 2024 the Coroner upheld his PII certificate. No issue arises in this appeal in relation to the documents held by the MOD.

43. The PSNI also held documents relevant or potentially relevant to the factual issues within the scope of the inquest, and disclosed to the Coroner six folders of documents ("folders 1-6"). On 18 January 2024 the Chief Constable, having considered that all the documents were relevant to the inquest, asked the Minister to issue a PII certificate in relation to the documents in folders 1-6 and in relation to any evidence relating to the

matters covered by the documents. The Chief Constable stated that "disclosure of the materials … would cause real risk of serious harm to the public interest."

44. On 5 February 2024 the Minister, representing the Secretary of State under the *Carltona* principle (*Carltona Ltd v Comrs of Works* [1943] 2 All ER 560), signed a PII certificate on behalf of the Crown in relation to the documents in all six folders and in relation to any evidence relating to the matters covered by the documents. The PII certificate was accompanied by a sensitive schedule containing "the particular information [and] … the precise harm that its disclosure would cause." This schedule was for the exclusive consideration of the Coroner and was described as a "highly classified document."

45. On 2 February 2024 the PSNI informed the Coroner of the existence of a seventh folder ("folder 7") which contained documents relating to an investigation by the PSNI's Historical Enquiries Team. On 12 February 2024 the Chief Constable asked the Minister to issue a PII certificate in relation to the documents in folder 7 and in relation to any evidence relating to the matters covered by those documents.

46. On 19 February 2024 a supplementary PII certificate on behalf of the Crown was signed by the Minister in relation to the documents in folder 7 and in relation to any evidence relating to the matters covered by the documents. The supplementary PII certificate adopted the reasoning set out in his earlier certificate dated 5 February 2024. Therefore, the details of the PII claim in relation to folder 7 are to be found in the certificate dated 5 February 2024 read with the sensitive schedule attached to the supplementary certificate.

47. In the PII certificate dated 5 February 2024 the Minister of State addressed three distinct questions.

48. The first question addressed by the Minister was whether the material passed the threshold test of disclosure. As the documents were relevant or potentially relevant to the inquest the Minister, at para 11, answered that question in the affirmative.

49. The second question addressed by the Minister was whether disclosure would cause a real risk of serious harm to an important public interest. To address that question the Minister set out in his certificate the threat from terrorism at paras 8 to 10 and then at paras 13 to 16 set out the public interest in non-disclosure.

50. The Minister's assessment of the threat from terrorism was that for a number of years there had been in the United Kingdom and, in particular, in Northern Ireland, a very serious threat posed by terrorist organisations actively engaged in campaigns of violence.

The Minister recognised that the majority of these terrorist organisations in Northern Ireland were observing ceasefires but nevertheless he assessed that the threat of terrorist violence remained, and residual terrorist groups continued to regard violence as a way of furthering their objectives. He stated, at para 15, that terrorist organisations have shown in the past that they are willing to kill innocent civilians in pursuance of their aims. The Minister then turned to counter-terrorism measures. He set out his assessment that these residual terrorist groups had become increasingly aware of the threat caused to their unlawful activities by the work of the PSNI which they had become increasingly determined to undermine. He assessed that any disclosure of the identities of individuals working to counter terrorism as well as any disclosure of the tactics, techniques or procedures used would damage capabilities for countering terrorism in Northern Ireland. His assessment continued that if terrorists were to acquire information about the methods of operation and capabilities of the PSNI, they would be able to take counter measures which would seriously reduce the ability of the PSNI to acquire intelligence and prevent attacks leading to loss of life. In such circumstances he assessed that the terrorists would also be capable of targeting attacks more effectively with the consequent risk of loss of life.

51. The assessment of the threat from terrorism is one formed by the Minister but there is no suggestion from any party to these proceedings, including from the Chief Constable, that the Minister's assessment was inaccurate.

52. The Minister relied on several matters supporting his assessment that there was an important public interest in non-disclosure of the documents or of any evidence relating to the matters covered by the documents. It is not necessary for the purposes of this appeal to summarise all those matters. Rather, it is sufficient to refer to matters relating to the use of covert human intelligence sources. In relation to those matters the Minister, at para 14, certified that the disclosure of:

> "Information relating to persons providing information or assistance in confidence to the PSNI, … would endanger or risk endangering the persons concerned or other persons or would impair or risk impairing their ability or willingness to continue providing information or assistance or the ability of the PSNI, to obtain information and assistance from the person concerned or other persons."

The Minister, at para 15, added:

> "As regards the gathering of intelligence information, those who supply such information do so on the basis that what is imparted is in confidence, and any disclosure in breach of

> confidentiality creates *a serious risk that such information would be less readily forthcoming in the future*. In addition, anything that might lead to identification of the individual source or sources of the information could result in grave danger to the persons concerned." (Emphasis added).

The serious risk to which we have added emphasis is one which applies not only to an existing CHIS but also to the recruitment of new CHISs who without the protection of secrecy could be deterred from providing their services. The risk is not confined to recruitment of CHISs in Northern Ireland but covers their recruitment elsewhere as well. The Minister's overall assessment, at para 18, was that disclosure of the documents would give rise to a real risk of serious harm to the important public interest of national security.

53. The third question addressed by the Minister was whether the public interest in non-disclosure was outweighed by the public interest in disclosure of that material. The Minister, at para 17, considered that the "material withheld is or refers to sensitive information, disclosure of which would be *particularly* damaging to the public interest" (emphasis added). He was satisfied that the overall balance of public interest was in favour of not disclosing the material. On this basis he put forward the PII claim for consideration by the Coroner.

(j) The procedural history in relation to the PII claims before the Coroner and the judicial review proceedings before Humphreys J

54. Prior to hearing the outstanding evidence in module three the Coroner had to decide whether to uphold the Minister's PII certificates and if so, whether there were ways in which the salient points could be disclosed without any harm being done to the public interest, for example by disclosing a gist of the material.

55. The Coroner dealt with the PII issues by examining the documents over which PII was claimed and holding several hearings in February 2024. At those hearings the PSNI was represented by senior and junior counsel who sought to uphold the Minister's PII certificates. The Secretary of State had retained senior and junior counsel, but they were not instructed to and did not appear before the Coroner in relation to the PII claims since this did not seem to be necessary. Rather, it was left to counsel on behalf of the PSNI to advance the Minister's PII claims given that it was the PSNI that had the most intimate knowledge of the documents and initially there was no difference in approach as between the Chief Constable and the Secretary of State.

56. On 4 March 2024, the Coroner upheld the PII claim over the documents in folders 1-6 and any evidence relating to matters covered by those documents. There has been no challenge to the Coroner's decision in relation to those documents and that evidence.

57. On 4 March 2024, the Coroner also upheld the PII claim in respect of the documents in folder 7 and any evidence relating to the matters covered by those documents. However, the Coroner considered that some information was potentially capable of disclosure by way of a gist. The Coroner provided a draft of the proposed gist (in the form of gist 1) to the Chief Constable's legal representatives and she afforded them time to take instructions. Gist 1 disclosed information over which PII was asserted by the Minister and was taken to involve a departure from the NCND policy. The Coroner did not provide a copy of gist 1 to the Minister or to the Secretary of State.

58. On 7 March 2024, in a closed hearing the Coroner was informed by counsel for the Chief Constable that the nature of the material in folder 7 was not amenable to gisting. However, after the hearing, by letter dated 7 March 2024, the Chief Constable indicated that he did not object to any gist at all being disclosed but rather objected to the terms of gist 1. He suggested that it should be amended to remove certain information. In making that suggestion to the Coroner the Chief Constable had neither consulted with nor obtained the agreement of the Minister or the Secretary of State.

59. The Chief Constable considers that "independent public authorities with different responsibilities and expertise may form different views as to harm to the public interest" and that if they do "the relevant court will be … able to resolve any differences." For this reason, the Chief Constable proceeded to assert his own view of the public interest in communication with the Coroner without seeking to consult with or involve the Secretary of State.

60. In our view, this involved two errors of approach. First, whilst it is no doubt correct that different public authorities may form different opinions about the existence and extent of harm to the public interest which might arise from disclosure of particular information, if that happens the first step should be for consultation to take place between the public authorities with a relevant interest in the matter with a view to trying to reach a consensus. It is inappropriate for the public authorities to proceed immediately to court to lay their differences before it to ask the court to determine the issue. In terms of assessment of the national security aspect of the public interest, for the reasons set out above (paras 38-39), the court is, by contrast with the public authorities involved, not well placed to make that assessment and the difference of view should be addressed in the first place by discussion between those authorities.

61. If it transpires that no consensus is possible, the proper approach is for the public authority with the primary responsibility for safeguarding the national security interest to make the relevant assessment and to inform the court. As explained in *Wiley* and at paras 35-39 above, this will typically be the Secretary of State, as it was in this case (as even the Chief Constable implicitly recognised, by asking the Minister to provide the PII certificate). This follows from the distribution of constitutional responsibilities and institutional competence referred to above, which in turn, if there were any issue to be

canvassed before the court, would lead the court to have regard to the evidence from the public authority which is best placed to provide an assessment of the relevant aspect of the public interest: again, see *Wiley* and paras 35-39 above. As we have explained there, in the present case this was the Secretary of State.

62. Secondly and in any event, even if the Chief Constable's analysis had been correct, it was incumbent on the Chief Constable in his letter dated 7 March 2024 to have informed the Coroner that the Secretary of State might take a different view so that any potential differences could be ventilated before her. The Chief Constable did not do so. If he had done so, then the Coroner would have been expressly alerted to the need to make enquiries of the Minister and the Secretary of State before arriving at any decision.

63. Furthermore, in the context of the importance of the aspect of the public interest which is concerned with national security and the fight against terrorism, even if the Coroner was not expressly alerted by the Chief Constable to the potential for different views, it was incumbent on her to check on the view of the Secretary of State. It was the Secretary of State, through the Minister's certificates, who was the public authority asserting PII on the basis of his assessment of the public interest. To put a gist of the information into the public domain would be to create a materially different situation potentially affecting national security than that addressed in the certificates on which the views of the public authority asserting PII would need to be sought. The Coroner could not properly reach her own conclusion on this without obtaining that assistance, ie relevant evidence about the risks involved. Instead of doing this, however, she proceeded to make her decisions that gist 1 then gist 2 should be disclosed. In the context of assessing possible detriment to national security it is not a sufficient response to say that the Secretary of State could have but did not make submissions. The Coroner should have sought the evidence she needed from the Secretary of State before making any decision.

64. On 8 March 2024, the Crown Solicitors Office on behalf of the Secretary of State wrote to the Coroner objecting to the disclosure of gist 1.

65. On 8 March 2024, the Coroner, having heard submissions on behalf of the Chief Constable but not on behalf of the Secretary of State, decided that gist 1 would be disclosed to all the participating parties in the absence of a judicial review challenge to her decision.

66. On 11 March 2024, judicial review proceedings were commenced by the Chief Constable challenging the Coroner's decision to disclose gist 1. In the proceedings the Chief Constable asserted that gist 1 would "breach the policy of neither confirm nor deny in a manner that would be contrary to the national security interests of the State."

67. On 12 March 2024, separate judicial review proceedings were commenced by the Secretary of State challenging the Coroner's decision to disclose gist 1.

68. On 13 March 2024, Humphreys J granted permission to apply for judicial review in both cases and both applications were listed for hearing on 22 March 2024.

69. On 13 March 2024, one further additional subdivided folder of PSNI materials was identified which had not been the subject of any ministerial certificate. On 14 March 2024, the Deputy Chief Constable of the PSNI wrote to the NIO in relation to the further additional materials stating that, in his opinion, the balance fell in favour of asserting a PII claim over them. On 19 March 2024, NIO officials provided the further additional materials and advice to the Minister. This advice from the NIO officials included the statement that the "PSNI does not consider it feasible to provide a meaningful gist while at the same time ensuring the necessary protection of the identified public interests and their justifications." Thereafter, the Minister performed the balancing exercise and determined that a further supplementary PII certificate should be issued.

70. On 21 March 2024, the Chief Constable proposed to the Coroner that she disclose an amended gist of the material in folder 7 in the form of gist 2. The Chief Constable's assessment was that "the release of gist 2 would not cause or risk any damage or harm to the public interest because it is general and not specific and (if this is relevant at all) it would not involve any 'breach of' or 'departure from' the government's NCND policy." In making that proposal to the Coroner the Chief Constable had not consulted with or obtained the agreement of the Minister or the Secretary of State. The Chief Constable ought to have but failed to inform the Coroner that the Secretary of State had not been consulted and that the Secretary of State might take a different view.

71. Again, even though not expressly alerted by the Chief Constable to the potential that the Secretary of State might take a different view, given the importance of national security, the Coroner ought to have but failed to obtain the views of the Secretary of State prior to giving any indication or decision in relation to the disclosure of gist 2.

72. On 22 March 2024, at the hearing before the judge, the Coroner indicated that she was minded to adopt gist 2. In giving that indication the Coroner failed to obtain or consider the views of the Secretary of State. If she had done so it would have been apparent to her that the Secretary of State's assessment as to the harm to the public interest which would be caused by the disclosure of gist 2 differed from that of the Chief Constable. The Secretary of State considered that the disclosure of gist 2 would bring about a real risk of serious harm to an important public interest. As we have explained, both as a matter of general principle in relation to the application of the *Wiley* PII principles and particularly given the importance of national security, it was incumbent on

the Coroner to have obtained the views of the Secretary of State before making any decision or adopting any position in relation to the disclosure of gist 2.

73. At the hearing on 22 March 2024 the Secretary of State sought to challenge the Coroner's indication that she would disclose gist 2. The Secretary of State was granted leave to amend his application for judicial review to include a challenge to the decision in relation to gist 2. However, the challenge to gist 2 was adjourned and the hearing before the judge continued in relation to gist 1.

74. On 25 March 2024, the judge delivered an open judgment dismissing the Chief Constable's and the Secretary of State's challenges to the Coroner's decision to disclose gist 1: [2024] NIKB 18. The proceedings on gist 2 were stayed pending a closed judgment on gist 1 which was delivered on 28 March 2024.

75. On 25 March 2024, the Chief Constable issued a statement accepting the outcome of the judicial review so that in effect he no longer challenged the disclosure of gist 1 despite: (a) his earlier assertion that disclosure of gist 1 would "breach the policy of neither confirm nor deny in a manner that would be contrary to the national security interests of the State" ; and (b) the submission of counsel on behalf of the PSNI that the nature of the material in folder 7 was not amenable to gisting. The Secretary of State maintained his challenge in judicial review proceedings before the judge to the disclosure of gist 2 and by way of appeal in relation to the disclosure of gist 1.

76. Between 22 March 2024 and 11 April 2024, the Coroner did not hold any open or closed hearing to consider submissions from the Secretary of State as to whether to disclose gist 2.

77. On 11 April 2024, the Coroner delivered open and closed rulings in which she decided to disclose gist 2 rather than gist 1.

78. On 25 April 2024, the Secretary of State's challenge to the Coroner's decision to disclose gist 2 was dismissed by the judge in an open judgment: [2024] NIKB 32. The judge also delivered a closed judgment.

(k) The Secretary of State's appeal to the Court of Appeal

79. The Secretary of State appealed to the Court of Appeal against the orders of Humphreys J in relation to both gists. Pending determination of the appeal the Coroner undertook not to disclose either gist.

80. On 30 April 2024, in an ex tempore judgment delivered by Keegan LCJ with which Horner LJ agreed, the appeal was dismissed with written reasons to follow. McCloskey LJ dissented. On 22 May 2024, Keegan LCJ delivered her open written judgment with which Horner LJ agreed: [2024] NICA 39. On 13 May 2024, McCloskey LJ delivered his open written dissenting judgment: [2024] NICA 82. On 22 May 2024, he delivered a closed written dissenting judgment.

81. The Court of Appeal refused the Secretary of State's application for permission to appeal to the Supreme Court but granted an order staying the disclosure by the Coroner of either gist pending an application to the Supreme Court for permission to appeal and if that application was granted pending the final determination of the appeal.

(l) The appeal to the Supreme Court

82. On 28 May 2024, the Secretary of State applied to the Supreme Court for permission to appeal. The application was opposed by the Chief Constable, the next of kin and the Coroner.

83. On 17 October 2024, a panel of the Supreme Court granted permission to appeal. In doing so it expressed concerns as to the appropriate role of the Coroner in the appeal and drew the Coroner's attention to *Maguire*, paras 115-117, where the limited role for a coroner whose own decision is under challenge in judicial review proceedings is explained. See also *Re Darley's Application* [1997] NI 384 and *In the Matter of Three Applications by Hugh Jordan for Judicial Review* [2014] NICA 36, which explain that it is not appropriate for a coroner whose own decision is under such challenge to assume an adversarial role in those proceedings, rather than a strictly neutral position. The court therefore ensured that arrangements were made, including by way of appointment of advocates to the court and special advocates, so that full adversarial submissions would be presented without the Coroner taking on an inappropriate role. In the event, the Chief Constable made submissions in both the open and the closed parts of the hearing in the court seeking to uphold the Coroner's decision to disclose gist 2, which reflected his own position as to what should happen.

(m) The Coroner's further ruling as to the viability of the inquest

84. The Coroner had made valiant efforts to hear all the evidence in the inquest before the 1 May 2024 deadline set by the 2023 Act. She was unable to do so by virtue of the judicial review challenges to her decisions to provide a gist of the information in folder 7. Her ruling that the evidence in folders 1-7 should be excluded on grounds of PII (subject to disclosure of a gist in relation to the material in folder 7) also had the effect that she would not be able to consider all material relevant to the inquest.

85. On 30 April 2024 she gave an oral judgment and on 1 May 2024 a written judgment on the viability of the inquest. In those judgments the Coroner addressed the viability of the inquest on two grounds. First, whether it was possible to hear all the evidence in advance of the 1 May 2024 deadline: see section 44(1) of the 2023 Act and section 16A of the 1959 Act. It clearly was not possible to do so. On that ground she held that the inquest was no longer viable.

86. Secondly, she considered whether her decision to uphold the PII certificates in relation to folders 1-7 meant that a proper inquest could not be held even if there had been an opportunity to hear further evidence. She addressed that ground on the basis that gist 2 would be disclosed. Her assessment was that:

> "the information which is withheld on PII grounds in this case is of central importance to the issues in this Inquest and is particularly relevant to matters identified in the Scope Document."

Based on that assessment she held that without the information being considered she was unable to conduct a proper and sufficient investigation into the deceased's death. On that ground also she held that the inquest was not viable. She added that:

> "I do not consider that my decision on the viability of this inquest should be the end of all investigations into this death. Given the sensitive nature and content of the materials over which I have upheld PII, and given the fact that I cannot via the vehicle of an inquest have a closed material procedure, I believe this is a case requiring a public inquiry."

The open judgments of the Coroner, the High Court and the Court of Appeal

(a) The Coroner's open judgment dated 8 March 2024 upholding the PII claim in relation to the MOD documents and folders 1 - 7 and her decision to disclose gist 1 of the material in folder 7

87. For the purposes of this appeal in which no issue arises in relation to the PII claim in respect of the MOD documents it is sufficient to state that the Coroner upheld the claim.

88. In relation to the PII claim in respect of the PSNI documents in folders 1-7 the Coroner, at para 2, identified the applicant as being the PSNI rather than the Minister representing the Secretary of State.

89. The Coroner, at para 34, upheld the PII claims in relation to all the documents contained in folders 1-7 and any evidence relating to the matters covered by those documents, save for the information set out in gist 1. She stated, at para 34, that if there were no judicial review challenge to her decision by close of business on 8 March 2024, subsequently extended to 11 March 2024, she would disclose gist 1.

90. In arriving at her decision to disclose gist 1, the Coroner considered, at para 25, that the information summarised in the gist was "of central importance to the inquest" and at para 33, she considered it was "highly relevant." The Coroner referred, at para 9, to the balancing exercise between the public interest in open justice and the public interest in preventing the risk of harm to national security. In performing the balancing exercise, the Coroner relied on the nine principles set out by Goldring LJ in *Secretary of State for Foreign and Commonwealth Affairs v Assistant Deputy Coroner for Inner North London* [2013] EWHC 3724 (Admin); [2013] Inquest LR 257 at paras 53 to 61 under the heading of "The balancing exercise." This case concerned the Alexander Litvinenko inquest, so we refer to it as "*Litvinenko*" and to the nine principles as "the *Litvinenko* principles." These principles sought to address the application of PII in the context of an inquest, as distinct from ordinary civil proceedings.

91. The fifth *Litvinenko* principle, as formulated by Goldring LJ, can be summarised as follows:

> (a) when carrying out the balancing exercise between these aspects of the public interest, 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";
>
> (b) If there are cogent or solid reasons to reject the Secretary of State's view then those reasons must be set out by the coroner; and
>
> (c) If there are no reasons, let alone cogent or solid reasons, then 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.

92. The Coroner, in seeking to apply the fifth *Litvinenko* principle stated, at para 29, that she was conscious of the need to have "proper regard" to assertions of risks of damage to national security contained in ministerial certificates and of the limited circumstances in which a judge or coroner may depart from such an assertion. She acknowledged, at para 30, that the information contained in gist 1 did give rise to a risk of damage to national security. However, she did not accept that the risk was of a level asserted in the Minister's certificate. She stated that the reasons for that view were set out in her closed

ruling. In the Coroner's view gist 1 mitigated any real risk of serious harm to the public interest. As the Coroner's assessment was that there was no real risk of serious harm to the public interest from the disclosure of gist 1 she did not carry out any balancing exercise, since there was no call for one. On that basis she decided to disclose gist 1. However, if she were wrong about the mitigation of risk so that there was a need to conduct a balancing exercise, then the Coroner, at para 33, held that the balance was in favour of disclosure of gist 1. The Coroner did not explain the balancing exercise, but she had formed the view that the gist was of central importance to the inquest which presumably led her to the conclusion that there was a strong public interest in disclosure. However, she did not state the level of risk to national security which she took into account on the other side of the balance.

(b) The Coroner's open judgment dated 11 April 2024 that a revised gist 2 should be disclosed superseding gist 1

93. The Coroner, at para 1, again identified the applicant in relation to the PII claim as being the PSNI rather than the Minister representing the Secretary of State, though she acknowledged at para 8 that "the Chief Constable's application was grounded on a ministerial assertion of PII by the Secretary of State."

94. The Coroner recounted that the Chief Constable had proposed an amended gist 2 for her to consider and that she had expressed a provisional view that gist 2 would be a suitable form of words for the gist of the material in folder 7. The Coroner decided, at paras 10 and 20, that gist 2 should be disclosed, superseding gist 1. In arriving at her decision she stated that she took into account that the Secretary of State remained opposed to disclosure of both gists. However, the Coroner remained of the view that she should depart from "the assertions/assessments in ministerial certificates relevant to the public interest." In the Coroner's assessment gist 2 provided a means of allowing for limited/partial disclosure of relevant information in a way that "mitigates or prevents" the risk of harm to national security and/or the public interest. On this basis the Coroner did not carry out any balancing exercise as regards the disclosure of gist 2 as the risk of serious harm had been mitigated or prevented. She decided to disclose gist 2. In the alternative, the Coroner stated that if she were wrong in her assessment as to mitigation and prevention of serious harm, so that there was a need to conduct a *Wiley* balancing exercise, she held that the public interest in non-disclosure of the information contained in gist 2 was outweighed by the public interest in disclosure for the purposes of doing justice in the proceedings. On that alternative basis also she decided to disclose gist 2.

(c) The open judgment in the High Court dated 25 March 2024 dismissing the judicial review challenges brought by the Secretary of State and the Chief Constable to the Coroner's decision to disclose gist 1

95. The Chief Constable and the Secretary of State challenged the Coroner's decision to disclose gist 1 on the ground that it would breach the NCND policy in a manner that would be contrary to the national security interests of the state.

96. The judge considered that he was restricted to review of the Coroner's decision on ordinary public law grounds. He stated, at para 15, that:

> "It is important to bear in mind that the judicial review court exercises a supervisory jurisdiction only. In respect of decisions made by inferior tribunals which are exercising statutory functions, it will only intervene when the decision maker has acted unlawfully or irrationally or where there has been some material procedural unfairness."

In relation to the court's ordinary supervisory jurisdiction the judge, at para 29, identified the substantial grounds of challenge as being first a claim of illegality based on the incorrect application of the legal test by the Coroner and secondly, a challenge to the rationality of the Coroner's decision.

97. In relation to the first ground of challenge, the judge held, at paras 30 and 33, that the Coroner had set out an unimpeachable articulation of the legal principles underpinning PII applications so that there was no basis to assert that there was any misdirection as to the law. The judge rejected the first ground of challenge.

98. In relation to the second ground of challenge the judge referred, at para 17, to the decision in *Re Officer C* [2012] NICA 47; [2013] NILR 221 at para 36, in which Girvan LJ stated that "[a] coroner will have only acted unlawfully if he has exceeded the generous width of the discretion vested in him to regulate the inquest in the interest of what he considers to be a full, fair and fearless inquiry." The judge stated, at para 35, that as the Coroner "was exercising a judicial role, in accordance with her statutory function … a considerable degree of latitude must be afforded to her." He also stated that:

> "This is particularly so where the exercise in question is a balancing act between competing interests in circumstances where the coroner is fully apprised of all the issues in the inquest. In this type of case, a judicial review court will be slow to impeach the merits of a judicial decision."

99. The judge held that in conducting the balancing exercise, the Coroner had taken into account all material considerations, including the need to have "*proper regard* to assertions of risks of damage to national security contained in ministerial certificates and the limited circumstances in which a judge or coroner may depart from such an assertion" (emphasis added). The judge held, at para 36, that "it could not be said that this decision in respect of the gist was one which no reasonable coroner could have arrived at." The judge rejected this second ground of challenge and dismissed the application for judicial review.

(d) The open judgment in the High Court dated 25 April 2024 dismissing the Secretary of State's challenge to the Coroner's decision to disclose gist 2

100. The Secretary of State challenged the Coroner's decision to disclose gist 2. The judge again considered that he was restricted to review of the Coroner's decision "within the traditional and limited scope of judicial review." He stated, at paras 15 and 17, that the proper approach was that the judicial review court exercises a supervisory jurisdiction only so that the court will only intervene when the Coroner has acted unlawfully or irrationally or where there has been some material procedural unfairness.

101. The judge, in what must have been a reference to the fifth *Litvinenko* principle, stated, at para 17, that "[i]t is … important that the coroner is *aware of* the need for cogent reasons to depart from NCND …" (emphasis added). The judge did not refer to the need for those cogent reasons to be explained by the Coroner.

102. The judge, at paras 16 and 17, rejected a submission on behalf of the Secretary of State that he should adopt an "anxious scrutiny" type approach to the Coroner's decision making. However, for completeness the judge stated, at para 29, that even if the standard of review were elevated to that of anxious scrutiny the Coroner was quite entitled to form the view that the public interest in disclosing gist 2 outweighed "the limited harm to national security." Therefore, in upholding the Coroner's balancing exercise, the judge proceeded on the basis that she took into account a reduced level of risk to national security rather than the real risk of serious harm as previously assessed by the Minister. The judge did not refer to the fact that the Coroner had not obtained from the Secretary of State a relevant assessment of the risk of harm to national security which might be posed by disclosure of gist 2.

103. A ground of challenge to the Coroner's decision to disclose gist 2 was that in carrying out the balancing exercise between the public interest in the protection of national security and the public interest in the administration of justice, the Coroner ought to have, but failed, to take into account the risk that the evidence in the inquest could not be completed by the 1 May 2024 deadline. It was contended on behalf of the Secretary of State that this was an important factor diminishing the public interest in the pursuit of

justice as the evidence could not be completed in sufficient time. The judge rejected this ground of challenge for reasons which we will consider in detail at paras 151-153 below.

104. Another ground of challenge to the decision to disclose gist 2 was that the Coroner had acted in a procedurally unfair manner by failing to invite or receive evidence or submissions from the Secretary of State in relation to gist 2 prior to her decision dated 11 April 2024. The judge rejected this ground of challenge on the basis that it was open to the Secretary of State to have sought an oral hearing and that he could have made submissions to the Coroner in the three week period between 22 March 2024, when the Coroner had provisionally indicated that she was minded to accept gist 2, and 11 April 2024, when she delivered her judgment that gist 2 should be disclosed superseding gist 1.

105. The judge concluded, at para 28, that "it could not be said that this decision in respect of [gist 2] was one which no reasonable coroner could have arrived at." The judge dismissed the application for judicial review.

(e) The majority judgment in the Court of Appeal dismissing the Secretary of State's appeal

106. Keegan LCJ addressed the question as to the circumstances in which a court will differ from a ministerial assessment of a serious risk to national security by reference to the *Litvinenko* principles: see paras 16 and 48. However, at para 45, the fifth *Litvinenko* principle was articulated as requiring the Coroner to pay "due regard" to the Secretary of State's assessment.

107. In agreement with the judge, Keegan LCJ applied ordinary public law grounds in relation to the challenges to the Coroner's decisions to disclose either gist 1 or 2. Keegan LCJ stated, at para 23, that:

> "This is a judicial review case and so any court, first instance or appellate, cannot lose sight of the fact that this is a court of supervisory jurisdiction. This is not a court of merit as has frequently been said. Thus, the appeal requires us to determine whether Humphreys J was wrong in finding that the coroner's ruling was lawful, rational, and procedurally sound and that she had power to order disclosure of the gist."

She stated, at para 42, that:

> "… the standard of public law review is that which applies in any judicial review where unlawfulness or irrationality is alleged, properly informed by the context."

Furthermore, at para 47, she stated that:

> "When reviewing a decision of the coroner, it is not for this court to engage in a merits-based review. Rather, we undertake our review applying public law principles and by reference to well-established authorities."

108. Keegan LCJ, at paras 27-28, rejected the Secretary of State's submission that the decision in *Re Officer C* which allowed a wide margin of discretion to the Coroner was inapplicable in the context of a decision where the subject matter was national security. Rather, she stated, at para 40, that "the Coroner has a wide discretion as to how to conduct his or her investigation" so that her decisions fell within that wide discretion.

109. Keegan LCJ, at paras 43-44, rejected the Secretary of State's submissions that a specific test of anxious scrutiny applied. She also considered that the decisions in *Begum* and *Pham v Secretary of State for the Home Department* [2015] UKSC 19; [2015] 1 WLR 1591 had no direct bearing.

110. Keegan LCJ, at para 29, summarised four grounds of challenge to the Coroner's decisions. The first ground of challenge was that the Coroner acted unlawfully and/or irrationally in directing a gist. Keegan LCJ, at para 51 dismissed the error of law challenge stating that the Coroner "was cognisant of the law, then clearly applied it." Keegan LCJ, at para 52, stated that this was a decision which the Coroner could make within the boundaries of her discretion. It is not clear which decision was being considered at para 52, given, for instance, that the Coroner made a decision as to the level of risk to national security and a decision as to the appropriate balance. In any event this ground of challenge was dismissed.

111. The second ground of challenge was that the Coroner had breached procedural fairness safeguards by not involving the Secretary of State in the decisions to disclose the gists. Keegan LCJ stated, at para 53, that "the NIO were sighted throughout on the gist issues and could have made any additional submissions to the Coroner." She also stated that the Secretary of State "through the judicial review knew of the content of the impugned gist and so was clearly sighted on it." She acknowledged that "the procedure was complicated by the intervening judicial review and some rather unorthodox approaches between the parties which made it cumbersome." However, ultimately, she did not think that any departure from usual coronial processes had caused unfairness or prejudice. She dismissed this ground of challenge.

112. The third ground of challenge was that the Coroner did not provide adequate reasons. Keegan LCJ, at para 56, dismissed this ground of challenge on the basis that "it would be wrong to apply too exacting a standard to [the Coroner's] series of decisions if the overall meaning is clear and cogent as to how [the Coroner] reached the decision she did." Again, it is not clear as to exactly which of the various decisions made by the Coroner was being considered in para 56. For instance, the Coroner: (a) decided to depart from the Minister's assessment of a serious risk to national security; and (b) decided the balance in favour of disclosure.

113. The fourth ground of challenge was that the Coroner did not have power to release the gist in any event given that there was no prospect of the inquest being completed before the 1 May 2024 deadline. Keegan LCJ dismissed this ground of challenge. We will consider her reasoning in more detail at paras 148-157 below.

114. The majority in the Court of Appeal dismissed the appeal.

(f) McCloskey LJ's dissenting judgment in the Court of Appeal

115. McCloskey LJ addressed the question as to the circumstances in which a court will differ from a ministerial assessment of a serious risk to national security. McCloskey LJ, at paras 44 and 45, thought there was a difference of approach in the judgments of Lord Neuberger MR and Sir Anthony May P in *Mohamed*. Lord Neuberger MR, at para 131, identified the requirement for "cogent reasons" for a judge to differ from an assessment by the Secretary of State in relation to national security. On the other hand, Sir Anthony May P, at para 262, referred to the principle that the court "should not substitute any view of its own of the existence or seriousness of [a risk of damaging consequences to national security] for that of the Foreign Secretary (in this instance), *unless it is persuaded that there is no proper basis for that view*" (emphasis added). Then, at para 285, Sir Anthony May P, stated:

> "It is for the appropriate departmental minister, not the court, to judge and assert any risk to national security. It is for the court to judge whether the minister's judgment and assertion are rational and sufficiently evidence-based."

Sir Anthony May P, at para 289, again referred to the requirements of either irrationality or not being based on evidence for a court to reject the minister's assessment of national security. Having reviewed the authorities, McCloskey LJ considered that the strands in the leading jurisprudence were drawn together in the nine *Litvinenko* principles.

116. McCloskey LJ, at para 44, addressed the extent to which a judicial review or appellate court is competent to reassess the balance which the decision maker, in this case the Coroner, was called on to make when the subject matter is national security. McCloskey LJ relied on the judgment of Lord Neuberger MR in *Mohamed* for the proposition that in considering the balancing exercise conducted by a lower court the role of an appellate court is one of "reconsideration" not merely supervisory review. In *Mohamed* on a judicial review application the Divisional Court had decided not to redact certain paragraphs in one of its earlier judgments despite a ministerial certificate assessing that disclosure would cause a real risk of serious harm to an important public interest. On appeal Lord Neuberger MR stated, at para 136:

> "Although the Divisional Court's decision not to redact the … paragraphs involved a balancing exercise, and a difficult one at that, *we have to decide whether the decision was right or wrong*. We are not simply reviewing the reasoning. But it goes further than that. All parties are agreed, correctly in my view, that the issue must be assessed as at the date of the decision, so we must consider matters as at today, which inevitably involves a reconsideration of the issue" (emphasis added).

117. McCloskey LJ recounted at paras 54-58 how the Chief Constable had requested the Minister to issue a PII certificate but in a volte-face had changed his approach by agreeing to disclosure of a gist of information in folder 7 in the form of gist 2.

118. McCloskey LJ, at para 64, identified six errors in the Coroner's open judgment dated 8 March 2024. One of those errors was that there were no cogent reasons for the Coroner to depart from the Minister's assessment of damage to national security.

119. McCloskey LJ, at paras 67-82, identified several errors in the judge's open judgments including: (a) affording the Coroner a considerable and inappropriate degree of latitude in deciding the matter; (b) in failing to identify the reasons provided by the Coroner for departing from the Minister's assessment of the risk to national security; and (c) in failing therefore to assess whether those reasons were cogent.

120. McCloskey LJ, at paras 86-107, considered the lawfulness of the Coroner's decision made on 11 April 2024 to disclose gist 2 when there was no prospect of the inquest being completed prior to the 1 May 2024 deadline. McCloskey LJ concluded, at para 102, that the Coroner was not legally empowered by either the domestic law framework or article 2 of the ECHR, in the discharge of her duty as a public authority under section 6 of the Human Rights Act 1998, to make disclosure in the circumstances prevailing on 11 April 2024. Therefore, her decision to do so was *ultra vires*. In addition, he held, at para 103, that she had erred by failing to take the 1 May 2024 deadline into

consideration. Also, at para 104, McCloskey LJ held that the decision of the Coroner was irrational as it would neither further nor achieve any of the statutory aims or objectives of an inquest or those of article 2 of the ECHR.

121. Finally, McCloskey LJ considered, at para 111, that the complete exclusion of the Secretary of State from the decision-making process in relation to both gists vitiated each of the Coroner's disclosure rulings on the ground of procedural unfairness.

122. McCloskey LJ would have allowed the appeal.

Legal principles

123. PII principles are directed to establishing whether particular evidence which is relevant to and otherwise admissible in legal proceedings should be treated as inadmissible, or as admissible only in the form of a gist of the information contained therein, by reason of the prejudice disclosure would cause to some important aspect of the public interest. Where PII applies, it is a matter of law that the evidence is treated as inadmissible. In that situation neither the court nor the public authority has any choice in the matter. The court, not the public authority asserting the public interest, makes the decision in the light of the relevant evidence whether it should be admitted or not: *Wiley*.

124. Obviously at first instance this means that it is the first instance court which makes the decision. However, in doing so it is applying a substantive part of the law of evidence. It is not exercising a discretion. So it is difficult to see how, on appeal or (where applicable) in judicial review proceedings to challenge that decision, the appropriate test for the appellate or reviewing court to apply in deciding whether the first instance court acted in accordance with the law or not is the test used for reviewing the exercise of discretion, as the judge and the majority in the Court of Appeal held should be applied in this case. The appellate or reviewing court (as the case may be) has to determine whether the first instance court has identified the relevant rule of substantive law and applied it correctly.

125. This view is reinforced by the importance of the aspects of the public interest on both sides of the *Wiley* balance. On the one hand is the due administration of justice in an ordinary civil case or, in the case of a coroner's court, the due investigation of a death in the public interest and according to law. On the other is what is asserted to be some material aspect of the public interest of sufficient force to justify the exclusion of relevant evidence. As Lord Reid put it in *Lewes Justices*, p 400, "[t]he ... question is whether the public interest requires that the [evidence] shall not be produced and whether that public interest is so strong as to override the ordinary right and interest of a litigant that he shall be able to lay before a court of justice all relevant evidence." These are both aspects of the public interest on which an appellate or reviewing court is as well placed as the first

instance court to form an assessment. They are also matters of such intrinsic importance that it is appropriate for the appellate or reviewing court to form its own view about their significance and about how they should be balanced in the *Wiley* exercise: compare the discussion about the role of an appellate court in relation to proportionality assessments in *Shvidler*, at paras 142-162. Where it is said that relevant evidence should be treated as inadmissible on PII grounds, that is a significant issue of principle (*Shvidler*, para 143); it is an issue directly relating to a judgment about how the rule of law should be upheld (*Shvidler*, para 162; *Wiley*, p 296 per Lord Woolf: "the courts, which have final responsibility for upholding the rule of law, must equally have final responsibility for deciding what evidence should be available to the courts of law in order to enable them to do justice"); and it depends on a sensitive assessment about how public confidence in the law can be maintained, which is an issue of such high importance for society that there is a "concomitant public interest in its being directly determined by a senior court" on an appeal or review (*Shvidler*, para 162(vi)).

126. Both sides of the equation are aspects of the public interest and the ultimate question for the court "is to decide where the public interest lies" (*Conway v Rimmer*, p 987 per Lord Pearce; *Wiley*, p 298), taking account of all aspects of it. That is a question appropriate to be addressed by an appellate or reviewing court according to its own assessment. There is a single public interest, albeit composed of various aspects, and the task of the court performing the *Wiley* balancing exercise is to identify what it is. There is not a range of views about the public interest which the court has to consider so as to ensure it takes a view falling within that range. If the court which first performs the *Wiley* balancing exercise misidentifies the public interest, it has gone wrong in law and an appellate or reviewing court is required to correct its error.

127. Leading authorities support this approach. In *Conway v Rimmer* the members of the House of Lords assessed the public interest and the claim to PII for themselves and also directed production of the contested documents to themselves so that they could make the relevant assessment having regard to the detail of their contents. They did not ask whether the lower courts had misdirected themselves or reached an unreasonable conclusion. Lord Reid (p 953) and Lord Upjohn (p 996) indicated that if a lower court decided that there should be disclosure, there should be a procedure to allow that matter to be tested in a superior court. Again, in *Lewes Justices* the members of the House of Lords assessed the public interest and the claim to PII themselves, without any question of deferring to the judgment of the Gaming Board or the lower courts: see pp 401-402 (Lord Reid), 405 (Lord Morris), 406 (Lord Pearson), 407-408 (Lord Simon) and 413 (Lord Salmon). In *Wiley*, the House of Lords made its own assessment of the public interest: pp 305-306.

128. In *Mohamed*, which concerned a question whether a court's decision should be redacted for PII reasons, in a judgment with which Lord Judge CJ agreed, Lord Neuberger MR made the point expressly at para 136:

> "Although the Divisional Court's decision [ie the lower court's decision regarding the application of the PII principles examined in *Wiley*] not to redact the redacted paragraphs involved a balancing exercise, and a difficult one at that, we have to decide whether the decision was right or wrong. We are not simply reviewing the reasoning."

Sir Anthony May P recorded that his own reasoning was in close accord with that of Lord Neuberger MR (para 208) and he too made his own assessment of the public interest balance (see, in particular, paras 285-290). Lord Neuberger MR also stated that the appeal court had to reach its decision on the question where the balance of public interest lay on the basis of the evidence available to that court: see paras 136-140 (it was a feature of the case that the evidence concerning the public interest had changed after the Divisional Court made its decision); see also para 264 per Sir Anthony May P. This too shows that an appellate court has its own responsibility to make its own assessment of the public interest for PII purposes, whatever the first instance court may have decided.

129. Undertaking the *Wiley* PII exercise is a complex matter, since the court has to balance two very different aspects of the public interest. And in judging the existence and extent of prejudice to the aspect of the public interest which is put forward by the public authority which asserts PII the court will work on the basis of the assessment by that authority, subject to it being rational and so forth (see paras 35-39 above). Unlike McCloskey LJ, we do not think that there is any significant difference so far as this is concerned between Lord Neuberger MR and Sir Anthony May P in *Mohamed*. At para 262 Sir Anthony May P rightly observed that, in assessing the risk to national security for the purposes of the *Wiley* balancing exercise, the court should not substitute its own assessment of the existence or extent of that risk for that of the Secretary of State "unless it is persuaded that there is no proper basis for that view"; and at para 285 he said that the court's role was limited to judging whether the Secretary of State's views were "rational and sufficiently evidence based" (see also para 289). This court has amplified what underlies and justifies this approach in the judgments referred to at para 38 above. It is by no means unusual for a court to have overall responsibility for applying a legal test, such as deciding on where the balance of the public interest lies according to the approach in *Wiley*, while at the same time some factors to be taken into account for that purpose require the court to accord a significant degree of respect to an assessment made by others, such as a government minister: see *Begum*, para 69, and compare the approach for a court applying the proportionality test as explained in *Shvidler*, paras 120-130.

130. In our view, the formulation of the test for assessment of the national security interest set out in the fifth *Litvinenko* principle (para 91 above), stating that the assessment of the Secretary of State should be accepted unless there are "cogent or solid reasons to reject it", does not adequately explain the court's role in relation to this part of the *Wiley* balancing exercise and is capable of being misleading. The court's role in relation to such an assessment is to apply normal public law principles, including in particular checking

that the assessment is not *Wednesbury* irrational and, as part of that, checking that there is some evidence capable of supporting it (*Edwards v Bairstow* [1956] AC 14; *Council of Civil Service Unions v Minister for the Civil Service* [1985] AC 374, 406 per Lord Scarman and 410-411 per Lord Diplock).

131. We do, however, agree with Goldring LJ's statement in the fifth *Litvinenko* principle that if a court is going to reject the assessment by a public authority of the aspect of the public interest which is within that authority's area of responsibility, it is incumbent on the court to explain its reasons. This imposes an appropriate discipline on the court to ensure that it approaches the *Wiley* balancing exercise with proper care.

132. In setting out the principles in *Litvinenko* Goldring LJ posited that the *Wiley* exercise in relation to an inquest is concerned with balancing "open justice" (para 53, the first principle) and "the proper administration of justice" (para 54, the second principle) against national security. These formulations appear to be derived from *Wiley* and *Mohamed*, both of which were concerned with the application of PII in the context of civil litigation in which the courts had to determine the legal rights and obligations of the parties. There is a clear and strong public interest in courts fulfilling this role, which is their central function in society. The public interest in a coroner examining the circumstances of a death is rather different and there are other mechanisms by which that may also be done, such as by police investigation. We would wish to reserve our opinion whether the public interest in enabling an inquest to go into the evidence relating to a death is necessarily of the same force and weight, for the purposes of the *Wiley* balancing exercise, as the public interest in the due administration of justice by a court in civil litigation. But the present case does not turn on this and we heard no argument on the issue, so we say no more about it.

133. Another difference between an inquest and civil proceedings is that in civil proceedings a litigant (typically a public authority) who is concerned about the detrimental impact on the public interest of disclosure of information has the option of protecting that interest by making concessions or of not adducing evidence in order to avoid such impact. This may of course mean that they are made vulnerable to losing in the litigation (which was one reason why a closed material procedure has been introduced by legislation; and see the discussion in *Al Rawi v Security Service* [2011] UKSC 34; [2012] 1 AC 531), but it leaves the public authority with some control over protection of the aspect of the public interest which it is charged with protecting. Similarly, in the context of criminal proceedings, a prosecutor has the option of dropping a prosecution or of not relying on evidence about sensitive matters. But since an inquest is an inquisitorial investigation into the circumstances of a death, such options are not available. Relevant information has to be provided to a coroner and he or she decides, on application of the *Wiley* balancing test, whether it is disclosed. There is no long-stop safety valve whereby an authority can simply withdraw the information and take the consequences. Every court applying the *Wiley* balancing test has a profound responsibility to identify the overall

public interest, but this feature of an inquest means that for a coroner this responsibility is particularly great.

134. In discharging that responsibility, a court and a coroner have to take great care that they have informed themselves fully and accurately about the competing aspects of the public interest before reaching an ultimate conclusion in conducting the *Wiley* balancing exercise whether information should be disclosed or not. For that reason, the House of Lords in *Conway v Rimmer* ordered the production to themselves of the documents in issue in order to check with detailed reference to their contents whether the public interest was in favour of their disclosure or not. As we explain below, we consider that the Coroner did not take the care she should have done to ensure that she was properly informed about the national security interest in this case.

135. Where a court decides that a gist of sensitive information should be disclosed rather than the evidence which contains the information itself, that gist becomes the relevant evidence in that case in place of the underlying materials. The basic question remains: is the public interest in the due administration of justice or (in the case of a coroner's court) the due investigation of a death in the public interest and according to law by means of admitting the gist into evidence of such force as to outweigh the countervailing public interest in non-disclosure, as here on grounds of national security? This means that the court or the coroner (as the case may be) should consider carefully what contribution the admission of the gist into evidence is likely to make to them being able to carry out their assigned function (respectively, the determination of the rights and obligations of the parties and determining the circumstances of a death).

136. We should mention that we have considerable doubt whether the Coroner examined this aspect of the case with the care that was required. Given the conclusions we reach below regarding the grounds of appeal it is not necessary to elaborate on this. Suffice it to say that both gist 1 and gist 2 were very short documents which set out a summary at a very high level of abstraction and in a very indeterminate manner. We do not think that if either of them had been admitted into evidence in the inquest the Coroner could have relied on that evidence to make any relevant findings of fact to determine the circumstances in which the deceased met his death; nor was there any realistic prospect that their disclosure would have prompted additional investigations by the Coroner, since those would have been met with PII objections of the same character as those already upheld by the Coroner in relation to folders 1-7. On the footing that the gists would have made no or only a negligible contribution to the Coroner's ability to fulfil her statutory function, it is difficult to see how the overall balance of the public interest could be in favour of their disclosure.

Application of the legal principles to the judgments in the lower courts

137. There were several errors in the judgments in the lower courts.

(a) The Coroner's failure to apply the correct test before departing from the Minister's and the Secretary of State's assessment regarding the nature and extent of damage to national security

138. It was not correct for the Coroner to have "proper regard" to the assertions of risk of damage to national security contained in the Minister's certificate. Rather, the assessment of the Minister and of the Secretary of State regarding the nature and extent of damage to national security should have been accepted by the Coroner unless there was no evidence to support that assessment or the assessment was *Wednesbury* irrational. The Coroner in both her open and closed judgments did not decide that there was no evidence to support the Minister's assessment or that the assessment was *Wednesbury* irrational. Therefore, the Coroner ought to have concluded but failed to conclude that there was a real risk of serious harm to national security based on the Minister's assessment.

139. The judge and the majority in the Court of Appeal also fell into error by failing to recognise that the Coroner had applied an incorrect test.

(b) The Coroner's incorrect conclusion that there was no need to carry out a balancing exercise

140. The primary reason given by the Coroner for disclosing the gists was that they "mitigated" or "prevented" any real risk of serious harm to the public interest. On that basis the Coroner decided that there was no need to carry out any balancing exercise and that they should be disclosed. Absent any finding by the Coroner that there was no evidence to support the Minister's assessment or that the assessment was *Wednesbury* irrational, it was not open to the Coroner to conclude that the gists mitigated or prevented any real risk of serious harm to the public interest. The Coroner had also omitted to inform herself properly about the extent of any risk to national security which might be associated with disclosure of the gists (para 63 above) so she was not in a position to discount the Minister's assessment in the PII certificates. Therefore, the Coroner's decision to disclose the gists on the basis that they mitigated or prevented any real risk of serious harm to national security was erroneous.

141. The judge and the majority in the Court of Appeal fell into error by failing to recognise that the Coroner ought not to have disclosed either gist without carrying out a balancing exercise.

(c) The Coroner's failure in carrying out the balancing exercise to weigh in the balance the Minister's and the Secretary of State's assessment of the nature and extent of damage to national security

142. The Coroner held that if she were wrong about the mitigation or prevention of any real risk of serious harm to the public interest then the public interest in non-disclosure of the information contained in the gist was outweighed by the public interest in disclosure for the purposes of doing justice in the proceedings. Absent the Coroner finding that there was no evidence to support the Minister's assessment or that the assessment was *Wednesbury* irrational then in carrying out the balancing exercise the Coroner ought to have but failed to weigh in the balance that there was a real risk of serious harm to national security based on the Minister's assessment. The Coroner failed to do so, but rather as the judge identified she took into account "limited harm to national security". The Coroner's balancing exercise was therefore flawed.

143. The judge and the majority of the Court of Appeal also fell into error by failing to recognise this flaw in the Coroner's balancing exercise.

(d) Prior to making any decision to disclose either gist the Coroner ought to have but failed to obtain the views of the Minister and the Secretary of State

144. Prior to making any decision to disclose either gist the Coroner ought to have but failed to obtain the views of the Minister or the Secretary of State. The context was the potential disclosure of information affecting national security in which the "defeat of the terrorist is a public interest of first importance": *R v Secretary of State for the Home Department, Ex p Brind* [1991] 1 AC 696, 749. In that context a high degree of care was required to be taken by the Coroner to inform herself about that aspect of the public interest. Furthermore, there was a duty on the Coroner to protect national security even if the persons with the status of properly interested persons did not do so: see by analogy the reference to the duty on litigants in *Wiley* at p 295G-H and *Rawlinson & Hunter Trustees SA v Director of the Serious Fraud Office (No 2)* [2014] EWCA Civ 1129; [2015] 1 WLR 797, para 30. In that context, and given that duty, it is not sufficient to say that the Secretary of State could have, but failed, to apply for status as a properly interested person and if successful in that application could have but failed to make submissions. Rather, the Coroner was obliged to take steps to inform herself about these relevant matters before making any decision about disclosure. This again meant that she should have obtained and considered the reasoned views of the Minister or the Secretary of State in relation to any proposal that the gists be disclosed. Her failure to do so led her to make decisions without taking into account material matters, namely the reasoned views of the Secretary of State. Her decisions to disclose the gists were flawed.

145. The judge and the majority of the Court of Appeal also fell into error by failing to recognise this flaw in the Coroner's decision.

(e) The Coroner's failure to correctly identify the applicant for PII

146. The Coroner incorrectly identified the applicant in relation to the PII claim as being the Chief Constable. The Coroner ought to have identified the applicant as the Secretary of State (acting by the Minister who had issued the certificates asserting PII) and that it was solely for the Secretary of State to make submissions as to national security rather than for the Chief Constable to do so. It is not sufficient to state that the Chief Constable's application was grounded on a ministerial assertion of PII by the Secretary of State. We consider that this failure caused the Coroner to fall into the error of failing to take steps to seek, obtain and consider the reasoned views of the Secretary of State prior to deciding to disclose the gists.

147. The judge and the majority of the Court of Appeal also fell into error by failing to recognise this flaw in the Coroner's decision.

(f) The Coroner's failure in carrying out the balancing exercise to take into account that there was no prospect of the evidence in the inquest being completed prior to the 1 May 2024 deadline.

148. The Coroner fell into error when making her decision on 11 April 2024 to disclose gist 2 in that she failed to take into account, in conducting the balancing exercise, the material consideration that there was then no prospect of the evidence in the inquest being completed prior to the 1 May 2024 deadline. If the evidence was not completed then the Coroner could not make a final determination, verdict or findings. That was clearly a material consideration in the balancing exercise which ought to have been but was not taken into account. At its least this consideration would have diminished very considerably the weight to be attached to the public interest in admitting the gist into evidence for the purpose of allowing the Coroner to fulfil her statutory function to determine the circumstances in which the deceased died.

149. In arriving at that conclusion in relation to this error committed by the Coroner we reject the reasoning of both the judge and the majority in the Court of Appeal and uphold part of the reasoning of McCloskey LJ. We deal with the reasoning at (i) – (iv) below.

(i) No requirement to carry out a balancing exercise

150. The judge upheld the Coroner's decision that as the risk to national security was mitigated or prevented there was no requirement to carry out a balancing exercise. The judge reasoned that as there was no balancing exercise there was no requirement to consider the impact of the deadline in such an exercise. However, the judge was in error. Absent any finding by the Coroner that there was no evidence to support the Minister's assessment, or that the assessment was *Wednesbury* irrational, it was not open to the Coroner to conclude that the gists mitigated or prevented any real risk of serious harm to the public interest. The Coroner was required in such circumstances to carry out a balancing exercise based on the Secretary of State's assessment of the nature and extent of the risk to national security.

(ii) The Secretary of State's failure to raise the issue of the deadline prior to the Coroner deciding to disclose gist 2

151. The judge considered that the Coroner was justified in not taking the deadline into account in the balancing exercise because the Secretary of State failed to raise it as an issue until 18 April 2024, which was after she had made her decision on 11 April 2024. However, the existence of the deadline was known to the Coroner and ought to have informed her assessment of the weight of the public interest in favour of disclosure of gist 2 whether it was raised by the Secretary of State or not.

152. Further, in circumstances where, as here, the Coroner ought to have but failed to seek the reasoned views of the Secretary of State prior to making her decision on 11 April 2024, she cannot rely on his failure to raise the issue in answer to the complaint that it was incumbent on her to take it into account herself.

(iii) Achieving some of the goals of an inquest

153. The judge held that even if the Coroner could not make "a final determination, verdict or findings" she would still have been able to achieve some of the goals of an inquest process by disclosing gist 2, such as explaining how the deceased died or to allay rumour and suspicion. McCloskey LJ, at para 101, disagreed. There is a marked distinction between making public a gist of information during the investigative stage and making public the Coroner's "final determination, verdict or findings." The gist of information may on analysis by the Coroner be inaccurate or completely or partially irrelevant. It is recognised during the investigative stage that the information in the gist remains to be analysed and either accepted or rejected. Reliance is placed on the final determination, verdict or findings not on what might be said during the investigative stage. In an inquest which will conclude there is both utility and a requirement to disclose the gist during the investigative stage. Disclosing the gist in such circumstances may

prompt further inquiries and may require the Coroner to expand the scope of the inquiry. However, in this inquest there was no prospect of it concluding and there was no prospect of further coronial inquiries. Rather, making a gist public would leave the information in the gist hanging in the air. It would positively invite speculation and rumour which is the complete antithesis of one of the central purposes of a coronial investigation. We reject the judge's conclusion that the disclosure of gist 1 or 2 would achieve some of the goals of an inquest.

154. We would, however, add that whilst we reject the judge's conclusion in relation to these gists it may be, for instance, that in some exceptional circumstances, say where the information in a gist was *conclusive* in relation to a material and central issue such as "who the deceased person was", that there might be some scope for saying that a goal of the inquest process could be achieved by disclosure even though there could be no overall "final determination, verdict or findings."

(iv) Ultra vires

155. In circumstances where there was no prospect of the inquest being completed, McCloskey LJ, at para 102, stated that:

> "In my estimation the Coroner was not legally empowered by either the domestic law framework or Article 2 ECHR, in the discharge of her duty as a public authority under section 6 of the Human Rights Act 1998, to make disclosure [of gist 2]."

In consequence he held that her decision to do so was *ultra vires*. The majority in the Court of Appeal disagreed. Keegan LCJ reasoned, at para 58, that "disclosure represents an important reassurance to the family of the deceased and maintains public confidence in the investigative process employed to date." She stated that "the Coroner was mandated by the article 2 [ECHR] procedural obligation to provide relevant disclosure *when it arose* as is the normal procedure." (Emphasis added). In her view, as the obligation to disclose gist 2 arose before the 1 May 2024 deadline the *vires* argument failed.

156. The disclosure of a gist of information during the investigative stage in relation to an inquest which can conclude is clearly within the power of the Coroner. We have not heard full argument as to whether a coroner has the power to disclose a gist of information that is *conclusive* in relation to a material and central issue such as "who the deceased person was" even if the inquest itself cannot be concluded. For the purposes of this appeal, and absent full argument on this point, it is not necessary to determine whether disclosure of a gist of information during the investigative stage, where the inquest cannot be concluded, is always ultra vires. However, in deciding this appeal, it is sufficient to state

that the deadline was a material consideration which ought to have been but was not taken into consideration by the Coroner in conducting the *Wiley* balancing exercise.

157. The majority in the Court of Appeal held that the Coroner still had lawful authority to disclose the gists even though there was no prospect of "a final determination, verdict or findings." However, the majority in the Court of Appeal did not address the issue as to whether the deadline was a relevant consideration which ought to have been taken into account by the Coroner in the balancing exercise. Therefore, their reasoning does not relate to the issue that the deadline ought to have been but was not taken into account by the Coroner in conducting the balancing exercise, as we consider was the case.

(g) Incorrect attribution by the judge and the majority in the Court of Appeal of a wide margin of discretion to the Coroner

158. The judge and the majority in the Court of Appeal fell into error in holding that the Coroner enjoyed a discretion in respect of her determination of the public interest in applying the *Wiley* PII principles: see paras 123-128 above.

159. Whether the Coroner had a discretion and if so, its width, require to be considered in relation to each of the various issues which fell for her determination. The Coroner had to determine whether there was evidence to support the Secretary of State's assessment regarding the nature and extent of risk of damage to national security. The question there is whether there is or is not evidence. No discretion is exercised. She had to consider whether the Secretary of State's assessment is *Wednesbury* irrational. That requires an evaluation, not the exercise of any discretion. In relation to the *Wiley* balancing exercise the Coroner had to determine whether the overall public interest was in favour of or against disclosure. Again, that is not an exercise of discretion. Rather, it requires an evaluation. On judicial review the issue is whether deference should be shown for her evaluation or whether the reviewing court decides for itself whether her decision was right or wrong. As we have explained, it is the latter.

(h) The judge and the majority in the Court of Appeal incorrectly reviewed the Coroner's decision on ordinary public law grounds

160. The judge and the majority in the Court of Appeal incorrectly considered that they were restricted to review of the Coroner's decision on ordinary public law grounds. Instead, they should have formed their own view as to how the public interests should be balanced in the *Wiley* exercise: see paras 123-128 above.

Further matters

(a) Level of detail required from the Minister in a PII certificate

161. On 10 April 2024 an officer of the Security Service, identified by a personal identification number rather than by name, swore an affidavit in support of the Secretary of State's application for judicial review of the Coroner's decision to disclose gist 2. The affidavit is part of the closed material before the High Court, the Court of Appeal and this court. For the purposes of this appeal, it is unnecessary to describe the contents of the affidavit in any detail. In the affidavit the officer accepted that he had not seen the papers in folder 7 nor indeed any other material in the inquest apart from the amended gist 2. The officer supported the contention that gist 2 damaged national security for three reasons set out in para 7. Those reasons were expressed in theoretical and general terms. It is understandable that some reasons regularly advanced in support of PII applications have a general application and can be explained in general terms. Nonetheless, in a certificate the general points made should also be related to the particular circumstances of the case at hand, otherwise there is a danger that the evidence becomes purely formulaic and the discipline involved in having to explain to a court in clear terms the nature of the public interest against disclosure to enable it to fulfil its role is lost. The effect of expressing the reasons in theoretical and general terms is that a court is driven to make oral inquiries in a closed hearing to determine whether the public interest in non-disclosure outweighs the public interest in disclosure of the material. A court should not be placed in that position. The primary purpose of our reference to the affidavit is to record that the Secretary of State correctly accepted before this court that more detail about the national security public interest could and should have been provided in the affidavit.

(b) Differences in approach to public interest immunity claims as between the Secretary of State and the Chief Constable

162. The Chief Constable acknowledges that the claim for public interest immunity in relation to folder 7 (the relevant folder for the purposes of this appeal) was supported by a ministerial certificate rather than by a certificate issued by the Chief Constable. However, he states:

> (a) folder 7 contains PSNI information which derives from and relates to counter terrorist policing of which the PSNI was and is the "information owner";
>
> (b) the ministerial certificate was sought by the PSNI not because "of any particular government equity or interest in its contents" but rather "pursuant to a long standing but in [the Chief Constable's] view anomalous

Northern Ireland practice whereby successive Chief Constables requested a ministerial certificate in connection with every PII claim they intended to make in civil proceedings or inquests";

(c) the Chief Constable has now discontinued this practice so that in future the PSNI will make its own PII related assessments and claims either jointly with other security agencies or separately as appropriate;

(d) the Chief Constable acknowledges that the discontinuance of the practice may mean that different "independent public authorities with different responsibilities and expertise" may form different views as to harm to the public interest;

(e) the Chief Constable relies on the recommendations in the Report of the Independent Commission on Policing for Northern Ireland dated September 1999 entitled "A New Beginning: Policing in Northern Ireland" (the Patten Report) that "the police service itself should take steps to improve its transparency" and that "[t]he presumption should be that everything should be available for public scrutiny unless it is in the public interest – not the police interest – to hold it back";

(f) the Chief Constable's assessment is that "the release of gist 2 would not cause or risk any damage or harm to the public interest because it is general and not specific and (if this is relevant at all) it would not involve any 'breach of' or 'departure from' the government's NCND policy";

(g) the Chief Constable acknowledges that his assessment is different from the assessment of the Secretary of State, but he considers that "the relevant court will be better able to identify and resolve any differences."

163. On 19 March 2024 officials in the NIO provided advice to the Minister in relation to the Chief Constable's request for PII certificates. In providing that advice they informed the Minister of State that "[i]n this case, PSNI does not consider it feasible to provide a meaningful gist while at the same time ensuring the necessary protection of the identified public interests and their justifications." With respect to the Chief Constable, we consider that there is some force in McCloskey LJ's description of his final position as involving a volte-face. We have considerable sympathy with the desire of the Chief Constable to demonstrate that the PSNI is seeking to be transparent. However, the national security interest in attempting to meet the threat of terrorism in Northern Ireland should not be underestimated. It is of course open to the Chief Constable to adopt his own position in relation to any PII claim. However, before he does so it is highly desirable that he should consult with the Secretary of State in the manner explained above (paras 35-

39). The national security interest should not be treated as a point of dispute between the Chief Constable and the Secretary of State to be brought to a court for resolution. Their role ought to be to take steps to inform the court about the nature and extent of the national security interest. In the case of disagreement, for the reasons we have explained, the ordinary position is likely to be that the court will look to the Secretary of State for the relevant assessment.

Our view as to the *Wiley* balance

164. The statutory deadline means that the inquest cannot be completed. In any event, as the Coroner herself concluded, the PII decisions she took in relation to folders 1-7 mean that it is not possible for her to fulfil her statutory function. Applying the *Wiley* balancing test ourselves in accordance with the approach we have set out at paras 29-39 and 123-135 above, it is clear that the balance of the public interest is against disclosure of gist 1 and gist 2.

Overall conclusion

165. For the reasons given above, we would allow the appeal. Neither gist should be disclosed.

166. In so far as the state has an obligation under article 2 of the ECHR to conduct further investigations into the circumstances in which the deceased met his death, a means by which that can be achieved with reference to all relevant evidence in the case is by a statutory inquiry employing closed procedures as appropriate. The Coroner has pointed this out: see para 86 above. Alternatively, consideration could be given to a review undertaken by the Independent Commission for Reconciliation and Information Recovery: see para 17 above.