

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

Thursday, 31 July 2014

(10.00 am)

Suspension of Inquest

MR JUSTICE OWEN: On 22 July, Thursday last, the Home Secretary announced the establishment of a public inquiry into the death of Alexander Litvinenko under the Inquiries Act 2005. I have been appointed chairman of that inquiry.

I have also been formally requested by the Lord Chancellor to suspend the inquest into Mr Litvinenko's death in accordance with the provisions of paragraph 3 to schedule 1 of the Coroners and Justice Act 2009.

The Act requires me to suspend the inquest in these circumstances, and, subject to any submissions that interested persons may wish to make at this stage, I propose to suspend the inquest and after a short break will formally open the public inquiry.

MR EMMERSON: Sir, there's just a couple of very short procedural points I would like to put on the agenda in relation to the next stage of the proceedings.

During the course of the inquest you made certain rulings on public interest immunity. Had the inquest proceeded, as I think was common ground, those rulings would naturally have been kept under review with the

1 potential for them to be varied if the need had arisen.

2 Now that the procedure moves to a statutory inquiry,
3 we would say that different public interest
4 considerations are at stake not least because the Act
5 makes specific provision for a restriction order which
6 would enable you to disclose material to core
7 participants that wasn't necessarily disclosed to the
8 public.

9 I raise this issue now because it has potential
10 implications for timetable, because if that is right
11 then obviously there will need to be further
12 consideration of the public interest balance.

13 MR JUSTICE OWEN: Mr Emmerson, I propose when in due course

14 I open the inquiry to indicate that I will be holding
15 a preliminary hearing on 5 September and that is one of
16 the matters that I will then wish to address.

17 MR EMMERSON: I am very grateful for that.

18 The linked issue, and again it may be rather
19 pressing as to time is that we will be applying for you
20 to exercise your discretion to appoint a special
21 advocate to represent Mrs Litvinenko's interests.

22 MR JUSTICE OWEN: That too is something that I shall wish to
23 address at the 5 September hearing.

24 MR EMMERSON: Very well, we plan, subject to your view, to
25 put a written submission to you within the next seven

1 days.

2 MR JUSTICE OWEN: That is most helpful. Thank you very much
3 indeed.

4 Are there any observations that any other interested
5 persons wish to make at this stage?

6 The inquest is therefore now suspended and it
7 remains only for me to express my thanks to those who
8 have participated in the inquest proceedings for their
9 assistance during my investigation. I am particularly
10 grateful to Marina Litvinenko for the patience that she
11 has demonstrated during the highly regrettable delays
12 that have occurred during the currency of the inquest
13 proceedings.

14 I shall therefore now rise and sit again to open the
15 inquiry very shortly.

16 (10.05 am)

17 (A short break)

18 (10.12 am)

19 Opening of Public Inquiry

20 MR JUSTICE OWEN: It has been brought to my attention that
21 some at the rear of the court have struggled to hear
22 what I was saying during the closing session of the
23 inquest. I shall do my best to keep my voice up, but
24 can I also say that the transcript of what I am about to
25 say in opening of this inquiry will be posted on the

1 inquest website, and that should be posted later today.

2 Alexander Litvinenko died on 23 November 2006 in
3 University College Hospital, London. The conclusion of
4 the post mortem was that his death had been caused by
5 ingestion of a fatal dose of the radionuclide
6 polonium-210.

7 On 30 November 2006 an inquest into his death was
8 opened by HM Coroner for Inner North London,
9 Dr Andrew Reid, and adjourned pending the police
10 investigation into the death of Mr Litvinenko and any
11 criminal proceedings.

12 The issues to which his death gives rise are of the
13 utmost gravity and have attracted worldwide interest and
14 concern. In written submissions made in the course of
15 the inquest proceedings Mr Emmerson QC, who represents
16 Marina Litvinenko and her son, invited my attention to
17 the reference by the Foreign Affairs Select Committee to
18 the murder of Alexander Litvinenko as "a miniature
19 nuclear attack on the streets of London". To the fact
20 that the foreign secretary and others have observed that
21 "the manner of Litvinenko's death has put many hundreds
22 of other people at risk", and to a motion of the United
23 States House of Representatives, dated 1 April 2008, in
24 which it was noted that polonium-210 "could be used to
25 kill large numbers of people or spread general panic and

1 hysteria among the public".

2 Similarly, at an earlier hearing it was submitted on
3 behalf of media organisations that the issues to which
4 the inquest gives rise include "allegations of
5 state-sponsored assassination by radioactive poisoning"
6 of a British citizen, issues of the gravest possible
7 public concern.

8 The police investigation led to the conclusion that
9 the fatal dose of polonium-210 was probably consumed by
10 Mr Litvinenko on 1 November 2006 when he was in the
11 company of Mr Andrei Lugovoy and Mr Dmitri Kovtun at
12 a hotel in London. Following a review of the evidence
13 by the Crown Prosecution Service it was announced on
14 22 May 2007 that a decision had been taken to prosecute
15 Mr Lugovoy for the murder of Mr Litvinenko and a warrant
16 was issued for his arrest. A formal request for his
17 extradition was made to the authorities of the
18 Russian Federation, but was refused on the basis that
19 the Russian constitution prohibits the extradition of
20 its own nationals. Sustained diplomatic efforts by Her
21 Majesty's Government to secure his extradition proved
22 unsuccessful.

23 It was subsequently decided by the Crown Prosecution
24 Service that Mr Kovtun should also be prosecuted for the
25 murder of Mr Litvinenko, and a warrant was issued for

1 his arrest. It has not proved possible to secure his
2 extradition.

3 On 13 October 2011 the inquest was resumed as it had
4 become clear that there was no realistic prospect of the
5 suspects facing a criminal trial.

6 On 7 August 2012 I was appointed Assistant Deputy
7 Coroner to conduct the inquest. A pre-inquest review
8 was held on 20 September 2012 at which, given the period
9 that had elapsed since the death of Mr Litvinenko,
10 I expressed the intention that the inquest should be
11 conducted with all due expedition with substantive
12 hearings to commence in early 2013. Unhappily, the
13 inquest proceedings that followed were plagued by
14 delays, full transcripts of the hearings that I have
15 held are to be found on the inquest website.

16 At a hearing on 13 December 2012 I invited
17 submissions from interested persons as to the scope of
18 the inquest. In a note prepared for the hearing,
19 counsel to the inquest set out the results of their
20 analysis of the government material that had been made
21 available to me for inspection subject to claims to
22 public interest immunity as might be made in due course.
23 Their assessment was to the effect that the HMG
24 material, taken alone and insofar as it was relevant,
25 established a prima facie case as to the culpability of

1 the Russian State in the death of Mr Litvinenko. But
2 did not establish a prima facie case as to the
3 culpability of the British state in failing to take
4 reasonable steps to protect Mr Litvinenko from a real
5 and immediate risk to his life, described as the Osman
6 issue, in reference to the principles laid down in
7 Osman v United Kingdom, (2000) 29 EHRR 245.

8 In my ruling, dated 17 January 2013, I determined on
9 a provisional basis and subject to continuing review
10 that I would include within the scope of the inquest
11 (a), the possible culpability of the Russian State; (b),
12 the possible culpability of the British state either by
13 itself carrying out the poisoning by its servants or
14 agents, an assertion advanced by an interested person
15 but subsequently found to be without any evidential
16 basis, or in failing to take reasonable steps to protect
17 Mr Litvinenko from a real and immediate risk to his
18 life.

19 The basis for my retaining the possible culpability
20 of the British state within the scope of the inquest,
21 notwithstanding the conclusion of counsel to the inquest
22 that the material that had been made available to me for
23 inspection by Her Majesty's Government did not establish
24 a prima facie case of such culpability, whilst to
25 satisfy the public interest in confirming or allaying

1 a suspicion of wrongdoing, see paragraph 27 of my ruling
2 of 17 January 2013.

3 Following the ruling I issued a provisional list of
4 issues for examination at the inquest, a list that
5 included (a), the possible involvement of Russian State
6 agencies in Mr Litvinenko's death, the Russian State
7 responsibility issue; and (b), UK state agencies'
8 knowledge/assessment of the risks/threats to
9 Mr Litvinenko's life and decisions/actions taken to
10 manage any identified risks/threat, the preventability
11 issue.

12 In January 2013 counsel to the inquest identified
13 a number of documents within the government material
14 that they considered to be relevant to my investigation
15 and of which it was expected that I would seek
16 disclosure. The Foreign Secretary claimed public
17 interest immunity in relation to such documentation.

18 In a ruling dated 17 May 2013 I upheld most of the
19 claim to public interest immunity but to the extent to
20 which I dismissed the claim the Foreign Secretary
21 challenged my decision by way of judicial review.
22 A challenge that was upheld in the divisional court in
23 November 2013.

24 There is no mechanism by which closed hearings can
25 be held in the course of an inquest. Accordingly, the

1 effect of upholding the claim to public interest
2 immunity was that the material in question would be
3 excluded from consideration in the inquest. Thus, in my
4 open judgment of 17 May 2013 I addressed the
5 consequences of upholding the claim to public interest
6 immunity and expressed the provisional view, subject to
7 further submissions, that the issue of Russian State
8 responsibility and that of preventability would have to
9 be withdrawn from the scope of the inquest and that in
10 consequence my Coronial duty to carry out a full, fair
11 and fearless investigation into the death of
12 Mr Litvinenko would be compromised to that extent.

13 I further said in my ruling, paragraph 45:

14 "Option 3 in relation to both preventability and
15 Russian State responsibility would be to remove the
16 issues from scope. To do so would be to leave
17 uninvestigated two issues that are of central
18 importance. There is relevant material bearing on those
19 issues that as a consequence of my decision to uphold
20 the relevant parts of the certificate cannot be
21 considered at the inquest. To address such issues
22 without being able to take such material into account
23 has the inevitable consequence that the inquiry would be
24 incomplete and a verdict potentially misleading and/or
25 unfair to interested persons and to others who might be

1 implicated, in particular the Russian State."

2 Paragraph 46:

3 "My provisional view is that to entertain those
4 issues on the basis of the open evidence but to
5 disregard evidence in respect of which I have upheld or
6 would uphold the PII claim would be to fail to discharge
7 my duty to undertake a full, fair and fearless inquiry
8 into the circumstances of Mr Litvinenko's death. The
9 same could be said of a decision to move the issues from
10 scope. But the better course is arguably not to address
11 the issues at all rather than to do so on a incomplete,
12 inadequate and potentially misleading basis."

13 But I went on to point out that a statutory inquiry
14 under section 1.1 of the Inquiries Act 2005 could, where
15 appropriate, hear evidence in closed session. And would
16 therefore enable the relevant material to be taken into
17 account, and invited submissions as to whether I should
18 invite HM Government to consider whether to exercise the
19 power to hold such an inquiry.

20 In my closed PII ruling on the same date,
21 17 May 2013, I made the following observation, which has
22 been published openly with the agreement of the
23 Secretary of State:

24 "It is to be noted that there is no material within
25 the relevant documents to suggest that at any material

1 time Alexander Litvinenko was or ought to have been
2 assessed as being at real and immediate threat to his
3 life. Accordingly, disclosure of the relevant material
4 would not appear to provide an evidential basis for
5 a breach by HM Government of its Osman duty to
6 Alexander Litvinenko. But importantly may serve to
7 dispel suspicion that HM Government was in breach of its
8 Osman duty."

9 The argument specific to the Osman material is of
10 course that it relates to the issue of the
11 responsibility of the British state for his death, but
12 the material that I have considered does not suggest
13 that Alexander Litvinenko was or should have been
14 assessed as being at a real and immediate risk to his
15 life at any material time, and therefore that
16 HM Government was not in breach of its Osman duty.

17 On 4 June 2013, over a year ago, I wrote to the
18 Lord Chancellor requesting HM Government to order
19 an inquiry into the death of Mr Litvinenko under
20 section 1.1 of the Inquiries Act 2005. Further
21 requesting that a decision be made as a matter of
22 urgency. The letter which contains my full reasons for
23 making such a request is to be found on the inquest
24 website.

25 By a letter dated 17 July 2013 I was informed by the

1 Home Secretary that HM Government had decided not to set
2 up an inquiry at that time.

3 Mr Litvinenko's widow, Marina Litvinenko,
4 subsequently sought judicial review of the refusal by
5 the Home Secretary to set up a statutory inquiry.
6 Following a hearing on 21 and 22 January 2014, the
7 divisional court quashed her decision in a judgment
8 given on 11 February holding that, paragraph 74:

9 "The reasons given by the Secretary of State did not
10 provide a rational basis for the decision not to set up
11 a statutory inquiry at this time but to adopt a wait and
12 see approach. The deficiencies in the reasons are so
13 substantial that the decision cannot stand."

14 The court directed that the Secretary of State give
15 fresh consideration to my request for the establishment
16 of a public inquiry. Its establishment was duly
17 announced in a written statement laid before Parliament
18 on 22 July.

19 The terms of reference of this inquiry.

20 In the period commencing 24 February I have been
21 consulted as to the terms of reference and
22 administrative arrangements for the inquiry. The terms
23 of reference will be found on the inquiry website, and
24 provide in its paragraph 1:

25 "Subject to paragraphs 2 and 3 below the chairman is

1 to conduct an investigation into the death of
2 Alexander Litvinenko in order to (1), ascertain in
3 accordance with section 5.1 of the Coroners and
4 Justice Act 2009 who the deceased was, how, when and
5 where he came by his death and the particulars, if any,
6 required by the Births and Deaths Registration Act 1953
7 to be registered concerning the death.

8 (2), identify so far as is consistent with section 2
9 of the Inquiries Act 2005 where responsibility for the
10 death lies.

11 And (3), make such recommendations as may seem
12 appropriate.

13 Under paragraph 2 of the terms of reference, the
14 inquiry is to take into account the investigations that
15 have been conducted under my direction as Assistant
16 Coroner. Practical continuity between the inquest and
17 the inquiry will be further achieved by my appointment
18 of counsel, solicitor, secretary and support staff in
19 the inquest, to discharge the same roles in relation to
20 the inquiry.

21 Paragraph 3 of the terms of reference is in the
22 following terms:

23 "In the light of the Assistant Coroner's views
24 expressed in his ruling of 17 May 2013, that there is no
25 material within the relevant documents to suggest that

1 at any material time Alexander Litvinenko was or ought
2 to have been assessed as being at a real and immediate
3 threat to his life, the inquiry will not address the
4 question of whether the UK authorities could or should
5 have taken steps which would have prevented the death."

6 That reflects my assessment of the content of closed
7 material to which I have already made reference and to
8 which Lord Justice Richards referred in paragraph 34 of
9 his judgment in the divisional court of 11 February.

10 Namely:

11 "Although the coroner himself has attached weight to
12 the second issue, that of preventability, and this
13 should plainly be taken into account in any decision as
14 to whether to set up a statutory inquiry, I propose to
15 make no more than incidental reference to it in my
16 discussion. This is primarily because of the way in
17 which the claimant's case is now put (see paragraph 26
18 above), but also because the issue would appear to have
19 lost much of its significance in the light of the public
20 disclosure of the coroner's view that the HMG material
21 does not establish even a prima facie case of breach of
22 the Osman duty. Osman is concerned with the duty to
23 protect against a risk that is real and immediate.
24 A real risk is one that is, "Not a remote or fanciful
25 one", and an immediate risk is a present and continuing

1 one, per Lord Dyson, Justice of the Supreme Court, in
2 Rabone v Pennine Care NHS Trust (2012), UKSC 2 at
3 paragraphs 38 to 39:

4 "If there was no prima facie of a failure by the
5 British state to protect against a risk of that nature
6 it is difficult to see what point of substance is left
7 on which public reassurance may be required."

8 But it is important to note that the terms of
9 reference further provide that:

10 "If the inquiry were to discover material not
11 previously made available to you or your request team
12 that suggests that the issue of preventability does
13 require investigation then I, that is to say the
14 Secretary of State, will give proper consideration to
15 a request by you for the terms of reference to be
16 amended."

17 The most important feature of the inquiry and the
18 reason why I ask that it be established is that it will
19 permit me to consider closed evidence and hold closed
20 hearings. That is hearings from which the public, most
21 of the core participants and the press are excluded.
22 Such hearings are of course highly exceptional and
23 rightly so.

24 As I have mentioned it is not possible to hold such
25 hearings at all during an inquest. The reason why it is

1 of great importance to be able to hold at least some
2 such hearings in this case is that HM Government holds
3 some documents that are relevant to Mr Litvinenko's
4 death, but which are of such sensitivity that they
5 cannot be used in open court. Had these proceedings
6 remained as an inquest, those documents would have had
7 to be excluded from my enquiries. That was the effect
8 of the PII rulings made by me and by the divisional
9 court last year. It was for precisely that reason, that
10 is to enable me to consider this material in closed
11 hearings, that I asked the government to establish this
12 inquiry.

13 The most important issue to which this sensitive
14 material relates is that of Russian State responsibility
15 for Mr Litvinenko's death. As I have previously stated,
16 I regard this issue as being of central importance to my
17 investigation. Moreover, in their December 2012 note,
18 to which I have already made reference, counsel to the
19 inquest expressed the view that the sensitive HMG
20 material taken in isolation establishes a prima facie
21 case that the Russian State was responsible for
22 Mr Litvinenko's death, a view that I have myself
23 subsequently endorsed.

24 It is thus all the more welcome that my
25 investigation will now be able to consider this

1 material, and to consider it in context, as well as all
2 the other available evidence in reaching a conclusion on
3 this critical issue.

4 Because of the sensitivity of the HMG evidence, it
5 is inevitable that at least some of my final report will
6 also have to remain secret. But I make it clear now
7 that I intend to make public my final conclusion on the
8 issue of Russian State responsibility, together with as
9 much as possible of my reasoning in that regard.

10 I should add that HM Government has made a restriction
11 notice under section 19 of the 2005 Act, the effect of
12 which will be to require that specified sensitive
13 material is considered in closed session, and may make
14 further restriction notices. I intend to make the open
15 parts of such notices available on the inquiry website.

16 The question of the preventability apart,
17 I anticipate that the issues that I explore in this
18 inquiry will be very much the same as those I would have
19 explored in the inquest. As I have explained, the
20 purpose of establishing the inquiry was not to alter the
21 scope of my investigation, but rather to enable me
22 properly to investigate the issue of Russian State
23 responsibility. Although I will of course hear
24 submissions on the scope of the investigation to be
25 conducted by the inquiry, my starting point will be the

1 provisional list of issues drawn up for the inquest --
2 less items 22 and 23, the two preventability issues.

3 I turn then to the future steps in the inquiry.

4 These proceedings must now proceed with expedition.

5 By 18 August I wish to receive:

6 (i) Applications for core participant status.

7 (ii) Applications for funding.

8 I propose to deal with such applications on paper.

9 The inquiry having now been formally opened,

10 I propose to hold a further procedural hearing on
11 5 September. I will then wish to address the following
12 issues:

13 (i) Scope taking the inquest provisional list of
14 issues as its starting point.

15 (ii) Directions for service of further evidence.

16 (iii) Anonymity, in particular the extent to which
17 further argument is needed in the light of rulings
18 already made in the inquest proceedings.

19 (iv) Procedural matters relating to conduct of
20 public hearings including arrangements for questioning
21 of witnesses under rule 10 of the Inquiry Rules 2006,
22 and whether and if so under what terms proceedings
23 should be broadcast.

24 (v) Procedural matters relating to the conduct of
25 closed hearings, in particular (a), any submissions

1 relating to restriction notices and (b), any application
2 for appointment of special advocates. I should add in
3 that regard that I do not at present consider it would
4 be necessary or appropriate to appoint a special
5 advocates, but in order to avoid delay in going forward
6 I would wish to hear and rule on any application to the
7 contrary at the earliest possible stage.

8 (vi) Finally, the start date for substantive
9 hearings. My present view is that the substantive
10 hearing must begin in January 2015.

11 Any party wishing to address me on these matters at
12 the September hearing should file written submissions in
13 advance; a timetable for the service of such submissions
14 will be made available in due course by the solicitor to
15 the inquiry.

16 At about the same time I will also hold a closed
17 hearing to give directions relating to the closed
18 element of the case.

19 I therefore now adjourn this inquiry to the
20 preliminary hearing to be held on 5 September.

21 (10.40 am)

22 (The hearing concluded)

23

24

25

1
2 Suspension of Inquest1
3
4 Opening of Public Inquiry3
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

