Neutral Citation Number: [2020] EWCA Civ 1375

Case Nos: C1/2019/2881, 2893, 0355

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
ADMINISTRATIVE COURT
MRS JUSTICE JEFFORD
[2019] EWHC 2897 (Admin)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 27 October 2020

Before :

LORD JUSTICE LEWISON
LORD JUSTICE FLAUX
and
LORD JUSTICE MALES

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Between :

1. CHIEF CONSTABLE OF WEST YORKSHIRE POLICE AND OFFICERS B AND E **2. THE POLICE FEDERATION OF ENGLAND AND WALES AND OFFICERS D, F, G, H, J, K, L, M, O, P AND Q**	**Appellants**
- and -	
1. NATALIE DYER **2. HM ASSISTANT CORONER FOR WEST YORKSHIRE (WESTERN)** **3. CALDERDALE AND HUDDERSFIELD NHS FOUNDATION TRUST** **4. THE PRESS ASSOCIATION**	**Respondents**

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Mr Hugh Davies QC & Mr Ian Skelt QC (instructed by **Legal Services West Yorkshire Police**) for the **1st Appellant**
Ms Helen Malcolm QC & Mr Brian Dean (instructed by Mandip Kumar of **Precedence Law**) for the **2nd Appellant**

Mr Leslie Thomas QC & Mr Adam Straw (instructed by **Broudie Jackson Canter**) for the **1st Respondent**
Mr Jonathan Hough QC (instructed by **Legal Services City of Bradford MDC**) for the **2nd Respondent**

Hearing dates : 15 and 16 September 2020

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Approved Judgment

Lord Justice Flaux:

Introduction

1. The Police Federation and the officers it represents and West Yorkshire Police and the officers it represents appeal with permission granted by Nicola Davies LJ against the Orders dated 30 October 2019 of Jefford J on a judicial review quashing in part the decision of the Coroner (the second respondent to this appeal) that the officers in question should give their evidence at the inquest of Andrew Hall from behind screens positioned to conceal them from the Court save from the sight of the coroner, jury, Court staff and legal representatives.

Factual and procedural background

2. Andrew Hall died on 13 September 2016 at Huddersfield Royal Infirmary. He was 43 years old. He was a black man whose death occurred shortly after he had been in police custody. A neutral summary as to the circumstances of his death is set out in [2] to [6] of the judge's judgment and can be summarised as follows.

3. In the early hours of 13 September 2016, Mr Hall was found collapsed at home by Ms Dyer, his partner and the first respondent. He had taken prescription medication and consumed some alcohol. When paramedics attended, he was unresponsive and was taken to A & E where he received medication and his condition improved. However he became agitated and was alleged to have slapped a nurse. The first respondent said in a witness statement that this occurred because he was disorientated, frustrated and panicking.

4. The police were called and he was taken to Huddersfield police station, arriving at about 7.30 am. At 8.35 am, he was taken to a custody area and his handcuffs were removed. He indicated he was feeling unwell and was going to be sick. He was taken to a cell where he could vomit. He was assessed by a nurse and then, at 10.10 am, taken back to the cell by three officers. Whilst this was happening, he freed one of his arms and took hold of a barred gate. The officers forcibly moved him and then restrained him. During this struggle it appears one or more of the officers struck Mr Hall multiple times. He may have struck back. By 10.18 am the officers had restrained him and taken him back to his cell. The nurse observed the later stages of what happened and formed the view he needed to be taken back to hospital.

5. Paramedics attended at 10.42 am and Mr Hall was taken back to hospital in handcuffs and leg restraints. He was sedated and medicated and arrangements were made for him to have a CT scan. While he was waiting for this his condition deteriorated and clinical staff could not feel a pulse. CPR was performed, but he was declared dead at 12.44 pm.

6. It is anticipated that 16 police officers will give evidence at the inquest. On 8 March 2019, the Chief Constable of West Yorkshire Police made an application to the coroner for anonymity for three officers, B, C and E and for them to give evidence from behind screens. A similar application was then made by the Police Federation on behalf of 12 further officers. The application for anonymity was not contested by Mr Hall's family and an order was made, together with orders that the audio of the CCTV footage featuring the officers will be redacted so their names cannot be heard and their faces

will be pixelated. The coroner, jury and legal representatives of the family will have access to unedited copies of the CCTV.

7. The applications for evidence to be given from behind screens was resisted by the family. The applications were heard by the coroner on 6 June 2019. He had two statements from Inspector Rotchell with his risk assessment, open statements from Officers B, C and E and closed statements from various of the officers. The basis for the application was to ensure the anonymity of the officers on the basis that if they were seen they might be identified and if so, they might be identified by or to Qassim Hall. He is Andrew Hall's brother but not one of the family members involved in the applications before the coroner or the subsequent judicial review. He has a lengthy criminal record and is well known to the police in Huddersfield. He has a history of making threats.

The statutory framework

8. The legal basis for the applications to the coroner was Rule 18 of the Coroners (Inquests) Rules 2013 (hereafter "the Rules") which were made under section 45 of the Coroners and Justice Act 2009 ("the 2009 Act"). Rule 11 provides for inquest hearings to be in public but Rule 18 governs applications for witnesses to give evidence from behind a screen. It provides:

> "**Evidence given from behind a screen**
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> 18.—(1) A coroner may direct that a witness may give evidence at an inquest hearing from behind a screen.
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> (2) A direction may not be given under paragraph (1) unless the coroner determines that giving evidence in the way proposed would be likely to improve the quality of the evidence given by the witness or allow the inquest to proceed more expediently.
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> (3) In making that determination, the coroner must consider all the circumstances of the case, including in particular—
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> (a) any views expressed by the witness or an interested person;
>
> (b) whether it would be in the interests of justice or national security to allow evidence to be given from behind a screen; and
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> (c) whether giving evidence from behind a screen would impede the effectiveness of the questioning of the witness by an interested person or a representative of the interested person.
>
> (4) A direction may be given under paragraph (1)—
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> (a) on the application by the witness, or in the case of a child witness the parent or legal guardian of that witness;
>
> (b) on an application of an interested person; or
>
> (c) on the coroner's own initiative."

The coroner's ruling

9. In his written ruling dated 7 June 2019, the coroner set out Rule 18. He then noted that Mr Hugh Davies QC, counsel for the Chief Constable, submitted that the coroner could determine that giving evidence from behind a screen would be likely to improve the quality of the evidence of the officers he represented because they had a genuine and well-founded fear for the safety of themselves and their families should their identities become known to Qassim Hall. The coroner recorded that Qassim Hall had 76 convictions dating back to 1997 and was the subject of extensive police intelligence in relation to a number of matters which resulted in arrests but no charges being brought. These included an arson attack on an ex-partner's home, an injunction to keep him away from a vulnerable 16 year old girl, a threat to harm a police officer who had arrested him (and his family) and threats of violence including threats to kill and shoot social workers and a healthcare charity worker, to assault a doctor and to burn down a surgery. He had publicly blamed the police for Andrew Hall's death and stated that the police "shoot blacks and Asians".

10. The coroner then set out the other submissions advanced by Mr Davies QC and noted that those submissions were adopted by Mr Brian Dean on behalf of the Police Federation and the 12 officers they represented. He submitted that the use of screens would not impede the effective questioning of the witnesses by the family's legal representatives or the smooth running of a fair hearing. He submitted that the officers' fears were not irrational but could be described as subjective fears that were objectively justified.

11. The coroner recorded the submissions of Mr Leslie Thomas QC on behalf of Ms Dyer and the other five family members he represented that in opposing the applications, they were asking for no more than the ordinary application of the rules of natural justice. He contended that Rule 18(2) established a presumption that the power under Rule 18(1) to allow screens will not be exercised and it was for the officers to justify a departure from the presumption. He noted Mr Thomas QC's submission that there should be a fundamental transparency to an inquest into the death of someone who had died close to a time when he was being restrained by agents of the state in the custody of the state.

12. The coroner also recorded Mr Thomas QC's submissions that a case had not been made out that screens were required to protect the officers' rights under Article 2 or Article 8 of the ECHR, that there was no evidence that Qassim Hall had threatened family members and that the family members he represented were of good character, particularly Ms Dyer and Ms Tracey Nash who had been an officer in the South Yorkshire Police.

13. In the Decision section of his ruling beginning at [33] the coroner stated that the wealth of competing authorities presented to him demonstrated that first and foremost these applications are immensely fact-sensitive. He noted at [34] that his decision as to whether to exercise the power given by Rule 18 had to take account of the matters set out in Rule 18(3).

14. At [35] he said that instinctively the proposition that the family of the deceased who has died in circumstances that call into question the state's discharge of its obligations under Article 2 should not see the agents of the state implicated in that death: "offends

what can be appropriately described as natural justice, in the sense of the fair and impartial application of law and procedure to all parties to a particular legal process." At [36] he said that instinct was all the stronger where the application was not based on any sufficient evidence or intelligence reflecting adversely on the family members most likely to be affected, going on to say at [38] that there was no basis upon which the Rule 18 power could be exercised other than in respect of the threat said to be posed to officers by Qassim Hall.

15. The coroner said at [39] that he found that threat credible, referring to Qassim Hall's convictions for violence and history of making threats including to kill. He accepted that Qassim Hall blamed the police for Andrew Hall's death and that the officers had a genuine fear that if identified that would create a risk of harm to them or their families from the actions of Qassim Hall. He also accepted that in the case of some of the officers, these fears were affecting their health and will continue to do so unless steps are taken to minimise the risk.

16. The coroner accepted at [40] Mr Thomas QC's submission as to the presumption that evidence would not be given from behind a screen and said at [41] that Rule 18(2) permits a departure from that presumption if he determined that the use of screens was likely to improve the quality of the evidence of the officers or allow the inquest to "proceed more expeditiously". It is to be noted that the Rule refers to expedience not expedition, but the coroner continued: "I take the view that if I give a positive direction pursuant to the first provision of Rule 18(2), I need not consider the second."

17. He went on to conclude that permitting the officers to give evidence from behind a screen would be likely to improve the quality of their evidence overall. Witnesses who are fearful for their safety or the safety of their families in the event that they are identified were more likely to be straightforward and forthcoming in their evidence if confident they will not be identified. At [44] he said that he could not make that determination without considering all the circumstances of the case and, in particular, the matters set out at Rule 18(3). He had summarised in the ruling the views of the witnesses and other interested persons ((3)(a)). He had considered whether the use of screens would impede the questioning of any witness by an interested person or his representative ((3)(c)) and concluded that the retention by the family of Mr Thomas QC obviated the risk of any such impediment.

18. As to (3)(b) no issue of national security arose and so far as the other limb of the sub-rule [i.e. the interests of justice] was concerned, the coroner said at [47] that his starting point was the interests of justice generally and of anyone concerned in the legal process: "are best served when those charged with making findings of fact and reaching conclusions based upon those findings are able to do so on the basis of the best evidence" and that in this case the best evidence will be given if the officers give evidence from behind screens.

19. At [48] he said:

> "To the extent that my decision has involved a balancing of competing interests between the officers and the family, I take the view that the wider interests of justice as set out above justify my decision, having regard to the purposes of my decision as per

> Rule 18(2) and the provisions of Rule 18(3)(c), which provide protection for the family."

20. He then confirmed that his decision cast no doubt or aspersion on the good character of the family but was based upon what he perceived as the genuine risk posed by Qassim Hall to the officers and their families.

The judicial review and the judgment under appeal

21. Permission to apply for Judicial Review of the coroner's decision was granted to Ms Dyer by HHJ Kramer sitting as a Judge of the High Court on four of the five grounds for which permission was sought. These were set out in the judgment at [13]:

> (i) Ground 1: "The Defendant misdirected himself, in that he failed to recognise (i) the fundamental importance of open justice and to give it great weight; (ii) the particular importance of open justice in this inquest, as it involves a controversial death in police custody of a black man following police restraint; (iii) that his decision interfered with the rights of the press within article 10 of the European Convention on Human Rights; (iv) that screening is only permitted in exceptional circumstances; and (v) that in this context screening, particularly screening of all factual police witnesses, is a serious incursion into open justice."
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> (ii) Ground 2: "The decision to screen the 16 officers from the family and public was a greater intrusion into open justice than was strictly necessary. It follows from the Defendant's ruling that there was no rational basis for screening the witnesses from anyone other than Qassim Hall. There was a less intrusive means of achieving the aim pursued, which was to screen the witnesses from Qassim Hall alone."
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> (iii) Ground 4: "The Defendant proceeded on the basis that screening is permitted if that would improve the quality of evidence, and thereby misdirected himself."
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> (iv) Ground 5: "The decision was not compatible with the procedural duty within Article 2 ECHR; was not correct as a matter of common law; or alternatively was disproportionate."

22. The judge noted that grounds 1 and 4 had been taken together on behalf of the claimant, Ms Dyer. She said that to consider these grounds it was first necessary to address the legal framework. She said at [15] that there was no dispute that the principle of open justice is a fundamental principle of common law as applicable in a coroner's court as in any other court, citing, inter alia, *R (T) v West Yorkshire Senior Coroner* [2017] EWCA Civ 318; [2018] 2 WLR 211. The judge then set out at [16] the different facets of the principle, including the ability of those present in court to see and hear the evidence being given. She stated that she did not consider it particularly helpful to frame any incursion into the principle as only allowed in exceptional circumstances. Her analysis was that: "where there is a balancing exercise to be undertaken, particular

weight is to be attached to this fundamental principle and one of the consequences of attaching particular weight to that consideration is that the incursion into openness should be no more than necessary."

23. The judge set out at [17] the four reasons advanced on behalf of the claimant as to why the use of screens was a significant incursion into open justice: "(i) it undermines the effectiveness of the investigation because the public would not be prompted to bring forward further evidence; (ii) the observing of the witnesses is an important part of the investigative process (not limited to the process undertaken by the decision makers); (iii) preventing the witnesses being seen undermines public confidence in the process; (iv) not being able to see the witnesses reduces the prospect of catharsis for the family of the deceased." The judge noted that no reliance was placed on the first point but the claimant continued to rely on the balance.

24. At [18] she noted that being able to see a witness give evidence is an important factor in assessing demeanour and credibility. She said that nonetheless screening was common in criminal trials because the courts had recognised both the needs of vulnerable witnesses and innocent bystanders giving evidence in difficult circumstances and the benefit to the quality of their evidence from being made comfortable. This was not seen as undermining public confidence in the system of justice or the openness of the process. However, she went on to say at [19] that the position here was significantly different. In the case of an inquest such as this the public interest in seeing the police officers, however they were involved, was of a different nature and measure from the public interest in seeing a vulnerable complainant or witness give evidence and the risk of undermining public confidence all the more obvious.

25. The judge then set out Rules 11 and 18 of the Rules. At [22] she said that at the hearing it became common ground that Rule 18 was not happily drafted, noting the problems with it as follows:

> "(i) Under rule (2) the coroner may give a direction only if he determines either (a) that giving evidence in the way proposed would be likely to improve the quality of the evidence given by the witness or (b) that it will allow the inquest to proceed more expediently.
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> (ii) Paragraph (3) then provides that the coroner must consider all the circumstances of the case and, in particular the matters at (3)(a) to (c), in making "that determination".
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> (iii) Strictly read "that determination" can only be a reference to the determination referred to at (2)(a) or (b) as to quality of evidence or expediency. The effect of rules Rule 18(2 and 3) would, therefore, seem to be, somewhat oddly, to require the consideration of the interests of justice (which I take to include the interest in open justice) only in the context of that determination. But there is no express requirement to consider the interests of justice in the overall consideration of whether to make such an order pursuant to rule 18(1).

> (iv) Thus on the basis of that reading, the rule does not expressly require any overarching consideration to be given to the principle of open justice."

26. She referred at [23] to the submission of Mr Adam Straw on behalf of the claimant that there must be such an overarching consideration because of the fundamental importance of the principle of open justice. At [24] she noted his submission that by following the structure of Rule 18(2) and (3) the coroner had failed to weigh in the balance the fundamental importance of open justice. In the next "Discussion" section of her judgment she said at [25] that she considered it was right that the principle of open justice must always have a place in the decision making process and be given appropriate weight in the balancing exercise between potential benefits and detriments of screens. She considered this consideration was encompassed in the consideration of the interests of justice under (3)(b) but said that a literal reading of the Rule required the interests of justice to be taken into account only in the determination of whether the direction of screens would be likely to improve the quality of the evidence or allow the inquest to proceed more expediently. She noted the submission of Mr Jonathan Hough QC, who appeared on behalf of the coroner, that the concept of expediency might extend to the principle of open justice but said that it seemed to her that the concept of the expedient process was more directed at considerations of efficiency and practicality.

27. At [26] the judge held that the determination under Rule 18(2) was a necessary but not a sufficient condition for the directing of screens. The coroner still had an exercise of discretion under Rule 18(1) as to whether to direct screens once that necessary condition was met and the judge considered that it was in the exercise of that discretion that the principle of open justice must be taken into account and the balancing exercise undertaken.

28. The judge went on to say at [27] and [28] that it by no means followed that the coroner had misdirected himself in law, for two reasons she identified. Firstly she noted these arguments had been fully ventilated at the hearing before the coroner so it could not be said that he was not aware of the matters the claimant submitted that he had to take into account. Secondly, the judge said the coroner's decision had to be read "with a degree of benevolence or pragmatism". She said that the coroner must be taken to have in mind the arguments before him even if he did not set out each of them in detail. If he took account of the relevant factors, he could not be said to have misdirected himself in law even if he did not articulate the legal principles in the way the claimant would have formulated them.

29. At [29] the judge noted that the claimant argued that because the coroner had followed the structure of Rule 18(2) and (3), once he had determined that the quality of the officers' evidence would be improved by giving that evidence from behind screens, he proceeded without more to direct that there should be screens. To the extent that he took account of the principle of open justice he only did so at that stage and never undertook any proper balancing exercise. The judge then analysed the coroner's ruling to ascertain whether those criticisms were well-founded.

30. She set out passages from the Decision section of the ruling, including the passages about the coroner's instinctive reaction at [35] and [36] to which I referred in [14] above. She noted at [33] of her judgment that the coroner entirely correctly said the

application was based upon the fears that Qassim Hall would seek to harm them and found that threat credible and the fears genuine.

31. The judge then set out in full the coroner's conclusions at [41] to [44] and [47]-[48] which I summarised at [16] to [18] above. She recorded the claimant's submission that what the coroner did was set out the competing submissions but did not then evaluate the comparative importance of the various factors or weigh them against each other. The determination he made in [44] was that referred to in [41] as to whether screens would improve the quality of the evidence and he made no further reference to [35] nor did he weigh in the balance the interests of open justice.

32. The judge repeated at [36] that the ruling should not be minutely dissected and should be given a benevolent reading. She found that his references to the principles of natural justice were clearly in context references to the principles of open justice or to procedural fairness which was submitted to encompass the same principles. She said that the coroner had made clear his instinctive difficulty or discomfort with the proposition that the family would not see the witnesses implicated in Andrew Hall's death if their evidence was given from behind screens. She said that the determination in [44] of the ruling in which the coroner considers all the circumstances of the case, may well be read as having inherent in it a balancing exercise in which the principle of open justice played a part.

33. However, at [37] and [38] the judge went on to conclude:

> "37. The difficulty with this reading of the ruling, however, lies in paragraph 48. That is the only paragraph in which the coroner makes specific reference to balancing the competing interests of the officers and the family. The exercise which he then undertakes is a binary one in which he weighs the purpose of his decision "as per Rule 18(2)" and the provisions of Rule 18(3)(c). By the purpose of his decision as per Rule 18(2), he appears to mean that the quality of the evidence is likely to be improved by the use of screens (which is itself in the interests of justice) and he weighs against it simply whether the effectiveness of questioning will be impeded by the presence of a screen. That, in my judgment, is too limited a balancing exercise. If those were the only factors to be taken into account, it would have the almost invariable consequence that if a witness genuinely expressed fear but the family of the deceased were able to cross examine, screens would be directed. That would not, and in the present case does not, take into account the interest that the public and the family has in seeing those who may be implicated in the death give evidence - an interest the coroner had already recognised – and it takes no account of the fundamental importance of public confidence in the process of the inquest particularly where the death involved raises issues of more general public concern.
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> 38. The exercise is not, so to speak, saved by reference to the broader submissions that were made to the coroner in the absence of findings as to which submissions were accepted or

> rejected, not least because the Chief Constable's submissions put the matter on a very different basis from those of the claimant."

34. The judge concluded in relation to grounds 1 and 4 that the coroner did misdirect himself in law and the challenge on the basis of ground 1 succeeded. At [40] she referred to the claimant's position that, in those circumstances, the judge should make her own decision about the use of screens if she considered there was only one possible outcome but she could remit the matter if she thought there was a range of possible outcomes. She noted that there was no real dispute that that was the appropriate course. To deal with this issue, she considered it easiest to address what her decision would have been on grounds 2 and 5 had she not concluded that the coroner had misdirected himself.

35. The judge noted at [41] that ground 2 involved a *Wednesbury* irrationality challenge, that even if the coroner did not misdirect himself, his decision was irrational essentially on the basis that less intrusive measures could have been directed, such as directions to screen the officers from Qassim Hall only or to restrict his entry to the courtroom. It was said that even if screens to protect the officers from the view of the general public was rational, it was irrational to direct screens that prevented the family members from seeing the officers give evidence.

36. Ground 5 was argued with ground 2 because it was similar. It was contended that the decision was neither compliant with the common law duty of fairness nor with the Article 2 procedural duty. As the judge noted at [43], both grounds raised the same broad argument that the coroner's direction was a disproportionate measure. She noted at [44] that the Article 2 procedural duty included that there be a sufficient element of public scrutiny of the investigation to secure accountability, maintain public confidence and prevent any appearance of collusion or tolerance of unlawful acts. The family must be able to participate effectively in the inquest: *R (D) v Secretary of State for the Home Department* [2006] EWCA Civ 143. The judge recognised at [45] that [42] of that case made clear that this did not extend to the family having a right to cross-examine, or it would seem, a right to observe witnesses giving evidence, but the interest in doing so remains a factor to be taken into account.

37. She went on to record at [46] that it was common ground that the decision as to compliance with the common law duty of fairness and/or proportionality was one for the court rather than an irrationality challenge. She said that if she considered the use of screens irrational, it would follow that she would conclude that it was not in accordance with common law principles and was a disproportionate incursion into the Article 2 procedural duty. In each instance, it was open to her to substitute her own decision, which she understood to be common ground.

38. The judge went on to consider the authorities to which she had been referred, including the decision of the House of Lords in *Re Officer L* [2007] UKHL 36; [2007] 1 WLR 2135 to which I will return later in the judgment. She summarised the principles at [51] as follows:

> "(i) There is nothing unlawful per se in the use of screens but there is, as I have already concluded above, a balancing exercise to be undertaken.

> (ii) Amongst the factors in that balancing exercise is the fundamental importance of open justice. That is why the provision of screens should only be ordered where necessary and to the extent necessary. The fact that witnesses may still be available for cross-examination is relevant but not conclusive, as is the fact that the family may have the opportunity to cross-examine.
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> (iii) The impact on the witnesses is a further factor. That is itself multi-faceted. The consideration of the impact on the quality of their evidence (and thus the interests of justice) may bring into play their subjective fears and concerns. But it is also necessary to consider whether those fears and concerns are objectively justified and they may carry greater weight in the balance if they are."

39. The next section of her judgment is headed "Factual background" and records that there was before the coroner and the judge open and closed evidence but her judgment referred only to the open evidence. Likewise before this Court, we had both the open and the closed evidence. However, in this judgment, I have only referred to and relied upon the open evidence.

40. The judge then set out details of Qassim Hall's lengthy criminal record and history of making threats. It is not necessary to set out the detail of those findings, since none of the parties has sought to challenge on this appeal the coroner's finding at [39] of his ruling that the threat from Qassim Hall was credible and the officers' fears genuine (recorded in [33] of the judgment).

41. The judge noted at [57] and [58] that, other than an alleged incident the day after he had been told of his brother's death when Qassim Hall attempted to climb over the gates of Huddersfield police station (of which incident the police had no record) there was no further evidence that in the three years since Mr Hall's death, Qassim Hall had taken any steps to identify or threaten any of the officers. The judge recorded at [59] that before the coroner Mr Davies QC had expressly disavowed any case that the other family members represented a threat to the officers or would breach the anonymity order themselves. What was contended was that the family members were vulnerable to forced extraction of the identity of the officers. The judge set against this the fact that the family already knew the identity of two of the officers and there was no suggestion they had disclosed that information to Qassim Hall.

42. The judge referred to the fact that Qassim Hall was not estranged from his family and to two incidents, one in which his mother was charged with violent disorder in 2005 whilst attempting to prevent his arrest and another when she was arrested but not charged when he and his partner were under investigation for harassment. The judge described these as: "the high point of the evidence that a named family member might become engaged with Qassim Hall, out of a sense of loyalty, in steps against the officers by disclosing their identity or otherwise."

43. In a "Discussion" section the judge then drawing the evidence together set out the position as she saw it, saying at [63] to [65]:

> "63. There is genuine fear and concern amongst the officers who will give evidence about threats that Qassim Hall may make against them or their families and might carry through if they are identified. As the coroner concluded, that in itself is a factor that may adversely affect the quality of their evidence and it was certainly open to him to conclude that the quality of their evidence is likely to be improved if they are relieved of that fear and concern.
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> 64. On the evidence before me, if the general public are able to see the officers give evidence, there is a real risk of their identification by or to Qassim Hall. The family (in the sense of the named members) are, however, in a different position. Although in one sense closer to Qassim Hall, it is accepted that they themselves pose no threat to the officers. Even if they are able to identify any of the officers, there is no obvious reason why they would identify the officers to Qassim Hall knowing the concern that there is about him. The identity of two of the officers is already known to the family and they have not disclosed this information. The suggestion that they may be forced by Qassim Hall to disclose the identities of the officers is pure speculation. In these respects, the case is factually very different from that in *Hicks* where the family members were expressing similar views to those making threats on social media.
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> 65. The submission on behalf of the Interested Parties is that that looks at the position now and that the position may be entirely different after the evidence has been given at the inquest or indeed many years into the future. That is a risk which I recognise but it is one that will always arise and the matter to be taken into account is, I think, the likelihood of that risk arising. As Mr Thomas QC submits it involves a number of hypotheses – that the officers will be visually identified by the family; that the family members will breach the anonymity order and disclose their identity to Qassim Hall; that Qassim Hall will threaten or otherwise harass or attack them as a consequence. There is no compelling reason to think that this risk will materialise and the risk should be given less weight."

44. The judge said at [66] that the coroner made a rational judgment that the quality of the evidence of the officers was likely to be improved by screens and that the quality of the evidence must necessarily be a weighty factor. She continued:

> "But it is a factor, and the interest in open justice is another weighty factor. When the balancing exercise comes to be done, the validity of any fears and concerns must also be factored in not least because it goes to the justification for the incursion into the public nature of the proceedings.

> 67. It seems to me that the coroner's decision was reached without any real consideration of that issue. The result was that the decision assumed that the acceptance that the fears and concerns of the officers were genuine necessarily meant that they were well-founded, when that involved the series of hypotheses that Mr Thomas QC identified, but without sufficient consideration of the evidence to support those hypotheses. The coroner's assessment of the evidence is to be found in paragraph 39 of his ruling. So far as the objective risk is concerned, he says simply that he finds the threat to be credible and continues:
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> *"QH has convictions for offences of violence (including violence against the police), and a history of making threats of violence (including threats to kill). I accept that QH blames the police for Andrew Hall's death …."*
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> That amounts to little more than a conclusion that, because Qassim Hall has some convictions for offences of violence and threats of violence, the threat to the police officers is a credible one. There is no consideration of the nature and context of those offences or of the events since Andrew Hall's death. More particularly, however, there is no consideration of the risk of the anonymity orders being breached by those who may be able to identify the officers. As a matter of common sense, that risk increases the greater the number of people who are able to see the officers give evidence and the more impracticable it becomes to enforce the orders for anonymity. But if the family only are permitted to see the officers give evidence, the position is very different because undertakings can be given by the individuals, there is no evidence that they are likely to breach those undertakings, and the assertion that they may be forced to do so is pure speculation.
>
> 68. Even if I had not concluded that the coroner misdirected himself in law, I would have found his decision irrational because it failed to take into account adequately or at all the objective risk to the officers in being seen by the family when giving their evidence and, in that sense, it made a greater incursion than was necessary into open justice."

45. The judge thus quashed the coroner's decision to permit screens but only to the extent that the screens prevent the identified family members from seeing the officers give evidence. However she decided on the entirety of the evidence that the coroner's directions as to screens should continue to apply to officers C and N. She does not set out her reasons for drawing this distinction, but there is no appeal from that part of her decision, so I need not consider it further.

46. She concluded that the screening of all the officers from the family was not in accordance with the common law duty of fairness and was a disproportionate measure.

47. Finally she considered a point which assumed greater prominence in the oral submissions of Mr Davies QC than previously as to the witnesses' Article 3 rights. He submitted that those rights were unqualified and that the evidence of the threat posed by Qassim Hall was sufficient to engage Article 3. The judge noted that anonymity had been granted for each of the officers so that even if their Article 3 rights were engaged the issue was a narrow one as to whether the provision of screens was necessary to preserve that anonymity. As she had already held, the argument that the family would both identify the officers and breach the anonymity order, for which there was no evidence, was wholly speculative. Following the approach suggested by Lord Carswell in *In re Officer L* in the case of Article 2 rights, that would simply lead the judge back to the common law position so that the argument about Article 3 did not affect the decision she had reached.

The grounds of appeal

48. The grounds of appeal of the Chief Constable are that the judge's decision was wrong for the following reasons:

(1) She misdirected herself as to the law;

(2) She made irrational and/or inconsistent conclusions;

(3) She failed to apply the common law test on the basis of the facts as found; and

(4) She wrongly concluded that the objective and/or subjective threat was such that Article 3 was not engaged and/or that whether or not it was engaged the only rational order was to permit defined family witnesses to see the anonymised witnesses.

49. There is a considerable overlap between those grounds and those advanced by the Police Federation which were as follows:

(1) The judge erred in ruling that the coroner had not taken account of the principle of open justice;

(2) In reaching that conclusion and substituting her own decision, the judge made errors of law and misdirected herself;

(3) Having reached her erroneous conclusion, the judge wrongly substituted her own findings on the evidence and minimised or dismissed evidence that was uncontested. She reached conclusions that are inconsistent and unsupported by any rationale;

(4) The judge failed to rule appropriately or at all on important submissions in particular as to Article 3, failed to consider the risks to the officers' families at all and having substituted her own views as to the (un)likelihood of disclosure by force or threat, failed to consider the risk of inadvertent disclosure; and

(5) Overall the judge was wrong to find that in the case of 14 out of the 16 witnesses, the balance came down in favour of allowing the family to see the witnesses.

Summary of the parties' submissions

50. At the outset of his submissions on behalf of the Chief Constable Mr Hugh Davies QC emphasised that the course which the coroner had adopted, that the officers would be screened from the public and the family but be fully visible to the coroner, the jury and the legal representatives, and the redaction and pixelation of the CCTV footage, so far as the public and family were concerned, was entirely compliant with the Article 2 procedural obligations on the state in relation to the investigation into the death of Mr Hall.

51. Mr Davies QC submitted that the order for anonymity recognised that Qassim Hall posed an objective threat and an indiscriminate risk to the officers and their families. The risk assessment by Inspector Rotchell, a qualified professional, was that Qassim Hall was a threat of harm in the limited area of Huddersfield. He continues to offend and express views antithetical to the police. The judge's assessment at [64] of the judgment that, if the public were able to see the officers give evidence, there was a real risk of identification by or to Qassim Hall, but that the family were in a different position, would not stand scrutiny. He had a background of mental instability and there was a real risk that if the family could see the officers give evidence, Qassim Hall would learn that the family had seen the witnesses and seek to obtain information about them, with an increased risk to them of his putting pressure on them to extract that information. Contrary to the judge's conclusion at [64] and [67] that this was "pure speculation" it was a real risk. The judge's conclusion was contrary to the coroner's finding at [39] of the ruling that the threat to the officers and their families from Qassim Hall was "credible".

52. Although in his opening submissions to this Court, Mr Davies QC put the case on behalf of the Chief Constable on the basis of both the common law and Articles 2 and 3 of the ECHR, in reply he accepted that (as Mr Leslie Thomas QC for Ms Dyer had told us during the course of argument) the application before the coroner was in the end a common law application applying the principles set out in *In re Officer L*. Article 2 was not relied upon and Mr Davies QC accepted that Article 3 had been "put on the shelf". In the circumstances it is not necessary to summarise any of the submissions he made as to the law if Articles 2 or 3 applied. As already noted, he accepted that the common law test was as enunciated by Lord Carswell in *In re Officer L*. Mr Davies QC relied upon [22] where Lord Carswell said:

> "The principles which apply to a tribunal's common law duty of fairness towards the persons whom it proposes to call to give evidence before it are distinct and in some respects different from those which govern a decision made in respect of an article 2 risk. They entail consideration of concerns other than the risk to life, although as the Court of Appeal said in paragraph 8 of its judgment in the *Widgery Soldiers* case, an allegation of unfairness which involves a risk to the lives of witnesses is pre-eminently one that the court must consider with the most anxious scrutiny. Subjective fears, even if not well founded, can be taken into account, as the Court of Appeal said in the earlier case of *R v Lord Saville of Newdigate, ex p A* [2000] 1 WLR 1855. It is unfair and wrong that witnesses should be avoidably subjected to fears arising from giving evidence, the more so if that has an

> adverse impact on their health. It is possible to envisage a range of other matters which could make for unfairness in relation of witnesses. Whether it is necessary to require witnesses to give evidence without anonymity is to be determined, as the tribunal correctly apprehended, by balancing a number of factors which need to be weighed in order to reach a determination."

53. He also relied upon later passages in the judgment where Lord Carswell sought to give guidance as to the relationship between Article 2 consideration of anonymity and such consideration applying common law principles, specifically the passages at [27] to [29]. Given that none of this was in dispute, it is only necessary to cite [29]:

> "In pursuit of this end, I suggest that the exercise to be carried out by the tribunal faced with a request for anonymity should be the application of the common law test, with an excursion, if the facts require it, into the territory of article 2. Such an excursion would only be necessary if the tribunal found that, viewed objectively, a risk to the witness's life would be created or materially increased if they gave evidence without anonymity. If so, it should decide whether that increased risk would amount to a real and immediate risk to life. If it would, then the tribunal would ordinarily have little difficulty in determining that it would be reasonable in all the circumstances to give the witnesses a degree of anonymity. That would then conclude the exercise, for that anonymity would be required by article 2 and it would be unnecessary for the tribunal to give further consideration to the matter. If there would not be a real and immediate threat to the witness's life, then article 2 would drop out of consideration and the tribunal would continue to decide the matter as one governed by the common law principles. In coming to that decision the existence of subjective fears can be taken into account, on the basis which I earlier discussed (see paragraph 22). For the same reasons as those which I have set out in paragraph 20, however, I would not regard it as essential in every case to commence consideration of the issue by seeking to identify such subjective fears."

54. Once it was accepted by Mr Davies QC that the application was made on the basis of the common law, I did not understand him to be contending that the judge's summary of the relevant legal principles at [51] of her judgment was wrong, specifically point (iii) that the impact on the witnesses can bring into play their subjective fears and concerns (as Lord Carswell held in the passages I have just quoted) but that if those fears and concerns are objectively justified they may carry greater weight. Ultimately, the real complaint levelled by the Chief Constable against the judgment in this context was in relation to the judge's categorisation of the threat or risk as "pure speculation" which amounts to a rejection of any objective justification.

55. In relation to the decision of this Court in *R (T) v West Yorkshire (Western Area) Senior Coroner* [2017] EWCA Civ 318; [2018] 2 WLR 211, upon which the respondent places considerable reliance, Mr Davies QC did not take issue with the applicable principles set out by Lord Thomas CJ in the judgment of the Court:

> "56. Open justice is the fundamental principle in respect of all proceedings before any court, including coroners' courts. The principle has been expressed in numerous cases, including *Scott* v *Scott* [1913] AC 417 (see the judgments of Viscount Haldane LC at 437-9 and Lord Shaw at 476-8) and *Attorney-General v Leveller Magazine* [1979] A.C. 440 where Lord Diplock summarised the principle at 449-450:
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> > "As a general rule the English system of administering justice does require that it be done in public: *Scott v Scott* [1913] AC 417. If the way that courts behave cannot be hidden from the public ear and eye this provides a safeguard against judicial arbitrariness or idiosyncrasy and maintains the public confidence in the administration of justice."
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> 57. This principle applies to coroners' courts: see *R (A) v HM Coroner for Inner South London* [2004] EWCA Civ 1439 at [20]. It is further embodied in Rule 17 of the Coroners Rules 1984 (now Rule 11 of the Coroners (Inquests) Rules 2013).
>
> 59. Any restriction on the principle of open justice, including the making of an order for anonymity, requires cogent justification: see for example, *Attorney-General v Leveller Magazine* [1979] A.C. 440 at 450. It is common ground that the coroner's power to manage inquest proceedings, includes the power to make an order for anonymity of witnesses and others: *R (A) v HM Coroner for Inner South London.* A coroner also has power under s.11 of the Contempt of Court Act 1981 to impose reporting restrictions:
>
> > "In any case where a court (having power to do so) allows a name or other matter to be withheld from the public in proceedings before the court, the court may give such directions prohibiting the publication of that name or matter in connection with the proceedings as appear to the court to be necessary for the purpose for which it was so withheld."
>
> However, the exercise of these powers requires justification for the departure from the principle of open justice."

56. Mr Davies QC submitted that on the facts of that case, there was no credible evidence of any threat to the applicant from her family and in any event her name had already been publicised in the local newspaper. In the circumstances, it was unsurprising that having engaged in the necessary balancing exercise, the Court concluded that the coroner had been right to refuse the application for an anonymity order.

57. So far as concerns the correct construction of Rule 18 of the Rules, Mr Davies QC adopted the submissions of Mr Jonathan Hough QC on behalf of the coroner, which I summarise below.

58. Mr Davies QC submitted that the reference in [48] of the coroner's ruling to "a balancing of competing interests between the officers and the family", in the context of the ruling as a whole, could only be to the competition between the family's open justice expectations and the position of the officers which was the whole point of the competing submissions. He said that whilst the judge had recognised that the ruling should not be subjected to minute dissection, that was the outcome which the judgment had produced. The judge had adopted a narrow contextual analysis of the ruling. Whilst it was accepted that the coroner had arguably not gone through a "pre-flight check list" in relation to the competing interests of open justice on the one hand and the concerns of the officers on the other, Mr Davies QC submitted that the coroner had dealt with the competing interests adequately and the judge had been wrong to substitute her own decision.

59. On behalf of the Police Federation, Ms Helen Malcolm QC indicated that the only area where her submissions diverged from those of Mr Davies QC was that she contended that both Articles 2 and 3 of the ECHR were engaged fully. She submitted that the real question was not whether Article 3 was engaged as a matter of law, but how the protective duty of the state under Article 2 was to be satisfied. This concerned the balance to be struck between the state's obligation to protect the officers and the state's obligation to ensure that the family have access to the extent that that is possible. She submitted that, contrary to the judge's conclusion, the coroner had engaged in an appropriate balancing exercise and had given important weight to the principle of open justice in particular at [35]-[36] of his ruling, where the reference to "natural justice" was clearly intended to be to "open justice". The suggestion that he had not taken it into account at all was just not sustainable.

60. Ms Malcolm QC submitted that the judgment was riddled with public law errors. After the hearing she and Mr Dean helpfully provided the Court with a Note setting out these errors. It is not necessary to enumerate all of them but I identify two of them which seem to be of particular significance. The first is that the judge mischaracterised as "submissions" matters which formed part of the coroner's decision from [33] onwards of his ruling. The second is that, although the judge accepted the coroner's findings on the evidence as to genuine fear and concern of the officers, she then minimised the risks and apostrophised the professional risk assessment of Inspector Rotchell as "wholly speculative" or "pure speculation". Whether these are "public law errors" or just errors or inconsistencies in the judgment may not matter.

61. Ms Malcolm QC submitted that it was illogical for the judge to say at [64] of her judgment that there was a greater risk from the officers being seen by the general public than from there being seen by the family who were those who were closest to Qassim Hall and were in communication with him. She submitted in this context that the coroner and the Court would be entitled to take into account not only the risk of disclosure by family members of the officers' identity as a consequence of pressure from Qassim Hall but also the risk of inadvertent disclosure. In answer to the challenge from Mr Thomas QC that there was no evidence addressing that risk, Ms Malcolm QC submitted that this did not mean that the Court was precluded from considering that risk. She noted that the risk of inadvertent disclosure of material affecting national security was what underpinned rules setting out the closed material procedure in jurisdictions such as the Special Immigration Appeals Commission.

62. She submitted that the judge had misunderstood the purpose of an inquest which was not to provide "catharsis" for the family or to allow them to assess the demeanour of the officers giving evidence, although that may be its welcome effect. She relied upon what Girvan LJ said in the Court of Appeal in Northern Ireland in *Re Officer C, Re Officer A and Re Jordan* [2012] NICA 47; [2013] NILR 221 at [35]:

> "While the ECtHR recognises that the next-of-kin have a legitimate interest in the inquest proceedings this does not mean that the inquest is a lis inter partes between the next- of- kin and the state. There is a clear danger of this principle being lost sight of in a contentious inquest such the present one which the parties may come to feel is adversarial whereas in fact it is inquisitorial. The interests of the next-of-kin are legitimate but not paramount. The coroner's function is to ensure a full, fair and dispassionate investigation but it is not the function of the coroner and jury to resolve a dispute or to determine the civil rights or criminal liability of any participant."

63. Ms Malcolm QC emphasised that the inquest was not a blame-laying exercise, however much the family might want it to be, and that the family had no right to cross-examine witnesses other than with the permission of the coroner. She submitted that, in an inquisitorial process such as an inquest, getting the best evidence was of particular significance. It was in the public interest for the best evidence to be available to the fact-finder and that public interest was actively served by making life comfortable for the officers giving evidence. If there was no blame on them, then it was right and proper to protect them. If there was blame, the correct forum for that issue to be resolved was a criminal trial, not the inquest. She submitted that the coroner had to have an eye to the future. If the officers were identified and then threatened or harmed, it was less likely that there would be a full and proper criminal trial. The officers would be less able or willing to give evidence.

64. During the course of argument, I expressed a concern about whether the second sentence of [41] of the ruling (which I quoted at [16] above) meant that because the coroner had not considered whether a direction for screens would allow the inquest to proceed more expediently, he could be said not to have considered the principle of open justice. Ms Malcolm QC sought to address that concern in a number of ways. She submitted that since he had commenced the paragraph with the words "Rule 18(2) permits a departure from that presumption", the coroner was recognising that he was in the realms of discretion and was not saying that the answer to the question was a given. It was also the case that Rule 18(2) was drafted in such a way that improving the quality of the evidence and allowing the inquest to proceed more expediently were alternatives not cumulative. Furthermore, it was clear from the ruling as a whole and in particular [44] to [48] that the coroner did not just consider the first part of Rule 18(2) but he had considered all the factors, including looking broadly at the interests of justice.

65. On behalf of the coroner, Mr Jonathan Hough QC adopted a neutral stance as to the result of this appeal but he sought to assist the Court on two aspects of the case: (i) the correct interpretation of Rule 18 and (ii) the nature and content of the ruling.

66. He reminded the Court that prior to the enactment of Rule 18, there was no full procedural code and thus no statutory rule in relation to the use of screens in inquests.

Any orders for screens were made under inherent common law case management powers. Before the Rules were made, in March 2013 the Ministry of Justice issued a consultation on coroners' rules and regulations which attached draft Rules. The draft Rule 18 was similar to the current version, except that (i) sub-rule (2) only referred to improving the quality of the witness's evidence as a basis for a screening determination; and (ii) sub-rule (3) did not make reference to national security interests as a factor in the determination. Following the consultation, the Ministry issued a response paper in which it explained: "We have amended rule 18 to allow the coroner to permit screened evidence only where this would be [i] likely to improve the quality of the evidence, or [ii] is in the interests of justice or [iii] national security." The Rules were then laid before Parliament and passed in their current form.

67. Mr Hough QC submitted that the use of the word "may" in sub-rule (1) indicates that this is a discretionary power. Sub-rule (2) provides for a threshold condition that the discretion can only be exercised if the coroner determines that either giving evidence from behind screens would be likely to improve the quality of the witness's evidence or "allow the inquest to proceed more expediently". The "determination" referred to in sub-rule (3) is that determination made under (2) but it requires the coroner to have regard to all the circumstances of the case including the interests of justice and national security. He submitted that, contrary to the judge's view, "expediently" should be given a relatively broad meaning of "appropriately" and not limited to convenience or practicality. This made internal sense of the Rule and meant that a determination that the giving of evidence from behind screens would allow the inquest to proceed more appropriately was a threshold condition. The consideration of what was most appropriate brings in the wider issues of what is in the interests of justice or national security.

68. He submitted that if "expediently" is given the narrow meaning which the judge seems to have favoured, serious practical problems are created since it is difficult to see how a coroner could order screens for national security or operational reasons (for example in relation to witnesses from the security services or under-cover police officers) if expedience was limited to convenience or practicality. This wider meaning was consistent with the use of the word expedient in other statutory contexts. Thus, the now repealed Tribunals of Inquiry (Evidence) Act 1921 permitted the public to be excluded from a hearing if "it is in the public interest expedient so to do for reasons connected with the subject matter of the inquiry or the nature of the evidence to be given." Section 9A(2)(a) of the Coroners and Justice Act 2009 (a section added by amendment after the making of the Rules) provides that a coroner may require a juror to surrender an electronic communications device if the order "is necessary or expedient in the interests of justice". Mr Hough QC submitted that if "expedient" bore only the narrow meaning of "practical", it would be an oxymoron in each case.

69. Mr Hough QC submitted that consideration of both anonymity orders and screens orders engages the open justice principle. What is entailed is a fact-sensitive balancing exercise taking account of all the factors, including the fears of witnesses, even if objective justification is weak or lacking. He submitted that in practice a coroner will comply with the balancing exercise by posing three base questions: (i) would the screening order sought improve the quality of the evidence or be appropriate in all the circumstances; (ii) if yes, does the balance of competing interests, including those of the family, justify the order sought; and (iii) would there be an Article 2 or 3 risk (risk

to the life of the witness or risk of serious harm to the witness) if the order were refused? If so, the order would usually be made.

70. He submitted that there were five particular features of the case which provided the context for the coroner's ruling: (i) the case involved the controversial death of a black man in police custody following multiple restraint; (ii) there was substantial evidence that Qassim Hall had a lengthy history of crime, including violence, although not the most serious, and a propensity for persistent harassment. On the basis of that evidence and evidence that he blamed the police for his brother's death, the anonymity orders were made; (iii) the other members of the family had no criminal history and there was no evidence that they posed a threat to the officers; (iv) there was evidence that the officers were fearful of giving evidence if they were identified; and (v) it was common ground that the coroner, the jury and the legal representatives will see the witnesses but that if the general public saw the witnesses there is a real risk of their being identified to Qassim Hall, as the judge found in [64] of her judgment.

71. Mr Hough QC then drew our attention to the salient aspects of the ruling. The coroner recorded at [29] and [30] that Mr Thomas QC objected in principle to screens but also argued that his clients should see the officers. In the Decision section beginning at [33] the coroner recorded that these applications are immensely fact-sensitive and he recognised at [34] the importance of the matters set out in Rule 18(3). At [35] and [36] he made the points about the screening of the officers from the family offending "natural justice" (in other words open justice) so that, as Mr Hough QC submitted, the coroner was focused on the central issue of whether the family members should see the witnesses. [37] to [39] deal with the evidence about the threat posed by Qassim Hall, [39] concluding (i) that the threat was credible; (ii) that the officers had a genuine fear; (iii) that it was affecting their health and (iv) that it would continue to do so, none of which, he submitted, was controversial.

72. He submitted that, from [40] onwards, the ruling followed the scheme of Rule 18. In answer to the question I had posed about [41] he submitted (i) that in [41] the coroner was trying to reflect the terms of Rule 18(2) which requires one or other threshold condition to be satisfied, not cumulative conditions; and (ii) the coroner took account of the interests of justice in the remainder of his decision. In [42] and [43] he concluded that the use of screens would improve the quality of the evidence, which nobody challenged. In [44] the coroner stated that he could not make the determination without considering all the circumstances of the case, in particular the matters set out at Rule 18(3), dealing there with (3)(a) and (c). At [46] in relation to one limb of (3)(b) he said that no issue of national security impacted on his decision.

73. At [47] he then considered the other limb of (3)(b) the interests of justice, saying they were best served when fact-finders could make findings on the basis of the best evidence which would be achieved by the evidence being given from behind screens. Mr Hough QC submitted that the coroner used the words "to the extent" at the beginning of [48] because he recognised that he was considering both a threshold consideration and a balancing exercise, not purely a balancing exercise.

74. The judge had concluded that the coroner had engaged in too limited a balancing exercise but Mr Hough QC submitted that he had taken account of the interests of the family. In [48] he had not limited his consideration of their interests to having the witnesses cross-examined by their legal representatives. He submitted that the coroner

as the principal decision-maker was better placed than the judge as a court of review. The factors which had weighed with him were the fears of the witnesses which would be alleviated by giving evidence from behind screens and ensure they gave the best evidence. The family would still hear the evidence. The coroner had weighed the critical factors in the balance appropriately.

75. On behalf of the respondent, Mr Adam Straw emphasised the importance of the principle of open justice in the balancing exercise that has to be undertaken. He drew specific attention to what was said by the Court of Appeal in *T* at [63]:

> "The balancing exercise is highly fact specific. It must take into account the evaluation of the purpose of the principle of open justice as applied to the facts of the case and the potential value of the information in question in advancing that purpose, as against the risk of harm the disclosure might cause the maintenance of an effective judicial process or to the legitimate interests of others: see the appeal from the Court of Session in *A v BBC* [2015] AC 588 at [34] - [41] and [46] - [57]. In *R (C) v Secretary of State for Justice* [2016] 1 WLR 444, the case involved a mental patient compulsorily detained under a hospital order made by a criminal court under s.37 and s.41 of the Mental Health Act 1983. The passage in the judgment of Lord Rodger in *Re Guardian News and Media Ltd.* (which we have set out at paragraph 58 above) was expressly affirmed by Baroness Hale, though this decision depended on a fact sensitive analysis of all the considerations, including the long standing anonymity given to those suffering from a mental disorder."

76. He also referred us to [38]-[39] in the judgment of the Supreme Court in *Cape Intermediate Holdings v Dring* [2019] UKSC 38; [2020] AC 629 emphasising the importance of the open justice principle. He submitted that the coroner had to take account of the purposes of the open justice principle, which were identified by the Supreme Court in that case at [42]-[43]:

> "42. The principal purposes of the open justice principle are two-fold and there may well be others. The first is to enable public scrutiny of the way in which courts decide cases - to hold the judges to account for the decisions they make and to enable the public to have confidence that they are doing their job properly. In *A v British Broadcasting Corpn*, Lord Reed reminded us of the comment of Lord Shaw of Dunfermline, in *Scott v Scott* [1913] AC 417, 475, that the two Acts of the Scottish Parliament passed in 1693 requiring that both civil and criminal cases be heard "with open doors", "bore testimony to a determination to secure civil liberties against the judges as well as against the Crown" (para 24).
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> 43. But the second goes beyond the policing of individual courts and judges. It is to enable the public to understand how the justice system works and why decisions are taken. For this they have to be in a position to understand the issues and the evidence

> adduced in support of the parties' cases. In the olden days, as has often been said, the general practice was that all the argument and the evidence was placed before the court orally. Documents would be read out. The modern practice is quite different. Much more of the argument and evidence is reduced into writing before the hearing takes place. Often, documents are not read out. It is difficult, if not impossible, in many cases, especially complicated civil cases, to know what is going on unless you have access to the written material."

77. Mr Straw submitted that part of the purpose of open justice was that the family should see the witnesses and be able to assess their demeanour when a central issue was whether they had an honest belief that Andrew Hall posed a threat. Mr Straw was unable to point to any authority which established specifically that part of the principle of open justice was to enable members of the public, or here the family, to assess the demeanour of witnesses. He submitted that not having sight of the witnesses will make it more difficult for the family to understand the decisions reached by the jury.

78. Mr Straw essentially agreed with Mr Hough QC's three-stage process as set out at [69] above, provided that the coroner considered the requirements of open justice. He also agreed that "expediently" in Rule 18 was to be interpreted broadly but this was not relevant to our decision as neither the coroner nor the judge had decided that the giving of evidence from behind screens was "expedient". He submitted that in the Decision section of his ruling the coroner had not performed the broader open justice balancing exercise. His reference to the "wider interests of justice" was simply a reference back to what he had said about the interests of justice generally in [47], namely the point about those interests being best served by the availability of the best evidence. The coroner had simply failed to address the broader principles of open justice as summarised in *T*.

79. In relation to ground 1 of the appeal by the Police Federation, that the judge had erred in concluding that the coroner had failed to take account of the principle of open justice, he submitted that whether the judge was wrong was a question of fact and the standard of review for this Court was whether the judge's decision was clearly erroneous. Mr Straw relied upon the analysis of the circumstances in which an appellate court can review findings of fact by a court of first instance in [78] to [80] of the judgment of Lord Kerr in *DB v Chief Constable of the Police Service of Northern Ireland* [2017] UKSC 7; [2017] 3 LRC 252. He submitted that the judge was clearly right that the coroner had not had regard to the powerful imperative of open justice.

80. He submitted that the judge had been correct to substitute her decision for that of the coroner as there was a balancing exercise in considering the duty of fairness to a witness (as per [22] of Lord Carswell in *In Re Officer L*) and on a judicial review it was for the Court to decide for itself whether a measure was fair, relying on [65] of the judgment of the Divisional Court in *R (Wiggins) v HM Assistant Coroner for Nottinghamshire* [2015] EWHC 2841 (Admin). Whilst due weight should be given by the Court to the decision of the coroner as the primary decision-maker, in this case very little weight should be given to his decision since he had misdirected himself as to the law.

81. Mr Straw relied upon [7.1] of the Explanatory Memorandum to the Rules which states: "The policy objectives of the coroner reforms in the 2009 Act are to: - put the needs of

bereaved people at the heart of the coroner system". He submitted that the needs of the family here included achieving catharsis as was emphasised by Ms Coles in her witness statement. The ability to assess demeanour was also a relevant factor. Overall, the principles of open justice meant that the family should be entitled to see the witnesses.

82. Mr Leslie Thomas QC made similar points in his oral submissions. Whilst he accepted that the family was not the decision-maker in the inquest, they play an important part. They could not grieve properly until they were able to look into the eyes of the person who took their relative's life, as their solicitor Ms Stevens made clear in her witness statement. He emphasised that because this case concerned the death of a black man in custody, there was a belief that the system was weighted against them and there could be a cover-up. There was no good reason why they should not see the witnesses and if they did not, far from being at the heart of the coronial system as the Explanatory Memorandum said, they would feel side-lined.

83. He submitted that the Chief Constable was simply wrong in taking exception to the judge considering race as a factor relevant to open justice. A principal purpose of open justice was to restore public confidence and there was always a high public interest in open justice in any case where someone was killed at the hands of police officers, particularly the death of a black man, of which there were a disproportionate number globally. There was a legitimate interest in knowing whether race played any part in this death.

84. In relation to the complaint by the appellants that the judge had erred in distinguishing screening from the family and screening from the wider public he submitted that the onerous threshold in *DB* to which Mr Straw had referred had not been met. The family was a small group of known individuals and Inspector Rotchell had identified no threat from the family itself. Ms Dyer says that she has known for four years who two of the officers are, but she has never identified them to Qassim Hall. The family has made clear that they will not disclose the identity of the officers to him and has provided undertakings to the court. By contrast, the wider public could be anyone who came into the public gallery. That person's character or propensity was an unknown risk. The distinction the judge had drawn at [64] was a rational one.

85. Mr Thomas QC submitted that the judge was correct to conclude at [67] that there was no objective risk, that there was no evidence that the family will breach the undertakings and the assertion that they will be forced to do so by Qassim Hall is as the judge said pure speculation. The alleged risk was without evidential or objective foundation. It was not correct that the judge had failed to evaluate the subjective fears of the officers. She had correctly stated the common law test at [49] and [51(iii)] and concluded at [63] and [66] that the officers' fears and concerns were genuine, but she was entitled to conclude that they had less weight because they were not objectively justified.

86. In relation to the suggestion by the Police Federation that Inspector Rotchell's evidence was not contested, Mr Thomas QC submitted that ultimately the only risk relied on was that Qassim Hall would somehow forcibly extract the information about the identity of the officers from the family and even that was contested by the family. There was no evidence of any stronger risk and no evidence of any risk of inadvertent disclosure.

Discussion

87. In my judgment, the starting point for the analysis must be to consider what is the correct construction of Rule 18 of the Rules. As was essentially common ground between the parties, the Rule is not happily worded, but I consider that the analysis of the Rule put forward by Mr Hough QC is the correct one. Rule 18(1) confers a discretion and Rule 18(2) then provides that one of two threshold conditions must be met before the discretion can be exercised: that the coroner determines that giving evidence behind screens would be likely to improve the quality of the evidence or that it would be likely to allow the inquest to proceed more expediently, that is more appropriately.

88. In making that determination he has to consider all the circumstances of the case under Rule 18(3) and, in particular, the matters listed in (a) to (c). I agree with Mr Hough QC that if "expediently" bore the narrow meaning of efficiency or practicality, it is difficult to see how, in the case for example of evidence from the security services or undercover police officers, ordering the evidence to be given from behind screens, whilst in the interests of national security, could be said to allow the inquest to proceed more efficiently or in a more practical manner. On the other hand, if expediency is equated with allowing the inquest to proceed in the most appropriate manner, the coroner can give the proper consideration which (3)(b) requires him to give to the interests of justice and of national security.

89. The "interests of justice" clearly is and is intended to be a wide term which encompasses the principle of open justice. The importance of that principle has been emphasised in countless authorities, perhaps most cogently in the recent past by the judgment of this Court given by Lord Thomas CJ in *T* in the passages which I cited at [55] above. As the Court made clear in [59] of that judgment, any restriction on the principle of open justice, including an order for anonymity or for screens, requires cogent justification.

90. It seems to me that the critical question for the Court is whether the coroner erred in law in concluding that an order for the officers' evidence to be given behind screens was justified. In considering that question, I consider that it is important to bear in mind that, despite the attempt by Ms Malcolm QC to broaden the application, the application which was made to the coroner was under the common law and not under Articles 2 and 3 of the ECHR. As Mr Davies QC accepted during the course of argument, he did not rely before the coroner on Article 2 and Article 3 was "put on the shelf". It was a common law application applying the principles in *In re Officer L* particularly at [22] and [28]-[29] of Lord Carswell's opinion. Mr Dean, who acted for the Police Federation before the coroner, adopted Mr Davies QC's submissions and did not advance any separate argument based on Articles 2 and 3.

91. Furthermore, if this Court considers that the coroner did not err in law, then it must follow that the judge's determination that he misdirected himself in law was wrong. The suggestion by both counsel for the respondent that somehow this was a question of fact for the judge or that this Court should exercise the same caution in relation to reviewing the judge's conclusion as we would if she had made findings of fact, based upon the decision in *DB*, is wholly misconceived.

92. The determination of the critical question whether the coroner erred in law will in turn depend upon whether he gave sufficient weight to the principle of open justice in

engaging in the balancing exercise required by the common law test. As the judge herself recognised at [28] of her judgment the coroner's decision must be read with a degree of benevolence or pragmatism. The judge repeated this point at [36] where she noted that [44] of the ruling, where he considered all the circumstances of the case, may well be read as having inherent in it a balancing exercise in which the principle of open justice played a part. She concluded at [37] that the difficulty with that reading is [48] of the ruling where she says that having referred to the competing interests of the officers and the family he then engages in a binary exercise considering only (i) the purpose of his decision under Rule 18(2), evidently a reference to his decision that the use of screens would improve the quality of the evidence and (ii) the provisions of Rule 18(3)(c) which provided protection for the family (because Mr Thomas QC will see the witnesses and be able to cross-examine them effectively). The judge concluded that this was too limited a balancing exercise.

93. It seems to me that this approach by the judge fails to take into account sufficiently the opening words of [48] of the ruling: "To the extent that my decision has involved a balancing of competing interests between the officers and the family". That is not a reference to what follows in [48], which does not consider those competing interests, but to what he has already said elsewhere in the Decision section from [33] onwards about those competing interests. In particular, at [35] the coroner identifies his instinctive concern that the proposition that the family of the deceased who died in circumstances calling into question the discharge by the state of its Article 2 obligations should not see the agents of the state implicated in his death whilst giving evidence offends the principle of "natural justice" (by which he clearly means open justice) and procedural fairness. He goes on at [36] to say the instinct is all the stronger where the application for the use of screens is not based on evidence or intelligence reflecting adversely on the family members most likely to be affected by it.

94. Those paragraphs do demonstrate that the coroner had well in mind the principle of open justice and that that principle would be offended if the family could not see the witnesses. In the circumstances, it cannot be said that he failed to appreciate the significance of the principle. What he then went on to do in [37] to [39] was to balance against the principle of open justice and the interest of the family in seeing the witnesses the fears of those witnesses of threats from Qassim Hall and their interest in not being identified to Qassim Hall. Thus, in my judgment, the judge was wrong to conclude at [37] that the coroner had only weighed against the quality of the evidence being improved by the use of screens the question of whether the effectiveness of questioning will be impeded by screens and thus engaged in too limited a balancing exercise. The judge has overlooked the earlier part of the Decision section where the competing interests were considered and balanced. This may have been overlooked by the judge because at [38] of her judgment she appears to have erroneously characterised as submissions aspects of the ruling which were clearly part of the coroner's decision.

95. Whilst the ruling is not expressed as clearly as it might be, as the judge correctly observed, it has to be read with a degree of benevolence and pragmatism. Doing so and considering the Decision section of the ruling from [33] onwards as a whole, in my judgment, the coroner did not err in law in failing to take proper account of the principle of open justice or engage in too narrow a balancing exercise. It follows that the judge was wrong to conclude that he had erred in law and to substitute her own decision for

that of the coroner. Accordingly both appeals must be allowed and the coroner's order reinstated.

96. In the circumstances, it is not strictly necessary to consider the other criticisms of the judgment raised by the appellants but I will deal relatively briefly with various matters since they were fully argued before us. The principal matter with which I should deal is the judge's distinction at [64] between what she recognises is the real risk that if the general public could see the officers give evidence the officers would be identified by or to Qassim Hall but the position of the family was very different and the suggestion that they may be forced by Qassim Hall to disclose the identities of the officers was "pure speculation", a view she repeats at the end of [67].

97. Despite Mr Thomas QC's arguments to the contrary, I agree with Ms Malcolm QC that the distinction which the judge draws is an illogical one. Aside from Qassim Hall or an associate of his going into the public gallery and identifying the officers (and in the case of an associate passing on information to him) it is difficult to see how a member of the public seeing the officers creates a real risk of identification to Qassim Hall whereas the members of the family who have that familial connection with Qassim Hall and are in communication with him do not create a real risk.

98. The professional risk assessment of Inspector Rotchell set out in [18] and [19] of his second statement was:

> "18. Whilst I assess that [the family members] would not pose significant risk in their own right to officers it is my belief that any officers would be identifiable and there is an enduring risk that their identities may be disclosed to others if they are able to see the officers during the inquest proceedings and/or otherwise discover their names. This disclosure to family members such as Qassim, who I assess would pose a risk, would be either through a sense of loyalty or as a result of fear of what he may do to them if they did not tell them.
>
> 19. Throughout the investigation officers' identities have been protected from disclosure. It is my belief that continuing anonymity is both necessary and proportionate given the objective threat."

99. As already noted, at [37] of the ruling the coroner referred to the fears of the officers that Qassim Hall would seek to harm them if made aware of their identity and at [38] he said that the Rule 18 power could only be exercised in respect of the threat said to be posed to officers by Qassim Hall. At [39] he found that threat to be credible and went on to make the further findings to which Mr Hough QC referred, which I have set out at [71] above. Although I accept that the coroner has dealt with the matter in a rather attenuated fashion, it seems to me that taking paragraphs [37] to [39] together, he was concluding that the fears of the officers were both subjectively genuine and objectively justified. By finding that the threat from Qassim Hall was credible, he was accepting the risk assessment of Inspector Rotchell that there was an objective threat to the officers from Qassim Hall. In the light of his evidence, the specific finding by the coroner at [39] (which was not challenged on the judicial review) and the fact that an order for anonymity was made by the coroner without objection from the family (itself

a powerful indicator that the officers' fears were objectively justified) the judge was wrong to conclude that the risk of Qassim Hall extracting the identity of the officers from family members was pure speculation. The risk and the threat he posed were objectively established.

100. As noted in my summary of the submissions of the parties, Mr Thomas QC advanced various reasons why the family should be able to see the police witnesses give their evidence pursuant to the principle of open justice. He referred to the fact that this was a case of a black man who died in custody (or rather immediately after having been in custody) in circumstances where the police as agents of the state were implicated in his death and there was a high public interest in open justice. That was a submission he also made to the coroner (as recorded in [22] of the ruling) and the coroner clearly accepted the force of the submission in his findings in [35]-[36] of the ruling to which I have referred, but he then had to balance that public interest (and interest of the family) against the interests of the officers. As I have held, the balancing exercise in which he engaged was an appropriate one.

101. Mr Thomas also submitted that it was important for the family to be able to see the officers implicated in Mr Hall's death in order to achieve catharsis. This does not seem to have been advanced as a distinct argument before the coroner. Whilst Ms Malcolm QC is no doubt right that achieving catharsis for the deceased's family is not the purpose of an inquest, the fact that the Explanatory Memorandum to the Rules states that one of the policy objectives of the reforms introduced by the 2009 Act is "to put the needs of bereaved people at the heart of the coroner system" demonstrates that, since one of those needs is likely to be the need for catharsis, this is an important matter to be taken into consideration. However, the coroner recognised the interests of the family but concluded on the balancing exercise that they were outweighed by the need to allay the fears of the officers to ensure that they gave the best evidence, itself an important aspect of the public interest.

102. Mr Thomas QC and Mr Straw emphasised that the family should be able to see the witnesses give their evidence in order to assess their demeanour. Mr Thomas QC did raise the question of demeanour before the coroner, but only in the context of pixilation of the CCTV footage so that the jury would not be able to assess the demeanour of the officers during the struggle with and restraint of Mr Hall, but the concerns he raised were addressed by ensuring that the coroner, jury and legal representatives see an "unredacted" version of the video footage. Counsel for the respondent were unable to point to any authority which considered that one of the reasons why the members of the deceased's family or members of the public more generally should be able to see witnesses give their evidence is to assess their demeanour.

103. As was pointed out in the course of argument, recent decisions of this Court have cast some doubt on the extent to which assessment of demeanour by the Court is a reliable indicator as to credibility: see [33] to [43] of the judgment of Leggatt LJ (as he then was) in *R (SS) (Sri Lanka) v Secretary of State for the Home Department* [2018] EWCA Civ 1391 and [38] of the judgment of Lewison LJ in *Staechelin v ACLBDD Holdings Ltd* [2019] EWCA Civ 817. However, whatever the values of or limitations as to assessment of demeanour, that assessment is for the fact-finder in any court, here the jury, and not for the family of the deceased. I was unimpressed by Mr Straw's fall-back submission that unless the family could see the witnesses, they might not understand the decision reached by the jury. As Lewison LJ pointed out in argument, if the family

thought a witness whom they could see was lying but the jury believed him, in one sense that poses a worse problem.

104. Accordingly, I consider that none of the additional matters raised by Mr Thomas QC and Mr Straw affects the validity of the balancing exercise in which I have found that, contrary to the judge's view, the coroner did engage.

105. Finally, I should record that during the course of argument we raised with the parties the question of whether the media should be able to see the police witnesses. No real objection was raised on behalf of the appellants, but points were raised as to the safeguards that would need to be in place and matters such as undertakings by representatives of the media. In the circumstances, although if an application is made to the coroner by representatives of the media to see the witnesses give evidence, it will be worthy of consideration, the decision as to whether to accede to such an application and on what terms is one for the coroner.

Conclusion

106. For the above reasons I would allow the appeals of the Chief Constable and officers B and E and of the Police Federation and the officers it represents and restore the order for screens made by the coroner.

Lord Justice Males

107. While I agree with much of Flaux LJ's judgment, I have reached a different conclusion. To explain why, it will be necessary to travel over some of the ground which Flaux LJ has already covered.

The Convention and the common law

108. When an application for witnesses at an inquest to be permitted to give their evidence behind a screen is based on fear for the witnesses' or their families' safety if their identity becomes known, there are two bases on which the application may be made. One is that the witnesses' rights under Article 2 or Article 3 ECHR are engaged. The other is that screens are necessary in accordance with the common law principle of fairness.

109. As appears from cases such as *In re Officer L* [2007] UKHL 36, [2007] 1 WLR 2135, there are material differences between an application invoking Convention rights and an application under the common law, albeit that both routes may and often will lead to the same destination. These differences may be summarised as follows.

(1) First, Articles 2 and 3 will only be engaged if there is a "real and immediate" risk of death or serious harm. This criterion "is and should be one that is not readily satisfied: in other words, the threshold is high" (*Officer L* at [20]). That demanding test does not apply under the common law.

(2) Second, Article 3 will only be engaged if the harm which is threatened reaches a certain "minimum level of severity". Again, the common law is more flexible.

(3) Third, Articles 2 and 3 will only be engaged if the risk is objectively well-founded (*Officer L* at [20]: "in assessing the existence of a real and immediate risk for the purposes of article 2 the issue does not depend on the subjective concerns of the applicant, but on the reality of the existence of the risk"). In contrast, the common law principle of fairness will take account of the witnesses' subjective fears and their consequences even if they are unfounded, albeit according them greater weight if they do have an objective basis (*Officer L* at [22]: "Subjective fears, even if not well-founded, can be taken into account … It is unfair and wrong that witnesses should be unavoidably subjected to fears arising from giving evidence, the more so if that has an adverse impact on their health").

(4) Fourth, in a case where Article 2 or Article 3 is engaged, the coroner has a duty to take reasonable measures to protect the witnesses. This means that, if screens are reasonably necessary for the witnesses' protection, that will outweigh the need for open justice (*A v British Broadcasting Corp* [2014] UKSC 25 per Lord Reed at [45]: "The Convention therefore requires that proceedings must be organised in such a way that the interests protected by those articles are not unjustifiably imperilled"). Under the common law, however, a number of factors have to be weighed (*Officer L* at [22]: "Whether it is necessary to require witnesses to give evidence without anonymity is to be determined, as the tribunal correctly apprehended, by balancing a number of factors which need to be weighed in order to reach a determination"). One of those factors – and always an important one – is the requirement of open justice.

(5) Finally, when Convention rights are invoked, the function of the court on a challenge to the coroner's decision is to decide whether Article 2 or Article 3 is engaged and, if so, whether screens are required. Under the common law, on an application for judicial review, the court's function is more limited. It must consider first whether the coroner has misdirected himself in law or has reached a decision not reasonably open to him. If so, the decision will be quashed and, unless there is only one possible decision which can lawfully be made, the court will remit the matter to the coroner. In considering whether the coroner has misdirected himself, the court should read his reasons and decision fairly as a whole, without nit-picking or over-emphasis on detailed textual analysis. This can be described as giving the coroner's decision a "benevolent" interpretation.

110. The application for screens in the present case was made under the common law. Although some submissions were made to us based on Article 3, that was not a case advanced to the coroner and, as I have explained, it would have given rise to different considerations. It follows that we are concerned with the common law and our primary focus should be on the coroner's decision.

Open justice and the use of screens in inquest proceedings

111. At common law open justice is always an important consideration to which, as a matter of law, substantial weight must be given (e.g. *R (T) v West Yorkshire (Western Area) Senior Coroner* [217] EWCA Civ 318, [2018] 2 WLR 211 at [56] referring to open justice as "the fundamental principle in respect of all proceedings before any court, including coroners' courts" and at [64] referring to "the powerful imperative of open justice"). Accordingly any derogation from open justice (including both anonymity and

the use of screens) must have a clear justification and must go no further than is reasonably necessary.

112. I agree with what Flaux LJ has said at [87] to [89] above concerning Rule 18 of the Coroners (Inquests) Rules 2013. Although in some respects not happily drafted, the terms of the Rule permit (and therefore should be read as requiring) the principle of open justice to be taken into account when making a decision as to the use of screens. Depending on the circumstances of the case, this may fall to be considered either (1) under Rule 18(3) when making the Rule 18(2) determination whether screens would improve the quality of the evidence or allow the inquest to proceed more expediently or (2) when considering the overall justice of the case after having made that determination. What matters is that it should be clear that the principle has been considered and given proper weight at some stage.

113. Where the coroner determines, after giving substantial weight to the need for open justice, that the use of screens is reasonably necessary, the inquest will be Article 2 compliant: *Bubbins v UK* (2005) 41 EHRR 24.

114. In considering whether there is justification for the use of screens, the purpose of the principle of open justice as applied to the facts of the case must be taken into account (*T v West Yorkshire Coroner* at [63]). In the case of an inquest, one major purpose of open justice is to ensure public confidence in the fairness, thoroughness and transparency of the process. Referring to the state's common law duty to investigate deaths of those in custody in *R (Amin) v Secretary of State for the Home Department* [2003] UKHL 51, [2004] 1 AC 653 at [31], Lord Bingham said:

> "In this country … effect has been given to that duty 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."

The bereaved family

115. Lord Bingham's summary of the purposes of open justice in an inquest into the death of a person in custody emphasises not only the importance of public confidence, but also the particular role of the bereaved family. The importance of that role is underlined by paragraph 7.1 of the Explanatory Memorandum to the Coroners (Inquests) Rules 2013, explaining that one policy objective of the Coroners and Justice Act 2009 was to "put the needs of bereaved people at the heart of the coroner system". It is therefore not surprising that Rule 18(3)(a) requires the coroner to consider any views expressed by an interested person, which clearly includes the family of the deceased.

116. In the present case it was accepted (or at any rate not disputed) that the police witnesses should be anonymous. This was itself an important derogation from open justice which

was necessary because Qassim Hall, the deceased's brother, was found to represent a credible threat to the safety of the witnesses and their families if their names were known to him, and because the officers were genuinely fearful for the safety of themselves and their families and, in some cases, that fear was affecting their health. The need for anonymity was not challenged before the coroner and has been accepted by the family. The issue before the coroner was whether those concerns justified a further derogation from open justice, namely the use of screens. Before the coroner the family challenged the need for the use of screens at all, and their submission that witnesses should not be screened from family members (other than Qassim Hall) was merely a fallback position. It is therefore understandable, perhaps, that the principal focus of the coroner's decision was on whether screens were necessary at all.

117. The family has not challenged in this appeal the coroner's decision that it was necessary to screen the witnesses from the public in general (including, if he attends, Qassim Hall). That was because of the risk that if the witnesses were seen by the public, their identity would be disclosed to Qassim Hall. For my part I do not see any want of logic in saying that the witnesses should be screened from the public, but not from the family. If Qassim Hall is indeed anxious to discover the witnesses' identity, it would not be difficult for him to ask an associate who is familiar with police officers in the Huddersfield area to attend on his behalf.

118. We are concerned only with the coroner's decision that screens should prevent the family from seeing the witnesses give their evidence. It is important to note, however, as Flaux LJ has explained, that the family's legal representatives will have sight of the witnesses while they give evidence and have been or will be given access to unedited CCTV footage which (we were told) shows in full the incident during which force was used on the deceased by police officers and restraint was applied to him. We have not seen that footage, but we are told that it shows a struggle between Andrew Hall and a number of police officers extending over several minutes, in the course of which officers struck Mr Hall a number of times and there is some evidence of him striking back. The family and the public will see an edited version of that footage in which officers' faces will be pixelated and their names will be "bleeped out". The jury will see a further version of the footage in which there is no pixelation but officers' names remain "bleeped out". It follows that the family's legal representatives will not be hampered in any way in conducting cross examination of the police witnesses by the existence of screens. Moreover, if it were to turn out that there is anything relevant to the cross examination which has been removed in the editing process, the family's legal representatives will be in a position to cross examine about it, albeit that care will need to be exercised to ensure that what is said does not identify the officers concerned.

119. Accordingly the use of screens to prevent the family from seeing the police witnesses will not affect the efficacy of the investigation into Andrew Hall's death. This case is not, therefore, about the ability of the family to have the evidence of those witnesses properly challenged. Whether or not screens are used, there will be a thorough investigation into the circumstances of his death in which the family's legal representatives will be able to challenge the officers' evidence and to suggest, to whatever extent is appropriate, that the use of force by the police was unlawful. The case is solely concerned with whether the family should be permitted to see that process as well as to hear it.

120. It is therefore necessary to consider how the purposes of open justice in inquest proceedings may be served by enabling members of the deceased's family to see police officers whom they believe to be responsible for the deceased's death give their evidence and the extent to which those purposes may be frustrated if the family is unable to see the officers do so.

121. This topic was addressed in the witness statement of Deborah Coles, an Executive Director of INQUEST, a charity which provides advice to bereaved people concerning contentious deaths, their investigations and the inquest process. Ms Coles has extensive experience acquired over 25 years of working with families of persons who have met their death at the hands of state agents. Under the heading of "The benefit for families of seeing important witnesses giving evidence", she identified four overlapping benefits, which can conveniently be labelled "trust", "demeanour", "accountability" and "catharsis". She said:

> "6. Families consistently express their need to uncover the truth of the circumstances of death and for those involved to be held accountable through the inquest process. Securing the trust of the family, and of the public, is particularly difficult when lethal force has been used by the state. Open justice is vital to assuage both family and public concerns about cover-ups and to ensure confidence in the investigation.
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> 7. There are a number of benefits to families of seeing important witnesses give evidence, especially those state agents who may be responsible for the death in some way. The first is to secure trust in the investigation. Families often feel, when someone is killed by the police or in state custody, that the authorities try to conceal the circumstances of the death. This is partly because the state is powerful and well-resourced, and it often holds all of the relevant evidence. That includes written evidence: most or all of the eye-witnesses in this type of death are often state agents – colleagues of those responsible. This makes it all the more important that the investigation is fully open. If witnesses give evidence behind screens, this will often make families lose trust and confidence in the investigation. They can suspect a cover-up.
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> 8. The second benefit is that families often place a great deal of weight on the demeanour and body language of the witnesses. For example, families at times decide they did not believe a witness because he or she looked 'shifty', evasive or arrogant. They form a view of the credibility of the evidence from seeing as well as hearing the witness. This is especially important when the honest belief of the officer or officers who used force determines whether the killing was lawful or not. When families are prevented from seeing a witness because of screens, they can complain they feel unable to tell, from the voice alone, whether the witness was telling the truth.

> 9. The third benefit is to secure accountability. For a family, seeing the officers who were responsible for a death stand up in the witness box and have to answer questions, is often one of the most powerful ways of holding the state to account. Families are much less likely to feel an officer is being held to account if he or she is merely an anonymous voice hidden behind a screen.
>
> 10. A fourth common benefit is to help bring about catharsis. Seeing the officers responsible for a loved-one's death explaining what they did can be an important part of the therapeutic process. If families feel excluded from the investigation, or have unanswered questions, or are inhibited, because they cannot see the witness, from judging whether the witness acted wrongly, this can make it more difficult for them to come to terms with the death and move on. Deaths in state custody are normally extremely traumatic for families, and the inquest is often a central part of the grieving process."

122. With the exception of what Ms Coles says in paragraph 8 about families placing weight on the demeanour and body language of a witness, I regard this as a compelling explanation of why it is important for family members to see the witnesses themselves in circumstances such as these and why it is not a sufficient alternative that their legal representatives may do so. As to demeanour, however, it is not the family's role to determine whether the witnesses are telling the truth, that being the function of the jury, while in any event it has increasingly come to be recognised that demeanour and body language are an unreliable guide to truthfulness (see *R (SS) (Sri Lanka) v Secretary of State for the Home Department* [2018] EWCA Civ 1391 at [33] to [43]). I have no doubt that in the present case the CCTV footage of the incident will be played many times during the cross examination of the police witnesses, if necessary in slow motion. The extent to which their evidence is supported by or consistent with that footage will be a far more reliable guide to whether they are telling the truth than their demeanour or body language.

The relevance of the deceased's race

123. For the family Mr Leslie Thomas QC placed considerable weight on the fact that Andrew Hall was black. He said that there was a particular and significant public interest in an inquest into the death of a black man in police custody, and that in such cases it is common for the bereaved family to believe that the system is weighted against them, that there is a cover-up, and that police officers are given special privileges. For that reason, he submitted, it is particularly important for the family to be able to see the police officers give their evidence.

124. For the Chief Constable Mr Hugh Davies QC took issue with this approach. He insisted that the race of the deceased is irrelevant and that there is a strong public interest in a full and transparent investigation into the death of any person in custody, regardless of their race. Accordingly the public interest in open justice, including the need to hold state agents to account, is no different in the case of a black man than in any other case. From this it follows that the deceased's race cannot provide a stronger case for the

family to be permitted to see the police witnesses give evidence than if the deceased had been white.

125. It is of course correct that the strength of the public interest in a full and transparent investigation into the death of a person in custody does not vary according to the deceased's race. That was not Mr Thomas's submission. Such an investigation is essential in every case for the reasons given by Lord Bingham in *Amin*. But I would accept that the death of a black man in police custody gives rise to particularly acute concerns. That is because of the perception which Mr Thomas described. It would be idle to deny that this perception exists. There is no doubt that black communities have in general less confidence in the police than other sections of the community, and that on occasion distrust and lack of confidence have led to racial tensions and conflicts. For present purposes what matters is not whether the perception is well-founded, but rather the fact that it exists.

126. In these circumstances it is entirely understandable that the family of Andrew Hall should wish not only to hear, but also to see the police witnesses when they explain why they believed it was necessary to restrain him with the use of force, including the striking of a number of blows, and to see those witnesses when they react to the case which seems likely to be put to them, that the force used was excessive and unlawful.

127. All this amounts, in my judgment, to a powerful case that the application of the open justice principle in the circumstances of the present inquest requires that they should be able to do so. If they are not permitted to see the police witnesses, there is a real risk that the inquest may not achieve all of the purposes which open justice is intended to promote. This does not necessarily mean that the application for screens should be rejected. But it does mean that a compelling justification will be required to sustain the coroner's order that the witnesses be screened from the family's view.

The quality of the evidence

128. A threshold requirement which must be satisfied before screens can be used is that their use "would be likely to improve the quality of the evidence given by the witness or allow the inquest to proceed more expediently". In this case the coroner based his decision on the fact that screens would be likely to improve the quality of the police witnesses' evidence and he did not consider any question of expediency.

129. A witness's subjective concerns may be relevant in two overlapping ways. The first, referred to by Lord Carswell in *Officer L* in the passage from [22] cited above, is that fairness requires that witnesses should not be subjected to fear, particularly if that affects their health, if that can be avoided. The existence of such fears is therefore a factor to be taken into account in the overall assessment. The second is that such fears may impede the witness, for example because he is distracted or pre-occupied, from giving his evidence to the best of his ability – in short, from doing himself justice.

130. The requirement that screens would be likely to improve the quality of a witness's evidence is directed at the need for the inquest, in this case the jury, to have the best possible evidence in order to determine the matters which it is the purpose of the inquest to determine, namely who the deceased was, and how when, where and in what circumstances he met his death. This is distinct from allaying a witness's subjective concerns, which is a separate factor in the balance.

131. While any likely improvement in the quality of a witness's evidence is sufficient to satisfy the threshold requirement under Rule 18(2), and obviously it is desirable that the jury should have the best possible evidence before it in order to perform its task, the weight to be given to such a likelihood in the coroner's overall evaluation whether there is sufficient justification to depart from the principle of open justice must depend on the circumstances of the case. It is necessary to consider what difference the use of screens is likely to make, for example whether any improvement in a witness's evidence is likely to be significant or only marginal and to balance this against the need for open justice. In general, for example, police officers can be expected to have some degree of resilience when giving evidence. In the present case it should not be too difficult for the officers, assisted as they will be by the CCTV footage, to explain what they did and why they did it – as indeed they have already done to the IOPC investigation which cleared them of any wrongdoing. In the case of an important witness, such as a police officer who has used force on a person in custody, the fact that screens would be likely to improve his evidence only marginally (if that were the position) would be unlikely to carry much weight.

The justification for screening the witnesses from family members

132. The justification put forward before the coroner for screening the witnesses from the family was a narrow one. The only risk on which the Chief Constable and the witnesses relied was the risk of harm caused by Qassim Hall who (it was accepted) should not see the witnesses. Moreover, at any rate by the conclusion of the hearing, it was not contended that any family member would deliberately or even inadvertently disclose information to Qassim Hall which would enable him to identify any of the officers. Rather, the case which was advanced was that family members would be vulnerable to force or threats of force by Qassim Hall. As Mr Davies put it in submissions to the Coroner on behalf of the Chief Constable and the officers whom he represented, his submissions being adopted by Mr Brian Dean who represented the remaining officers:

> "I emphasise we are not contending more than [that] any family member in this context is vulnerable to the forced extraction of the very information we're seeking to protect from Qassim Hall. None of them have the history that justifies any assertion and we have not made any such assertion that they would breach the order in themselves. The point is he is the risk and he knows who they are."

133. This was the only objective basis for the existence of a risk of harm on which the Chief Constable and the witnesses relied.

134. Accordingly the objective justification for the use of screens depends on the existence of a real risk that Qassim Hall would seek to exert pressure on family members to reveal information likely to enable him to identify one or more of the officers and that those family members would succumb to such pressure.

The coroner's ruling

135. It is right to acknowledge that in summarising the arguments made to him, the coroner referred to the acceptance by Mr Dean, representing some of the police officers, of the fact "that the use of screens involves a significant departure from an important general

principle of natural justice", and to the submission by Mr Thomas that the family was "asking for no more than the application of the ordinary rules of natural justice". It is plain that the coroner's reference to "natural justice" meant (or at least included) the principle of open justice. Further, the coroner began the "Decision" part of his ruling, after acknowledging that applications for the use of screens were fact sensitive and required him to take into account the matters set out in Rule 18, as follows:

> "35. Instinctively, the proposition that the family of a deceased who has died in circumstances that call into question the state's discharge of its Article 2 obligations should not see the agents of the state who are implicated in that death, while they are giving evidence to the inquest into it, offends what can be appropriately described as natural justice, in the sense of the fair and impartial application of law and procedure to all parties to a particular legal process.
>
> 36. That instinct is all the stronger where the application is not based upon any sufficient evidence or intelligence that reflects adversely on the family members most likely to be affected by it."

136. I would accept that these passages show that the coroner's starting point was that the principle of open justice required that the family should be able to see the witnesses in question. He stated also that he accepted Mr Thomas's submission that Rule 18 was expressed in terms making clear that the presumption was that evidence at an inquest should not be given from behind a screen.

137. So far, it might be possible to criticise the coroner's ruling on the basis that he did not spell out that open justice is a principle to which substantial weight must be given or the corollary that the use of screens in the circumstances of the present case requires a compelling justification. Certainly he did not refer to the particular importance of transparency in the case of the death of a black man in police custody. However, if that criticism stood alone, it might not be fair to regard the coroner as having misdirected himself, having regard to the need to accord his ruling a benevolent interpretation. Clearly, having started from the point that "natural justice" required that the family should be able to see the witnesses, he was then correct to go on to consider whether there was a justification for departing from that position.

138. The coroner went on to find that the police witnesses were genuinely fearful for their safety and for the safety of their families and that, in some cases, those fears were affecting their health. There was, therefore, a finding of subjective fears which were having serious consequences for the officers concerned.

139. The coroner found also that these fears were credible, by which he meant objectively well-founded, in the light of Qassim Hall's history including convictions for offences of violence against the police (albeit I would add, relatively minor violence) and a history of making threats of violence. It is important, however, to see precisely what it was that the Coroner found. There are two relevant paragraphs of his ruling, which I set out with my added emphasis:

> "37. Here, the application is based upon fears expressed by the officers in open statements that have been disclosed, and in closed material that has not, that QH, *if made aware of the identity of any particular officer or officers*, would seek to harm any such officer or officers, on the basis that QH holds the police responsible for Andrew Hall's death.
>
> …
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> 39. I find that threat to be credible. QH has convictions for offences of violence (including violence against the police), and a history of making threats of violence (including threats to kill). I accept that QH blames police for Andrew Hall's death, and that officers implicated in that death (using the word 'implicated' entirely neutrally) have a genuine fear that, *were they to be identifiable and identified*, that would create a risk of harm to them or their families from the actions of QH. …"

140. Thus the coroner found that Qassim Hall presented a threat to the safety of the officers or their families *if* he became aware of their identity. But the coroner did not at any stage consider whether there was an objectively well-founded risk that permitting the family to see the witnesses give evidence would cause Qassim Hall to become aware of this. In view of the clear but limited way in which the Chief Constable and the officers had put their case, the question which the coroner ought to have considered was whether there was a real as distinct from fanciful risk that Qassim Hall would seek to extract this information from family members by force or threats of force and that they would succumb to those threats. If he had done so, there is in my judgment no basis in the evidence on which he could have concluded that there was such a real risk. There was no basis for thinking that Qassim Hall is so determined to wreak vengeance upon police officers that he is prepared to use violence or to make a credible threat of violence against members of his own family (clearly a threat which was less than credible would not have this effect). Indeed Inspector Danny Rotchell, who carried out a detailed assessment of the risks presented by Qassim Hall for the purpose of the hearing before the coroner, did not really address this possibility. Moreover, there was unchallenged evidence that some family members already know the identity of two of the officers but have not revealed this to Qassim Hall. There was no evidence that Qassim Hall has taken any steps to identify or threaten any of the officers who may have been involved in the events of his brother's death on 13th September 2016 in the time which has since elapsed.

141. Accordingly, while the coroner's findings about the risks presented by Qassim Hall are not challenged, they do not in my judgment justify a conclusion that there is an objectively well-founded risk of harm to the officers or their families. In my judgment the judge was right to say at [64] that "The suggestion that [the family] may be forced by Qassim Hall to disclose the identities of the officers is pure speculation". Although her use of the word "speculation" was criticised, it is clear that what she meant was that there was no sound evidential basis for thinking that this might happen.

142. Having made his findings about the risks presented by Qassim Hall, the coroner went on to consider whether the use of screens would be likely to improve the quality of the officers' evidence and to consider the matters set out in Rule 18(3). He concluded that

the quality of the evidence would be improved, but did not expressly refer at this stage to the importance of open justice and its role in promoting the purposes of the inquest. He said:

> "42. Considering the evidence as a whole, and acknowledging that I have the advantage of seeing evidence that has not been shared with all PIPs, I conclude that permitting the officers to give evidence from behind a screen would be likely to improve the quality of their evidence overall.
>
> 43. I take the view that witnesses who are fearful for their safety, or the safety of their families, in the event that they are identified, are more likely to be straightforward and forthcoming in their evidence if they are confident that they will not be identified. The quality of the evidence of such witnesses is likely to be improved if appropriate steps are taken to minimise those fears. In this case, that can be done by directing that the officers give their evidence from behind a screen
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> …
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> 47. As to the other limb of Rule 18(3)(b) is concerned [*sic.*], my starting point is that the interests of justice generally, and the interests of anyone concerned in a particular legal process, are best served when those discharged with making findings of fact and reaching conclusions based upon those findings are able to do so on the basis of the best evidence. In this case, I consider the best evidence will be given if the officers who are the subject of this application give their evidence from behind screens. Witnesses who are fearful of the consequences of being identified will give more reliable evidence if they know they will not be identified.
>
> 48. To the extent that my decision has involved a balancing of conflicting interests between the officers and the family, I take the view that the wider interests of justice as set out above justify my decision, having regard to the purpose of my decision as per Rule 18(2) and the provision of Rule 18(3)(c), which provide protection for the family."

143. In my judgment this ruling was flawed.

144. First, as already noted, the coroner did not treat the need for open justice as a factor to which substantial weight had to be given as a matter of law, in particular in a case concerned with the death of a black man in police custody, so that a powerful justification was needed to override this.

145. Second, the coroner appears to have lost sight of what had previously been his stated starting point, namely his instinctive view that the family should see the witnesses give evidence as a matter of natural justice "in the sense of the fair and impartial application of law and procedure". Instead, by the time he came to make his decision, his new starting point was that the interests of justice generally were best served by allowing the use of screens when that would enable the witnesses' best evidence to be given. That was an error in my judgment. The fact that the use of screens would be likely to improve the quality of the witnesses' evidence was a necessary threshold but in itself was not a sufficient justification for their use. Nor did it establish a rebuttable presumption that screens should be allowed.

146. Third, it is clear that the coroner proceeded on the basis that there was an objectively well-founded risk of harm to the officers or their families from Qassim Hall when, for the reasons which I have explained, he was not entitled to do so. It is to be expected that this is a factor that would have carried considerable weight with him as no judge would wish to expose witnesses or their families to such a risk. Subjective fears, however genuine and even when having consequences on a witness's health, carry rather less weight.

147. Fourth, while it is obviously desirable that a witness should be able to give his best evidence, there is a distinction between providing for the comfort and allaying the fears of a witness on the one hand and enabling the inquest to obtain the most reliable evidence on the other. So far as obtaining best evidence is concerned, the coroner did not consider whether or to what extent the concerns of the officers which would or might prevent them from giving their best evidence would have a material impact on the ability of the inquest to arrive at reliable conclusions. In the present case what the officers did will be apparent from the CCTV footage. Whether the force which they used was reasonable and proportionate on the one hand or excessive on the other is an objective question, which will likewise depend primarily on the CCTV footage. Their evidence will go mainly to the question whether they had an honest belief in the need to use the force which they used. The coroner did not consider how much difference the presence or absence of screens would make to their ability to give evidence on that issue, which would not necessarily be the same in all cases. The coroner has found that it would make some difference but it is hard to think, at least in some cases, that the difference will be significant. There can be no doubt that the officers will say, as no doubt they have already said to the IOPC investigation, that they honestly believed that their use of force was reasonable, necessary and proportionate in the circumstances as they perceived them to be. Accordingly, while the coroner was entitled to say that obtaining best evidence from the police witnesses was a factor in favour of the use of screens, and while in general the weight to be given to each factor was a matter for him, his decision contained no analysis of what difference the use of screens was likely to make to the ability of the inquest to arrive at the truth. Without such analysis, he was not in a position to decide how much weight to give this factor.

148. When these flaws are taken together, I do not think that the coroner's decision can be saved by giving it a benevolent interpretation.

149. Accordingly the balancing exercise which the coroner ought to have carried out would have taken account of the following factors. Militating strongly against the use of screens was the principle of open justice for all the reasons which I have explained. Factors in favour of their use were (1) the subjective fears of the witnesses (which had

not been shown to be objectively well-founded), (2) the fact that, in some cases, the witnesses' health had been affected, (3) the fact that the use of screens was likely to improve the quality of the witnesses' evidence, but the weight to be given to this factor would require some analysis, as above, and (4) the fact that the use of screens would not impede the effective testing of the witnesses' evidence. It would also have been sensible to recognise that the order for anonymity and the fact that the officers would be screened from the public would go some way to alleviating any concern.

The judge's decision

150. For these reasons I agree with the judge that the coroner misdirected himself. I do not agree, however, that this is a case where, undertaking the correct exercise, there is only one possible decision which could lawfully be made. Accordingly I consider that the judge was wrong to substitute her own decision whether screens should be used rather than remitting the decision to the coroner.

Disposal

151. I would therefore set aside the coroner's ruling together with the judge's order and would remit the matter to the coroner to make a fresh decision in the light of this judgment. To that extent I would allow the appeal. However, I would not disturb the judge's order in relation to Officers C and N, as there has been no appeal from that part of her decision.

Postscript – the media

152. I agree with what Flaux LJ has said at [105]. For my part, I can see no reason why representatives of responsible media organisations, who can be relied upon not to disclose information to Qassim Hall and to report the unlikely event of any threat being made to them by him, should not be permitted to see the police officers give evidence. That would go some way to promote the objectives served by the principle of open justice. However, I agree that it should be left to the coroner to deal with any application which may be made, or if appropriate to consider the matter on his own initiative.

Lord Justice Lewison:

153. I agree that the appeal should be allowed for the reasons given by Flaux LJ.