Neutral Citation Number: [2010] EWHC 3098 (Admin)

Case No: CO/11728/2010

**IN THE HIGH COURT OF JUSTICE**
**QUEEN'S BENCH DIVISION**
**DIVISIONAL COURT**

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 30/11/2010

**Before** :

**LORD JUSTICE MAURICE KAY,**
**Vice President of the Court of Appeal, Civil Division**
**and**
**LORD JUSTICE STANLEY BURNTON**

- - - - - - - - - - - - - - - - - - - - -

**Between :**

| | |
|---|---|
| **THE QUEEN on the application of SECRETARY OF STATE FOR THE HOME DEPARTMENT** | **Claimant** |
| **- and -** | |
| **ASSISTANT DEPUTY CORONER FOR INNER WEST LONDON** | **Defendant** |

- - - - - - - - - - - - - - - - - - - -
- - - - - - - - - - - - - - - - - - - -

**Mr James Eadie QC** and **Mr Jonathan Hall** (instructed by **Treasury Solicitors**) for the **Claimant**
**Mr Hugo Keith QC, Mr Andrew O'Connor** and **Mr Benjamin Hay** (**counsel to Inquests**) for the **Defendant**

**Interested Parties:**

**Mr Patrick O'Connor QC** and **Ms Caoilfhionn Gallagher** on behalf of some **bereaved families**
**Mr Christopher Coltart** on behalf of some **bereaved families**
**Families** represented by **Anthony Gold; Kingsley Napley; Sonn Macmillan Walker;Hogan Lovells; Russell Jones & Walker (solicitors)**

**Mr John Beggs QC** and **Mr Ian Skelt** for **Chief Constable of West Yorkshire Police**
**Mr Max Hill QC** for the **Commissioner of Police of the Metropolis**
**Mr Guy Vassall-Adams** on behalf of **Media Organisations**
**Written submissions** by **Ms Dinah Rose QC** and **Mr Ben Jaffey** on behalf of **INQUEST, JUSTICE and Liberty**

Hearing date: 18 November 2010

- - - - - - - - - - - - - - - - - - - - -

# Judgment

**Lord Justice Maurice Kay :**

1. This application for judicial review, for which we grant permission, relates to a decision made by Lady Justice Hallett, who is presently sitting as Assistant Deputy Coroner for West London, so as to conduct inquests (the Inquests) into the deaths of the victims of the bombings in London on 7 July 2005. I shall refer to her as "the Coroner". The single issue raised by the application is whether the Coroner has power to receive sensitive evidence relating to the Security Service in a closed hearing. For these purposes, "closed" means "in the absence of properly interested persons and their legal representatives". The closed hearing would be attended only by members of the Security Service and their legal representatives, together with counsel to the Inquests and those instructing them. An additional possibility contemplated by the parties and referred to in the judgment of Stanley Burnton LJ is the exclusion of some but not all properly interested persons, with say an interested police force remaining at the discretion of the Coroner. The issue relates wholly or mainly to the construction of rule 17 of the Coroners Rules 1984, which provides:

   > "Every inquest shall be held in public: Provided the Coroner may direct that the public be excluded from an inquest or any part of an inquest if he considers that it would be in the interests of national security to do so."

2. The dispute centres on the words "the public" in the proviso. Do they include properly interested persons and their legal representatives who are participating in the Inquests? Or are they limited to members of the public in a wider sense, meaning all those who are not "properly interested persons"? In the latter case, once the public in the wider sense had been excluded, the hearing would continue *in camera*, but with all properly interested persons and their legal representatives able to attend and participate.

3. The case for exclusion extending to properly interested persons and their legal representatives is put on behalf of the Home Secretary and the Security Service (supported by the West Yorkshire Police and a number of the bereaved families). The contrary case is put by counsel to the Inquests (also supported by a number of the bereaved families). We have also received oral submissions on behalf of the Metropolitan Police and Media Organisations, together with a written submission on behalf of INQUEST, Justice and Liberty.

4. The difficulties that have arisen in relation to sensitive material in the Inquests mainly derive from an earlier and unchallenged ruling by the Coroner dated 21 May 2010 to the effect that she would inquire into the "preventability" of the bombings, including whether there had been failings on the part of the Security Service and/or the West Yorkshire Police and/or the Metropolitan Police properly to investigate and/or assess the intelligence in relation to two of the bombers; whether there were any failures of communication between the Security Service and the West Yorkshire Police in relation to the gathering and assessment of relevant intelligence relating to the two; whether the assessments by the Security Service were affected by any inadequate record-keeping; and whether any of the alleged failings contributed to or were causative of the events of 7 July 2005.

5. Inevitably these issues involve sensitive information and documents. To a limited extent, some of it is already in the public domain, mainly as a result of the criminal trial of other persons arising out of Operation Crevice and through two reports of the Intelligence and Security Committee. The basis upon which all parties invite us to approach the present application is that there remains some material which would be unsuitable for production at an *in camera* hearing attended by properly interested persons and their legal representatives but from which the wider public would be excluded. Although potentially relevant to the issue, the material would attract public interest immunity (PII). The concern of the Security Service is that, if the Coroner is prohibited from taking such material into consideration, particularly in relation to preventability, there is a risk that she will reach a conclusion on less than full information and, for example, the Security Service may be subjected to criticism which may be unjust in the light of the contents of the PII material. The case for the Security Service is that this risk would be avoided if part or parts of the Inquests were to take the form of a closed hearing from which all but the Security Service and their legal representatives and counsel to the Inquests and those instructing them were excluded. The Coroner could then consider the material but be circumspect in her references to it in her final decision. The problem with that, say the properly interested persons who oppose the present application, is that there would be a decision based at least in part upon material which they will not have seen, which decision would lack intelligible reasoning. Although they are properly interested persons, they would not be accorded full participation or be provided with a transparent explanation of the decision which the Inquests are intended to produce.

6. These are, of course, policy points in a case which is concerned with statutory construction. They assist in understanding the context. However, our task is not to determine which would be the "better" solution but to decide whether or not the Coroner was free to choose between them. In terms of policy, neither solution would be perfect. I can well understand why the bereaved families are divided. Some are prepared to remain less than fully informed about the material and the eventual reasoning on the basis that they would prefer a decision based on full information and are content to place their trust in the Coroner. Others, whilst also making clear their profound confidence in the Coroner, are unhappy about closed material and the possibility of a decision containing unexplained reliance upon it.

7. Put simply, if the open material seems to point to conclusion A, from their point of view it would defeat one of the stated purposes of the Inquests if it were to be trumped by closed material leading to conclusion B and without any explanation. It is common ground that, if the Coroner does have the power of exclusion for which the Security Service contends, it does not extend to a power to procure the appointment of special advocates in relation to the closed material and hearing or to promulgate a closed decision in conjunction with an open one.

8. As I have indicated, the central issue on this appeal is one of statutory construction: does rule 17 empower the Coroner to exclude properly interested persons and their legal representatives from part of an inquest and to receive and later take into account closed material received in their absence? In order to answer this question it is necessary to consider not only the wording of rule 17 but its context and to strive to give effect to its purpose.

9. In *R(Amin) v Secretary of State for the Home Department* [2004] 1 AC 653, [2003] UKHL 51, Lord Bingham said (at paragraph 31):

> "In this country … effect has been given to [the state's duty to investigate] for centuries by requiring such deaths to be publicly investigated before an independent judicial tribunal with an opportunity for relatives of the deceased to participate. The purposes of such an investigation are clear: to ensure so far as possible that the full facts are brought to light; that culpable and discreditable conduct is exposed and brought to public notice; that suspicion of deliberate wrongdoing (if unjustified) is allayed; that dangerous practices and procedures are rectified; and that those who have lost their relative may at least have the satisfaction of knowing that lessons learned from his death may save the lives of others."

10. In the cognate context of compliance with Article 2 of the ECHR (which is not in issue in the present case), "the principal hallmark of an … inquiry is that it is 'effective'"; per Lord Rodger in *R(L) v Secretary of State for Justice* [2009] 1 AC 588, [2008] UKHL 68. The criteria set out in these passages - transparency, participation, effectiveness – may not all pull in the same direction in a particular case, as the present application demonstrates. At least since *Scott v Scott* [1913] 1 AC 417, open justice has been established as a fundamental principle applicable to judicial proceedings. It is not an absolute rule but exceptions to it are essentially for Parliament to create: see Lord Shaw in *Scott* (at page 485), recently endorsed in a contemporary context in *Al-Rawi v Security Service* [2010] 3 WLR 1069, [2010] EWCA Civ 482, at paragraph 38.

11. On the basis of this well-known line of authority and the fundamental principles contained within it, it seems to me that we should approach the task of construction by keeping in mind the question whether rule 17 was intended to empower a coroner to exclude properly interested persons from part of an inquest, such exclusion being in conflict with the aims of transparency and participation, even if, as Mr Eadie submits, it enhances the aim of effectiveness.

12. Rule 17 was preceded by rule 14 of the 1953 Rules which was in precisely the same form. Before that, there was no statutory provision. The position at common law was represented by *Garnett v Ferrand* (1827) 6B + C 611, the ratio of which was simply that a coroner could authorise the removal of a disruptive busybody, who had no proper interest in the proceedings. Lord Tenterden CJ indicated that the position would have been the same if the man had had a proper interest. In my view, this authority provides no assistance in the present case. It is concerned with circumstances which a coroner is empowered to deal with pursuant to his inherent power to regulate the hearing.

13. I consider it highly probable that, in 1953, no thought was given to the question of whether a properly interested person could be excluded from part of an inquest on grounds of national security. We have become accustomed to high-profile, state-involved inquests in recent years and their scope has been significantly widened by the more generous meaning given to the questions of "how, when and where the deceased came by his death": section 11(5)(b)(ii). Nevertheless, the first edition of *Jervis on Coroners* to be published after the enactment of the 1953 Rules (the 9th

edition) and all subsequent editions have proffered an interpretation of rule 14/17 in the same terms (current, 12th edition, at paragraph 11-11):

> "Proceedings at an inquest must be held in public unless in the interest of national security the coroner is of the opinion that the inquest or any part of it ought to be held *in camera*."

14. There is no reason to suppose that the expression "*in camera*" was used otherwise than with its normal meaning of a hearing from which the wider public, but not the parties or their legal representatives, are excluded. The diligent researches of counsel have unearthed only one known example of exclusion of properly interested persons under rule 17 and there the brief secret hearings attracted no objection and the point of construction was not raised: see the ruling on a media application in the *Hercules* inquest, 26 March 2009.

15. The essence of the construction issue can be simply expressed: does "the public" in the proviso to rule 17 mean "any person" or does it only apply to those who are not properly interested persons and their legal representatives? We have received numerous submissions about the adverse consequences which would flow from one or the other interpretation. At their highest they are these. If the "any person" construction is correct, it would mean that properly interested persons might receive a decision significantly influenced by material of which they and their legal representatives know nothing. They may have seen and heard evidence tending to point to conclusion A but find that closed material has trumped that and given rise to conclusion B. The other side of the coin is that the Coroner will have based her conclusion on all the evidence, with none excluded. If the "but not properly interested persons or their legal representatives" construction is correct, the result will be the exclusion of potentially significant material on the basis of PII so that the Coroner bases her conclusions on incomplete material but the proceedings will not have departed from the principles of transparency and participation.

16. In her ruling, the Coroner relied heavily on the relationship between rule 17 and its place in the 1984 Rules as a whole. She gained particular assistance from rules 20, 37 and 57, to which I now turn. Their material parts provide as follows:

> "20(1) Without prejudice to any enactment with regard to the examination of witnesses at an inquest, any person who satisfies the coroner that he is within paragraph (2) shall be entitled to examine any witness at an inquest either in person or by an authorised person."

17. Paragraph (2) lists eligible beneficiaries of this provision who, of course, include bereaved families.

> "37(1) Subject to the provisions of paragraphs (2) to (4), the coroner may admit at an inquest documentary evidence relevant to the purposes of the inquest from any living person … unless a person who in the opinion of the coroner is within rule 20(2) objects to the documentary evidence being admitted."

18. Rule 37(2) deals with the resolution of such an objection.

> "57(1) A coroner shall, on application and on payment of the prescribed fee (if any), supply to any person who, in the opinion of the coroner, is a properly interested person a copy of any report of a post-mortem examination … or special examination … or of any notes of evidence or of any document put in evidence at the inquest."

19. The Coroner was impressed by the fact that these three provisions confer "absolute rights" on properly interested persons in the sense that they are expressed in mandatory language ("shall") with some conditions or exceptions but none in relation to national security or by reference to rule 17.

20. I, too, find this to be cogent. Plainly, appropriate conditions and exceptions are included. Rule 20(1) is expressed to be "without prejudice to any enactment with regard to the examination of witnesses at an inquest" and there is a duty imposed on the coroner by rule 20(1)(b) to disallow "any question which in his opinion is not relevant or is otherwise not a proper question". There is nothing in rule 20 to suggest that the "entitlement to examine witnesses" (as it is headed) is circumscribed by a national security qualification. Similarly rule 37(1) begins with a qualification ("subject to the provisions of paragraphs (2) to (4)") but it is not linked to rule 17.

21. For my part, I find rule 57 to be particularly significant. The purpose of enabling a properly interested person to obtain copies of the prescribed material is to enable him to satisfy himself that the conclusions of the coroner are soundly based. Rule 57 is an adjunct to section 13 of the 1988 Act which provides for an application to the High Court (by or under the authority of the Attorney General but usually on request of a properly interested person) for another inquest to be held where it is necessary or desirable and in the interests of justice. The grounds are described as "fraud, rejection of evidence, irregularity of proceedings, insufficiency of inquiry, the discovering of new facts or evidence or otherwise". This is the route through which an aggrieved party is enabled to mount a statutory challenge to an inquest (or to a refusal to hold one). It assumes a basis for informed dialogue between such a person and the office of the Attorney General. It seems to me that it would be quite impossible for an aggrieved person even to begin to mount such a challenge in relation to unexplained conclusions founded on closed material. They would be virtually immune from challenge or scrutiny.

22. Modern legislation has developed ways of avoiding or at least mitigating such consequences, in particular by the use of special advocates and closed judgments where closed material is permitted for national security reasons. Such procedures operate, for example, in the Special Immigration Appeals Commission and in relation to control orders. They are an imperfect compromise but have withstood judicial scrutiny. Although an unsuccessful appellant or controlee does not see the closed material or the closed judgment, he has the benefit of the special advocate to enable closed material to be tested and the closed judgment to be scrutinised for legal error. If the "any person" construction of the rule 17 proviso is correct, it would mean that even that imperfect form of procedural protection would be denied. Moreover, it is common ground that a coroner has no authority to promulgate a closed decision so there would be no alternative to a single open decision including passages to the effect: "I reject that evidence (or those submissions) for reasons I am not able to disclose".

23. I mention all this not because it directly aids construction in a linguistic sense but because, in my judgment, the legislature would not have created a procedure with such exceptional consequences in the absence of clear language to that effect. This provides additional support for the construction adopted by the Coroner. If it needs further linguistic support, it receives a limited amount from the language of rule 20. Mr Eadie's equiperation of "the public" with "any person" fails to acknowledge that the words "any person" were used by the draftsman in rule 20(1) and elsewhere (including rule 57). Of rather greater significance is section 8(3) of the 1988 Act by which a coroner is obliged to summon a jury in certain circumstances, including highly sensitive ones such as deaths in prison or in police custody. Rule 17 applies equally to inquests where there is or there is not a jury. This raises the obvious question of how a closed procedure could possibly operate with a randomly-selected jury. It cannot have been contemplated that a properly interested person and his legal representative would be excluded while a jury sees and hears closed material.

24. I accept that an inquest is by definition an inquisitorial process and is different in kind from adversarial civil and criminal litigation. The task of a coroner is to investigate and to produce answers to the questions posed by the scope of the inquest. It is usual for a coroner to do so on the basis of full information. Mr Eadie submits that these features of inquests in general call for an approach to construction which strives to ensure that a coroner is able to act on full information. In so doing he emphasises the need to ensure that inquests are effective. However, the fact that inquests are inquisitorial does not diminish their context as essentially judicial procedures which are governed by the principle of open justice except to the extent that that principle is limited by statutory provision. The inquisitorial context is a factor but it is not determinative as to construction.

25. For all these reasons, I am satisfied that the Coroner's construction of rule 17 was correct. I now turn to Mr Eadie's alternative submission, namely that in this inquisitorial context there is still scope for an implied power to receive closed material in a closed hearing so as to further the objective of the Inquests, provided that such a course is not prohibited by the statutory provisions. He relies on *R v HM Coroner for Lincoln, ex parte Hay* [2000] Lloyd's Rep Med 264, in which Brooke LJ said (at page 271):

> "Subject to the need to obey the requirements of the Act and the Rules, it is for each coroner to decide best how he should perform his onerous duties in a way that is as fair as possible to everyone concerned, as well as doing his best to reduce the number of avoidable adjournments."

26. In my judgment, this submission founders on the qualifying clause of Brooke LJ's uncontroversial formulation. The effect of the construction of rule 17 adopted by the Coroner and confirmed by us is that there is no scope for the implied power because of "the need to obey the requirements of the Act and the Rules".

27. I have not so far mentioned section 17A of the 1988 Act, which was added by amendment with effect from 1 January 2000: Access to Justice Act 1999, section 71(1). Its late arrival renders it of limited value as an aid to construction of the 1984 Rules. It provides:

> "(1) If on an inquest into a death the coroner is informed by the Lord Chancellor before the conclusion of the inquest that –
>
> (a) a public inquiry conducted or chaired by a judge is being, or is to be, held into the events surrounding the death; and
>
> (b) the Lord Chancellor considers that the cause of death is likely to be adequately investigated by the inquiry,
>
> the coroner shall, in the absence of any exceptional reason to the contrary, adjourn the inquest and, if a jury has been summoned, may, if he thinks fit, discharge them."

28. The significance of this provision is that statute now acknowledges that there may be circumstances in which the investigation may be more suited to a judicial inquiry otherwise than under the Coroners Act. In current conditions, the alternative judicial inquiry would probably take place under the Inquiries Act 2005, which includes specific provisions permitting restrictions on attendance and disclosure or publication of evidence or documents: section 19. It remains open to the Lord Chancellor to invoke section 17A in the present case if a procedure governed by the 1988 Act and the 1984 Rules is considered inappropriate. One can conceive of practical difficulties but also pragmatic solutions. However, they are not matters for this Court.

29. Other Parliamentary activity since the passage of the 1988 Act is worthy of mention. Section 45 of the Coroners and Justice Act 2009 provides for the making of Coroners rules on a number of matters, including a provision

> "conferring powers on a senior coroner …
>
> (a) to give a direction excluding specified persons from an inquest, or part of an inquest, if the coroner is of the opinion that the interests of national security so require." (section 45(3)).

30. This provision has not yet been brought into force. One wonders why it would have been considered necessary if rule 17 carried the meaning for which Mr Eadie contends. Interestingly, in the Counter Terrorism Bill of 2008 there were clauses in Part 6, "Inquests and Inquiries", the purpose of which was to provide for the reshaping of inquests raising national security issues. Parliament refused to enact the provisions. A similar fate befell clauses in the Coroners and Justice Bill 2009. What all this demonstrates is that the construction sought to be placed on rule 17 by Mr Eadie is, in effect, an attempt to pre-empt legislation which is either not yet in force or has been rejected in the recent past by Parliament. If these are steps which Parliament is not yet prepared to take, I am fortified in my unwillingness to adopt what would be a forced construction of rule 17.

31. Finally, I turn to the Coroner's view of the consequences of the construction that has prevailed. She said:

> "I do not accept that my ruling will amount to an abrogation of the inquisitorial function. On the contrary, I am satisfied my ruling is entirely consistent with that function as presently regulated by Parliament. I am still hopeful that, with full cooperation on all sides, most, if not all, of the relevant material can and will be put before me in such a way that national security is not threatened …
>
> I repeat, sources may be withheld, redactions made. I do not intend to endanger the lives of anyone. I do not intend to allow questions which might do so. I do not intend to allow questions which I know to be based on a false premise or which I know to be misleading …
>
> Finally, I wish to emphasise I do not intend to make findings adverse to the Security Service which I know to be false."

32. Almost all of that seems to me to be uncontentious. Experience of similar problems in other areas of litigation in recent years disposes me to the view that, to a considerable extent, material in respect of which PII is rightly claimed can often be produced in a redacted, summarised or gisted way without risk to national security so as to enable properly interested persons and their legal representatives to participate effectively in the proceedings. I accept, and it is the premise upon which this case has been conducted, that there will remain an area of sensitive material which is not suitable for disclosure. I am unable to quantify it. The Coroner, when she made her ruling, had not seen it. Nor have we. If our expectations prove to be too sanguine, there may be difficulties ahead. It is not for us to predict them or to prescribe solutions. However, I do consider it necessary to refer to the final sentence in the above passage of the Coroner's peroration on this issue.

33. The Coroner is well aware that, in reaching and reasoning her eventual conclusions, she will have to disregard all undisclosed PII material. That is implicit in an earlier passage in her ruling and from a later passage coming after her ruling on another issue which is not the subject of an appeal. It follows that I do not think that in the final sentence to which I have referred she was anticipating the possibility of rejecting a finding based on open material because it would fly in the face of the undisclosed, PII material. That would be wrong. She would be bound to base her decision on the open material or, perhaps, to decline to make a decision at all on the issue in question. As to that and its possible consequences, it would be inappropriate for us to say more.

34. I would dismiss the application for judicial review, but with an expression of gratitude to all counsel and those instructing them for their excellent submissions.

**Lord Justice Stanley Burnton:**

35. I agree that this application must be dismissed for the reasons given by Maurice Kay LJ. I add a few words of my own in deference to the quality of the submissions that have been made to us.

36. Rule 17, in its first sentence, recognises the fundamental principle of our legal proceedings, namely that they should be public unless there is good reason for them not to be. Quite apart from this, however, in the first part of Rule 17 the natural

meaning of "public" is persons other than properly interested persons. There is no reason to ascribe any other meaning to "public" in the proviso. Consideration of the other Rules to which Maurice Kay LJ has referred, such as Rule 20, confirm that this is indeed the meaning of "public", for the reasons he gave and which were also given by the Coroner.

37. Like Maurice Kay LJ, I consider that specific and clear words would have been required to qualify the rights of properly interested persons under, for example, Rule 20, in order to achieve what is sought by the Claimant.

38. Furthermore, the Claimant's contention is that the Coroner may choose which properly interested persons may be present during closed sessions. Some may be excluded, others, such as the representatives of those organisations, may be allowed to be present. There is no trace in the Rules of any such power, and no indication as to the basis on which it would be exercised. It involves rewriting Rule 17. It would put the Coroner in the invidious position of having to say that she trusts certain parties but not others. It may be that she would have to rely on the views of the Security Service as to the trustworthiness of properly interested persons: an undesirable situation where it is the Security Service which is itself a properly interested person because of the investigation into its responsibility.

39. Lastly, the contention that the Coroner has an implied power to hold secret sessions when she considers that it would be in the interests of national security to do so is hopeless. Rule 17 prescribes the power of the Coroner in such circumstances. Where there is express provision there cannot be an implied provision applicable in the same circumstances.