Thursday, 28 October 2010
(10.00 am)
LADY JUSTICE HALLETT: Mr Eadie, are you happy to be right back there?
MR EADIE: My Lady, I have the wall behind me, so nowhere else to go. As long as you can hear.
LADY JUSTICE HALLETT: I just have one thing to say before we start. A great deal of heat has been generated on the papers in relation to the timing of the hearing of these issues. All I'm going to say at this stage is this: if necessary, I will return to the issue of timing and I will consider it.
I know those whom you represent, Mr Eadie, feel they have been unfairly criticised and I know there are others who wish to advance criticism. I am making no -- a ruling isn't required, but I'm saying nothing on that issue at this stage, because it seems to me that we have two very important issues to resolve. I think it's better we get on with them and, if necessary, I'll return to the airing of the question of timing at some other date, if invited to do so.
Submissions by MR EADIE
MR EADIE: My Lady, I'm very grateful indeed for that indication. I only have a tiny segment at the end of my submissions which was entitled "sigh" on that issue, but

you will have seen what we said on the last occasion about 17 June and the 18 June letters. I say no more about it.

My Lady, my submission is that there are six initial points which truly lie at the heart of both of the issues that you will have to consider today. The first is that these proceedings are inquisitorial in nature. They are not adversarial civil proceedings in which there is a claim made by one party, defended by another and the judge sits above the dust in the middle.

There are no rights or obligations under domestic or European law that are asserted or are in issue. They are inquisitorial in nature.

Secondly, the central function, the very purpose, of an inquest is to seek to answer the statutory questions including, specifically, the "how" question. That is a function that is to be performed by the coroner, identifying issues and investigating the material, the relevant material, that bears on those issues.

Article 2 is not in issue in this inquest by reason of your Ladyship's earlier finding, but the central purpose of an inquest is pretty much identical, whether you are in Article 2 territory or domestic territory, in terms of its basic function, and there is a very helpful collection of citation from two or three authorities at

paragraphs 10 and 11 of the West Yorkshire submissions, the West Yorkshire Police submissions, in this case about the basic purpose of this sort of inquest. The key elements of that central function are that there should be, whether under domestic law or European law in the ECHR, an independent investigation, plainly satisfied in this case because your Ladyship is in charge of the inquest and, secondly, that that independent investigation should be effective. Could you take up, please, the bundle of authorities? There are two, I think, bundles of authorities, one helpfully provided by your team of counsel. I want the other one and tab 19 of the other one, please, which contains the judgments of the House of Lords in the JL case.

LADY JUSTICE HALLETT: Did you say 19?

MR EADIE: Sorry, 22, I'm sorry. I had a wrong reference.

LADY JUSTICE HALLETT: 22, I have L.

MR EADIE: Yes, that's the one we want, in the speech of Lord Rodger at paragraph 78. Page 624 in the law report, paragraph 78.

LADY JUSTICE HALLETT: I have it.

MR EADIE: "The principal hallmark ..." As I say, this was an Article 2 investigation, but my submission is that the essential purpose is, the

essential nature and function, of a domestic inquest is pretty similar.

"The principal hallmark of an Article 2 compliant enquiry is that it should be effective and the citation in the Ramsahai v The Netherlands case ..."

I won't read it out aloud, but you'll see what it said in paragraphs 324 and 325 of the judgment of the Grand Chamber in that case and, paragraph 78, we submit, highlights those two key features, independence and effectiveness.

That that is the basic function is clear in every inquest and perhaps, a fortiori, in a context such as this, in which it's been considered appropriate for obvious and good reason to set up the inquest with a judge from the Court of Appeal in charge of it. So that's the second point.

The third point is that the doctrine of public interest immunity exists for a good reason, and the reason my Lady will be well familiar with it is to protect the interests of national security. The interests of national security are, in effect, simply a euphemism for the protection of the public, and what the doctrine of public interest immunity is designed to do is to prevent information, the release into the public domain of which would cause or would risk causing

damage to national security and, thus, to the ability of the responsible authorities to protect the public. That must not occur and it's that protection which the doctrine of PII exists to deal with.

I'm not going to labour that point. My Lady will be well familiar with that doctrine and the underpinnings of it.

Fourthly, that doctrine is, however, an exclusionary doctrine. All concerned accept that the premise on which these issues of principles arise involves the exclusion of material that may be not merely peripherally relevant to the issues that you're considering, but may be critically important to reaching a fair and proper judgment on those issues.

So we're talking about critically important material being excluded from the consideration of the inquests.

Fifthly, it is important, we respectfully submit, to bear in mind the nature of the issues that arise in this context. Those issues, so far as preventability are concerned, have been clearly identified following the ruling that your Ladyship gave on 21 May of this year, and they are contained in the letter from the Solicitor to the Inquest to all the parties of 27 May of this year.

We simply invite you, at this stage, to note two

points on those issues and their nature. Firstly, they are extremely serious. They are major issues with the most serious possible repercussions. One only, in fairness, has to look at the last of them, so far as preventability is concerned, and, as I'm sure my Lady will recall, the last of those issues is whether any of the above alleged failings were causative of the events of 7 July 2005.

The second point to note about the nature of those issues is that the context in which they arise concerns the actions of the Security Service principally, but also of the police in relation to their attempts to protect the public from Al-Qaeda and other terrorist atrocities, and it reveals no national secret to say that much of the work which those organisations do is, for obvious and good reason, secret.

Sixthly, a number of short points, if I may, under the heading "effectiveness and fairness".

I emphasise at the outset that the Security Service is concerned and by these applications seeks to ensure that the coroner can have access to all the material that is relevant to the specific issues identified as fall in the detail of the "how" question. That is a constructive and not an obstructive purpose and intent. It is driven, not merely by desire in the

interests of basic fairness not to have adverse decisions made against it on the basis of only part of the critically important information bearing on those issues, although that is, of course, a part of it and an entirely understandable part of it, given the seriousness of what is at stake, but it is also driven by a clear recognition that any decision-making process, at its most basic level, that excludes information that may be thoroughly important to the judgments that are to be reached as to the correct answer on those issues would inevitably be fundamentally flawed.

And, as I've said already, the assumption that has to be made on these applications is that there is precisely such material. That's because the issues that are being fought at this stage are issues of principle, as all concerned accept.

So, for example, one must test the issue of principle on the basis that there may exist information in open which, if viewed in isolation, would lead on a critical issue to conclusion A but, if put alongside material which cannot be revealed for good reason, would lead to diametrically the opposite conclusion, and it was for those reasons that, on the last occasion I was here, we posed, and we continue to pose, the question that we do in our written submissions at paragraph 26.

No one, we respectfully submit, has provided an answer to that question. The question was: why, after all, would anyone wish to see those who regularly take considerable personal risk for the public good, without any public recognition, pilloried in public or the subject of the most adverse, serious findings, if there was material which could not be provided to the decision-maker which might have an impact on any judgments made?

There is no answer in the written submissions before you to that question, and we do say that it's critically important that those who advocate the absence, even of a power to operate a closed process, must assert that it is acceptable and fair and that any process of investigation would be effective in circumstances in which critical information is simply unavailable to the decision-maker.

We do rhetorically ask: what interests would be served by that? We acknowledge, of course, the interests of the families in knowing as much as possible, and I emphasise again, as I have done on previous occasions, the prior need before one reaches the closed process point, for all other options to be tested: are there ways in which information can be gisted; are there things that can be made available in

public in different ways.
But there are circumstances in which that simply cannot be done because of the need not to disclose sensitive information so as to undermine the efforts of those concerned to protect the public, and I emphasise again that the premise on which the issue of principle proceeds is that that cannot be done.
But once that stage is reached, once that cannot be done, can it sensibly then be said that the interests of the families, in having as much information about this process and about the preventability issue as possible, should trump the effectiveness of your investigative process or, indeed, should trump the fairness of the process by leading to the exclusion of critical information?
We do respectfully invite you to take into account, even though, as I say, Article 2 is not in place, the fact that, even in an Article 2 investigation, the interests of the families and the publicity attendant upon investigations is recognised as being qualified, qualified by the need for the investigation to be effective. See, if you would, Lord Rodger again in the L case, tab 22, this time at paragraphs 80 to 82.
You'll see what he says at the beginning of paragraph 80:

"Similarly, because the investigator is independent, his investigation may well be effective and so fulfil the requirements of Article 2, even though no part of it is conducted in public."

You'll see the quote from the Bulgarian case that is then set out with its emphasis that the degree of public scrutiny may well vary from case to case and so on.

You'll see again, picking up, that whole passage between 80 and the end of 82 deserves reading, but halfway through 82 on page 626, just by the letter F:

"Alternatively, it may continue with witnesses being heard in private or in public or some in private and some in public depending on what is needed for an effective investigation."

The driving logic of the entirety of this part of Lord Rodger's speech in the Article 2 context is to recognise, as the Strasbourg jurisprudence itself does, that the critical findings, unsurprisingly, given that accountability lies at the heart of it, the critical features of any such investigation are its independence, on the one hand, and its effectiveness on the other, and publicity must not be allowed to be used as a tool to undermine effectiveness.

LADY JUSTICE HALLETT: There you're using publicity in the sense of revealing to the outside world as opposed to

here we're talking about not even allowing interested parties to know what's going on.

MR EADIE: We are. My Lady --

LADY JUSTICE HALLETT: There's a distinction, isn't there?

MR EADIE: There is, although the two merge into each other. You will recall from the earlier days of the Article 2 jurisprudence, there have been the four or five critical features of any Article 2 compliant investigation, and they have separated out but included the elements of, on the one hand, publicity and, on the other hand, the need to respect the interests of the families so far as that is possible. But the two obviously merge into each other. If you can't reveal certain information because it is sensitive, that impacts to restrict the degree of publicity that might be capable of being provided, even to the conclusions that the investigation reaches, and it may also, for the same reasons, need to restrict the ability of the families to participate fully. Whichever one of those two distinct elements one focuses on, the driving feature, the trumping feature, if you will, of an Article 2 compliant investigation has to be its effectiveness. That is the thrust of the speech of Lord Rodger.

My Lady, there's been some debate in the written submissions as to the appropriate order in which the

issues are to be approached, whether one does RIPA first or whether one does closed process first. We don't terribly mind which order you approach them in, and I'll wait to see how it's put by others before responding, if it's said there's a point of principle that underpins that distinction.

Just so there should be no doubt about it at this stage, we do submit that RIPA, if we're right on our interpretation of it, provides power in its own right in primary legislation to receive material, and we do submit that RIPA provides a scheme for the receipt of such material by only a limited class of persons and there is, therefore, as it were, a preclusion on further disclosure outside that limited class, but we do say it's permissive to that degree and it provides a freestanding and, therefore, permissive approach that allows a body to receive such information, and we say, therefore, that it is clear from that scheme itself that it is a self-standing scheme providing its own power and the court to receive that information.

We say, given that fact, given that that is primary legislation, it cannot be the position, and is not the position, that, as it were, whatever may be the position under the rules, the Coroners Rules (secondary legislation), that those trump the permissive and

carefully crafted scheme in RIPA.
LADY JUSTICE HALLETT: So express statutory authority for me to have a closed, closed, closed hearing, essentially --
MR EADIE: If I'm right. If I'm right, which I'm going to --
LADY JUSTICE HALLETT: -- if you're right, for RIPA, if it exists, and we'll avoid saying that throughout the hearing.
MR EADIE: Quite.
LADY JUSTICE HALLETT: So does that mean that you agree with Mr Keith, as we seem to have embarked upon the closed hearing argument already, is that what we're going to continue with?
MR EADIE: My Lady, I was going to go to closed process first.
LADY JUSTICE HALLETT: Exactly.
MR EADIE: What I'm not accepting is that there is, as it were, a principled reason for that: namely, that we have to establish under the rules that there is some freestanding basis to allow even RIPA material in, because we say that the primary legislative scheme is itself sufficient for that purpose.
Does that make sense?
LADY JUSTICE HALLETT: For whatever reason, we're going to continue with closed hearings?

MR EADIE: We are, if that's convenient.
LADY JUSTICE HALLETT: Thank you.
MR EADIE: So far as the closed process is concerned, the central question is whether or not there is power, my Lady, to operate a closed process. We say, first of all, that, as a matter of approach, the powers available to you have to be approached on the basis of the fundamental objects of the process that you are conducting and the fundamental objects that the system is designed to perform. In other words, an effective and a fair process for answering the "how" question. We say that can and should properly inform both any issue of interpretation of the powers that are conferred expressly upon you and also the question of how you approach issues of inherent jurisdiction or implied power, pretty much the same thing.
We say that is an absolutely critical feature in terms both of your interpretative approach and your approach to inherent or implied power.
We say, my Lady, we submit, that there is power to operate such a process and that that power is derived from and is consequent on a number of things.
Firstly, the accepted need, which no one denies, to carry out the investigative duty effectively. You will see that that purpose is at least reflected in rule 11.2

of the Coroners Rules, which provides for the examination of all purpose having knowledge of facts which the coroner considers it expedient to examine. Secondly, it is reflected in the acknowledged and accepted need to proceed fairly, and you have seen references -- I'm not going to turn up these rules unless we need to -- but you will have seen references effectively to the need to give those who might be the subject of criticism the opportunity to participate. That reflects the core principle of fairness; see in particular rule 20(2)(d), rule 24 and rule 25. Thirdly, it has been long acknowledged that the coroner has a broad discretion, subject, of course, to the constraints, such constraints as there may be, in the primary legislation and/or the rules, but a broad discretion to tailor the procedures followed to achieve the aims that I've identified and that aren't, I think, controversial. Perhaps the best authority for that is to be found in the bundle that your counsel have produced in the Hay case. I think it's at tab 7 of their bundle of authorities, a decision of the Divisional Court.

The relevant passage for our purpose is in paragraph 46, in particular the first sentence of paragraph 46. Do you have that on page 271, first

column, paragraph 46, first sentence:
"We are unwilling, for our part, to fetter the discretion of a coroner by being at all prescriptive about the procedures he should adopt in order to achieve a full, fair and thorough inquiry."
Then the final sentence:
"Subject to the need to obey the requirements of the Act and the rules, it is for each Coroner to decide how best he should perform his onerous duties in a way that is as fair as possible to everyone concerned, as well as doing his best to reduce the number of avoidable adjournments."
LADY JUSTICE HALLETT: How are they being asked to fetter a coroner's discretion in that case?
MR EADIE: I think they were -- let's go back to the headnote -- I think he was refusing to disclose a witness list before the hearing to the family members, as you see from the second paragraph of the headnote. Mr O'Connor says it may be the content of the evidence, but there's an attempt to trammel it nonetheless.
LADY JUSTICE HALLETT: Yes, it looks as if they were complaining that they hadn't had the opportunity to have a fair hearing generally.
MR EADIE: Yes. There seem to have been a number of

complaints, if one looks down the various findings 1 to 5.

LADY JUSTICE HALLETT: Thank you.

MR EADIE: My Lady, bearing in mind the effectiveness point and the fairness point, as acknowledged and reflected in the various rules and, indeed, the general approach to procedure that we see from ex parte Hay, we submit that those who advocate a process which would be fundamentally flawed, for the reasons I've indicated, and fundamentally unfair, for the reasons I've indicated, because it would necessarily involve the coroner making judgment about important issues on only part of the information, they must assert, we respectfully submit, such a course -- in other words, adopting a procedure which would allow you to receive all the information -- is positively prohibited by the rules. We say that is the correct approach in principle.

You have the broad discretion that ex parte Hay acknowledges. You should tailor it to ensure that your investigation is thorough, full, fair and so on, and the investigation is ultimately effective and, given the consequence of my learned friend's arguments, we say that you should not be deflected from that course unless the rules positively prohibit you from achieving

fairness, from achieving effectiveness.
My second submission is that, not merely do the rules not positively prohibit that outcome, but they positively contemplate the possibility of a closed process.
All concerned, I think, accept -- and I use the words in Mr Keith's helpful skeleton submissions -- that rule 17 of the Coroners Rules is pivotal, and we accept and assert that description.
There have been various versions of the rules floating around. I got a loose version, I think from Mr Keith, which is probably the most helpful because it contains all the rules rather than simply a selection of them. We've got some of them behind tab 7 of our bundle, and the loose clip that I was handed I think was to go behind tab 3 of their bundle, but, my Lady, you probably have enough of the rules anyway. Rule 17 is the one that we're after, wherever you may find it. It certainly is behind tab 7 of ours.
LADY JUSTICE HALLETT: Right.
MR EADIE: Rule 17:
"Every inquest shall be in public ..."
That's the general rule, everyone accepts that.
"... provided that the coroner may direct that the public be excluded from an inquest or any part of an

inquest, if he considers that it would be in the interests of national security to do so."

So there is a specific and express power to exclude the public on the basis that it would be in the interests of national security to do so, and my first submission in relation to that rule is that, on its face, it is clear that that power must cover any and all national security reasons. The proviso is premised on it simply being in the interests of national security to do so.

What that means, if it's got to cover any and all -- legitimate, of course, but any and all legitimate national security reasons, is that the rule is evidently designed to protect, by way of excluding the public, that information which it may be in the interests of national security to protect, but which exists, as it were, at the bottom of that scale, right the way up, to information at the very top of that tree in terms of seriousness. The most serious information imaginable.

There is no warrant, I submit, and none is suggested, for restricting the reasons for exclusion, only to certain of the less sensitive types of national security information.

Some information, as my Lady will be well aware, covered by national security concerns, simply can't be

disclosed outside the narrow circle, and there are, in general, a series of systems that are set up and that are designed to protect against any wider release of information into the public domain, systems of developed vetting and so on.

That entire system is premised on the proposition that information, at a particular level of sensitivity, simply cannot be disclosed otherwise than to cleared individuals. That's not simply the government being difficult, but those rules exist for the protection of the public.

If that is so -- in other words, if this proviso covers all the national security reasons -- what that indicates is that it is highly likely that there will be situations in which interested parties will not be able to see such information, and we do say that it is very interesting to note who the interested parties in an inquest might be. Look at rule 20:

"Any beneficiary of a policy of insurance issued on the life of the deceased, the insurer", and so on.

One can test the proposition perhaps most graphically by positing the situation in which one of these bombers actually -- or in which these bombers were interested parties or their relatives were interested parties.

Is it to be said that rule 17 would not permit them to be excluded from parts of the hearing at which this national security sensitive information, potentially at the very top of the tree in terms of seriousness, is considered?

We say that rule 17 cannot, on any sensible view, be interpreted to create, as it were, a cutout from the proviso to create rights in interested parties to see the information. That cannot possibly be right. It is, therefore, clear that rule 17 must contemplate the exclusion of interested parties, must omit it.

We say that it is not merely entirely possible, but entirely natural, to construe the public as meaning exactly that: everyone, including interested parties. There is no cutout for interested parties. If there were, those who represent the bombers could claim access to the national security sensitive information and that would be a nonsense.

My learned friend Mr Keith seeks to advance an argument or a series of arguments that suggest that public, and indeed this provision, rule 17, is designed simply to permit in camera proceedings and, therefore, cannot be operated to exclude interested parties, but we respectfully disagree for the reasons I've indicated.

LADY JUSTICE HALLETT: It would be the usual way in which

lawyers approach the exclusion of the public, would it not? I mean, isn't that the way we normally exclude the public, say, from a criminal trial or -- that would be how we would generally approach it. I appreciate that may not be necessarily be my guide to statutory interpretation, but --

MR EADIE: But it would cover that. The question is: does it cover that and nothing else? The difficulty that has to be confronted, for those who say it means only that, is to -- is the need, therefore, as a corollary of that, to assert that interested parties cannot be excluded.

LADY JUSTICE HALLETT: Mr Keith, as I'm sure you're about to come to, says "But look at three rules on, we have the mandatory provision that an interested person shall be entitled to ask questions". It's only three rules on. No mention of, "save in the interests of national security".

MR EADIE: That I'm going to come to, because he relies, not merely on rule 20, but he also relies upon rule 37 and rule 57.

LADY JUSTICE HALLETT: And the right to a jury, yes.

MR EADIE: Exactly. I'm going to come to those, but just simply on the face of this, on the face of rule 17, what has to be said is that you cannot exclude -- even though the premise is in the interests of national security,

you cannot exclude interested parties, and we say that is a very, very peculiar outcome, if that is right. My Lady is right, often rules which deal with in camera proceedings are expressed in this way. But we say that, given the reference to the interests of national security and so on, and given the extraordinary consequences that would follow, if you weren't allowed to exclude interested parties, that is not an attractive interpretation. Particularly if this argument, which it is, is put forward in order to assert that you cannot receive information which is highly relevant for the function that you are here to perform. He says, "Well, if I'm right" -- first of all, he says, "Well, that's excluded the editors, the learned editors of Jarvis for the last 50 years", to which, without any disrespect to the editors of Jarvis, our first answer is "So what?" But the second and perhaps more principled answer is: did they, in fact, turn their mind to this issue and then reach a view, contrary to it? To which the answer is evidently not, because the learned editors of Jarvis simply do not grapple with this issue. There is no positive indication in the textbooks, that we are aware of, that they even considered this point.

LADY JUSTICE HALLETT: They seem to refer to the state of the common law prior to 1953, so it seems to have

crossed their mind, doesn't it?
MR EADIE: My learned friend also makes a point in relation to that, but as I understand it, he says, in relation to the state of the common law prior to that, that you could exclude everyone, including interested parties.
LADY JUSTICE HALLETT: He disagrees with Mr O'Connor on that.
MR EADIE: He does. Then he says what happened when they introduced the rules was not merely a codification but a narrowing, and you will not be surprised to know that we agree with him on the first part of that proposition, codification, and fundamentally disagree with him on the second part of the proposition (narrowing).
We say that, when they introduced the rules, they used the concept of the public to mean the public, and my learned friend Mr Keith acknowledges in his argument that, in order for his construction of the rule to be right, he has to imply words for the avoidance of doubt, and we say that that recognition is itself an indication, and a powerful indication, that he is some distance from the natural meaning of the word "public", but our core point on this goes, not as a matter of linguistic analysis, but goes to the core purpose of this provision and, most importantly, to the consequences of being unable to exclude interested

parties in circumstances where you're dealing with the very situation which the rule is contemplating: namely, information which cannot be disclosed in the interests of national security.

LADY JUSTICE HALLETT: As far as your definition of the public, that does not include obviously the coroner?

MR EADIE: No.

LADY JUSTICE HALLETT: You say it wouldn't, in this case, include Counsel to the Inquests and Solicitor to the Inquests or --

MR EADIE: My Lady, we are content for them to be present.

LADY JUSTICE HALLETT: Ah, "content" is not the same as the statutory definition.

MR EADIE: We say that the public doesn't include you, certainly, and we do not assert, if I can put it this way, that it includes Mr Keith and Mr O'Connor and my learned friend.

LADY JUSTICE HALLETT: But you assert that it includes other counsel?

MR EADIE: We assert that it includes other counsel and we assert that it includes interested parties.

LADY JUSTICE HALLETT: So for these purposes, the Counsel to the Inquests are, as it were, part of me, is that the basis of your submission?

MR EADIE: They are part of you. I'm not excluding the

possibility there might be a problem if Counsel to the Inquests in a particular case was not, for example, developed vetted.

LADY JUSTICE HALLETT: That makes this rather a complicated definition, doesn't it, whether, if we go down the line of, but if I had instructed somebody else to be Counsel to the Inquest, who wasn't vetted, that surely doesn't really assist on statutory interpretation?

MR EADIE: My Lady, it doesn't, but we say what you can't do is to reason from the proposition that we are content --

LADY JUSTICE HALLETT: It's a pragmatic concession.

MR EADIE: It's a pragmatic concession, but we also say that what you cannot do is to reason from that pragmatic concession to the proposition that the public must, therefore, indicate that all and sundry, including the bombers, must be allowed in.

LADY JUSTICE HALLETT: Because if I forced you, you'd say public means everyone but me, so don't go down that path, because we may not end up with our effective hearing?

MR EADIE: Quite.

LADY JUSTICE HALLETT: I follow.

MR EADIE: I'm afraid fairness does involve always a bit of a mucky compromise in the end.

But we say that, otherwise, the concept of public

should not be artificially restricted by the implication of words. We say its fundamental purpose is clear.

And I come back to the first, the very first point, I made before we entered into this territory, which is that, given the points I made at the outset and the need for effectiveness and the need for fairness, what has to be demonstrated, in my submission, is that the rules are positively inconsistent with your performing an effective and fair resolution or investigation of those issues.

My Lady, then the other rules. Can I start at the back end, as it were? There are rules dealing with the record of evidence. I think it's 57. Notes of evidence and so on.

Now, the reason we've accepted and we assert that rule 17 is pivotal is because it does inevitably impact on the way you approach these other sequential rules. If I am right in my interpretation of the width of permissible interpretation, or the natural interpretation, as we would submit, of rule 17, it plainly impacts, for example, on rule 57. Of course, on its face it looks as though there is, as it were, an unqualified right to receive all notes of evidence, but it is impossible sensibly to construe that rule as, in effect, undermining the power of exclusion in rule 17.

Suppose you exclude the public, including interested parties, from a segment of the hearings and you then receive evidence during that segment from which they're excluded. Is it to be said that, although you had power to send them out and exclude them, you nevertheless are then obliged, through the apparently unqualified wording of rule 57, to undo all the good that you've previously done through 17 and open up that which is national security sensitive through the provision of notes -- my Lady has the point.

LADY JUSTICE HALLETT: Self-defeating you'd say.

MR EADIE: It becomes self-defeating, but self-defeating in an extraordinarily damaging way. It would then operate directly contrary to the core interests that are designed to be protected by rule 17 which exists for the protection of the public.

LADY JUSTICE HALLETT: It looks as if, after rule 17, national security has just gone out of the window, as far as the rules are concerned.

MR EADIE: It's not expressly referred to in any other rule, but we say that is because those other rules must be read subject to rule 17. That's why I accepted and asserted the pivotal position of rule 17, as Mr Keith asserts it. We say he's entirely right, because it would be deeply bizarre if, with the one hand, the rules

allowed exclusion on that very ground, in other words, in order to protect the interests of national security, but, on the other hand, took away that protection. We say that is perhaps most clearly illustrated by rule 57. My Lady has the point about self-defeating and inconsistency, but it applies equally to, for example, rule 20. Can you exclude them under rule 17 in order to protect the interests of national security, but then, nevertheless, be obliged to let them in for the purpose of examining the very witnesses whose evidence needs to be protected on national security grounds? That would make a nonsense of rule 17.

LADY JUSTICE HALLETT: Is there any distinction at all -- I'm sure there isn't, but I just want to check -- between the functions of an inquest enquiring into the circumstances of death and the making a report under Rule 43? There is no distinction, is there?

MR EADIE: I don't think for this purpose there can be, because all that that ultimately does is to focus on the end product. What we are dealing with is the process here, at this stage at least, we are dealing with the process by which you reach those judgments. Your judgments on the "how" question and your judgments on whether or not Rule 43 requires an additional report. But here we're dealing with the primary investigative

function rather than its conclusion and its consequence. We say there can't be a distinction, as far as that is concerned.

We say the same answer must inure both for rule 57, rule 37 in relation to documentary evidence, and also in relation to rule 20, which I think was the rule that my Lady alighted on, the examination power. How can it possibly be that people can be excluded under 17 on national security grounds, but nevertheless assert the right to examine witnesses who might give evidence that there needs to be a protective for precisely that reason.

If necessary -- that's our primary answer on rule 20 -- if necessary, there is a separate answer which is, in any event, rule 20 must itself be subject to some implicit limitations, and there is perhaps a question of interpretation there about what the word "examination" means. Does it mean simply, as it were, a sterile right to ask questions which can then not be answered for good reasons of national security?

If it does cover, at least prima facie, through examination, the giving of answers not merely the asking the questions, we say it must be subject, in any event, to certain implicit limitations, through PII and so on, to prevent, as it were, the giving of answers. So there

is already and in any event an implicit limitation within rule 20. Once one acknowledges that, it is but a short step to recognise that the rules must be read coherently and together and that the specific reference to national security in rule 17 does necessarily have wash-over effects into the approach that we should properly take of the other rules.

LADY JUSTICE HALLETT: Is there any help to be gained for me in other proceedings; for example, proceedings where somebody would normally have the right to know what the material was that was being used, to deport them or to impose a control order, but we then have a Special Advocate who does the examination themselves? Is there any help to be gained from that kind of proceedings, as far as interpretation of the right to examine witnesses under rule 20 is concerned?

MR EADIE: I'm going to come to Al Rawi in a moment, but in my submission, it's a bit difficult to go too far down that road, for reasons which I'm going to come back to, I'm afraid, again and again and again, which is the difference in terms of the functions between you and a court in that sort of situation, SIAC, or whoever it may be.

The one thing that can, I think, fairly be said is that there are a variety of different -- now, in modern

legislative schemes, there are a variety of different ways in which these sorts of things are dealt with. You have in the bundle already the contrast between us and the Inquiries Act sorts of process, the different language which is used there. That itself stands in contrast to the differently set up statutory scheme; for example, dealing with control orders and the SIAC procedure.

LADY JUSTICE HALLETT: They're all statutory based and they're all statutory schemes, so I don't get any help there.

MR EADIE: My Lady, they are all statutory schemes and Al Rawi, which I'm going to come to, did raise the question whether or not you could appoint a Special Advocate in the absence of such a process, but in my submission, what you have to do is to recognise that your function is investigative and that you have to construe the rules as they are to allow you to achieve the objectives and the fundamental objectives that underpin the inquisitorial process that you're engaged on. My submission is that you don't get a great deal of assistance from other parallel statutory schemes and you particularly don't get a great deal of assistance from statutory schemes which are designed to deal with processes that are fundamentally adversarial, be they

ordinary civil proceedings, or be they situations in which the state is itself imposing restrictions on individual liberty or movement.

So that's what I say about inconsistency with the rules and the manner in which you should approach the interpretation of the rules; fundamentally affected by the nature of the function that you're engaged in.

But the second point that is then taken is: well, what if there's a jury? The short answer to that is that different considerations would then be in play because no one asserts that sensitive information could be disclosed to a jury, but that isn't a good argument, in my respectful submission, for there being no power to do so in any circumstance.

The inability to provide critically important information to the finder of fact is, on any view, a handicap to effectiveness and fairness, and it would, I suggest, be very odd logic indeed to use that to justify extending the handicap outside the sphere in which it has to operate.

Then it is said: well, there is an alternative, and this is the principal argument that seems to be deployed to meet the, I suspect, acknowledged difficulties in terms of providing an effective and fair process on any part of the information. It is said: well, there's an

alternative, which is section 17A.
Section 17A is a relatively late legislative arrival. It exists as a power in the Lord Chancellor, as my Lady will be well aware, but that doesn't solve the problem. It doesn't provide an answer to the fundamental fairness and effectiveness issues that are raised.
It never used to exist when the coronial rules did exist, so the question arises: well, what was the position at that time, ie before 17A even existed? And I've made my submissions about that. We say that 17A can't, as it were, come galloping after the event to the rescue. But in any event, and more fundamentally, the Lord Chancellor, in whom the discretion resides, may, for a whole variety of different reasons, including, it may be said, delay, may well decide that he doesn't want to turn the thing into a public inquiry. What then? The duty would remain on the coroner, under the legislation and the rules, to conduct an effective and fair inquisitorial process and the rules would have to be construed, we submit, in order best to achieve that, subject to any necessary limits.
The question, ultimately, is whether or not that can be achieved under the rules. It is no answer to say there is another possible process which might or might

not occur which draws the sting.
My Lady was reminded, as I was speaking just then, I made the point at the outset of these submissions that the test was whether or not the rule positively prohibited you from conducting an effective and fair investigation. I was reminded that there is, of course, a very well-established line of authority ex parte Simms, the principle of legality, and, indeed, the principles that govern the situation when it's argued that legislation excludes a common law right or remedy, and the principle that is there applied, well-established under Simms, but also that other line of cases, Johnson v Unisys and so on, that says, if you're going to do that, you must do it clearly. You must do it, either expressly in legislation, a fortiori secondary legislation, you must do it either expressly or by necessary implication.
I'm afraid it may not be in the bundles, but we'll fish out the relevant authority. I think there's a passage and speech by Lord Hobhouse in a case called Morgan Grenfell in which he analysed what necessary implication meant. It was in the context where legislation was said to exclude LPP, and what he said was that necessary implication -- I summarise -- does not just mean it would be quite a good idea as a matter

of interpretation, it means there must be a logical inconsistency, in effect, between the nature and terms of the legislation in question and the continuance of the right. We'll furnish that passage.

We say a very similar approach should apply here precisely because the consequence of the arguments against me is to undermine effectiveness and is to undermine the ability of the Security Service to defend itself and, therefore, fairness.

May I deal with Al Rawi? I haven't got a great deal to add, I think, to the relevant paragraphs in our written submissions. The relevant paragraphs are paragraphs 28 to 32 of our first rather than our response submissions. Al Rawi is at tab 23 in our bundle of authorities.

I'm not going to spend long on this, because we've given you the relevant analysis that we submit is the case, and in the skeleton submissions.

What, in essence, we submit is this: that the Court of Appeal in Al Rawi was dealing, in effect, with a rather different issue, which is whether or not you could appoint Special Advocates without specific and express statutory permission to do so.

They held that you couldn't do that in what they described as being ordinary civil proceedings, but --

and it's a pretty important "but" -- that was because, in those sorts of proceedings, the judge is acting as arbiter as between private interests and they specifically acknowledged that a different principle might well apply where there were what they described as being "significant public interest elements", and they had to draw that distinction because, when you read the judgment, you will see Mr Justice Silber, who decided to the contrary at first instance, had cited and relied upon a whole series of cases in which Special Advocates either had been appointed or had been contemplated, for example, by the House of Lords in a succession of cases, Roberts, R v H and so on, when there hadn't been statutory authority for such an appointment, and so the Court of Appeal recognised that there were such situations; in other words, where you could end up with, in effect, a closed process with the Special Advocate providing, as it were, the fairness sop to that, to try to mitigate any unfairness in relation to closed evidence.

We respectfully submit, therefore, that the prior question, which is posited by Al Rawi, is whether or not the proceedings in question are "ordinary civil proceedings", on the one hand, or proceedings in which there are significant public interest elements, and we

say it's absolutely clear that the process of an inquest, particularly one of this kind, on any view, involves the most significant public interest elements. So inquests of this kind squarely fall within precisely that category of case that the Court of Appeal recognised might need to have both a closed process and a Special Advocate, even in the absence of statutory authority.

My Lady, as I say, I'm not going to go through it in any great detail because the relevant paragraphs and, indeed, those submissions are set out in writing in our written submissions.

There is perhaps one point, however, that should be picked up in relation to Al Rawi and it is, I think, a point that we touched on when we were discussing whether or not this hearing should happen and, if so, when, I think my learned friend Mr O'Connor made a couple of points on it.

It goes to the nature of the closed process, which, again, is a matter that my learned friend Mr Keith in his skeleton has touched on at the outset by way of a preliminary point.

You will see from Al Rawi, if you still have it open, paragraph 2, the nature of the closed process that was being asserted.

LADY JUSTICE HALLETT: I've read that.
MR EADIE: What was being asserted in that case was that you should have a process which involved, in effect, no PII balancing. You simply said, "Is it going to be not in the interests of national security? If so, let's have a closed process and let's not go through the balancing exercise that PII would require", in other words, damage versus interests of justice and so on.
It's unsurprising, therefore, that in that circumstance, the Court of Appeal said, "Well, hang on a second, you can't turn up and say interests of justice require me to have a closed process because, otherwise, I'll only have part of the material, but, on the other hand, I'm not going to do the interests of justice part of the PII analysis because it's going to be frightfully inconvenient because there's so many documents and it's going to be unworkable."
We're not saying that here. We are entirely content for my Lady to go through that PII balance before you reach the doors of the closed process, as it were. We are entirely content for you to take into account the interests of justice, the side of the PII balance, in assessing what material can and should be made available to the families before one gets to the closed process.
What we do say, and what we will say, when we come

to it eventually, is that it would be relevant for you to take into account in assessing the interests of justice whether or not there is available to you in principle a closed process. One could put that question rather differently: is it relevant to the interests of justice part of the PII balance that the material is either (a) excluded in its entirety, or (b) could be taken into account by the coroner in a closed process? To which we say the answer is plainly "yes", and we say that point isn't touched upon at all by Al Rawi.

We say there's no difficulty created by Al Rawi.

My Lady, RIPA, if I may, and I'm conscious of the time, but RIPA, if I may, now.

The basic structure of RIPA is that there is a preclusion in section 17.1 and there are then permissive but limited exceptions in section 18.

It is, of course, the position that one would need to consider whether or not, if there was such material, its revelation, either in totality or by way of a gist, would be in breach of the preclusion in section 17.1.

That's got to happen anyway.

But if one can gist it, you're not in the territory that we're worried about.

The real issue that arises for you to determine, given that there appears now to be an element of common

ground as to the coverage of section 17.1, is: what is the true nature and scope of the permissive exception in section 18.7(b)?

We say that, first of all, that issue of interpretation is properly to be approached having regard to the fact that the interests of justice may vary and may differ as between different contexts, and all the points I made at the beginning feed in to the nature of the interests of justice in our particular context.

I've made submissions in writing as to whether or not you are a relevant judge for this purpose. My learned friend Mr Keith was graceful enough to concede that, in this respect, we had made what he described as "a fair point", for which we are deeply grateful, and the fair point I think was that, if you're not a relevant judge, section 18.11 is cast in rather surprising terms because it doesn't include the words "when acting as such". I think I described it rather inelegantly the section 18.11 issue as being a status or a jurisdiction thing. You will appreciate from the written submissions that we say it's a status thing. Perhaps the only point it is worth bringing out orally in relation to that is that it would perhaps have a quite surprising consequence, which is that, if you're

not a relevant judge for this purpose, you can't even look, and you would be precluded from looking, at the material for any purpose whatever, even to see and check to satisfy yourself as to whether or not an appropriate gist had been given or whether or not gist could be given, but we say that it is clear, for all the reasons we've submitted in writing, that you are a relevant judge for this purpose.

Then the real question becomes: well, receipt for what purpose? Disclosure for what purpose? Plainly 18.7(b) would cover disclosure for what can be described as the policing purpose, ensuring that gists are properly given.

There is then, however, the more difficult question, which is whether or not, in the context of an inquest of this kind, you can receive it and take it into account; in other words, you can go beyond simply that policing purpose and use it to inform your decision-making.

Can I make three brief points orally, without in any way derogating from the way in which we put it in our written submissions, in favour, as it were, of the proposition that you can and should be allowed to, and you do have power, to receive it and take it into account?

The first point is that it is perhaps appropriate to

test the position by reference to public inquiry proceedings, which are specifically dealt with, as you see, in 18.7(c) and 18(8A).

No one, I think, contends that a public inquiry set up under the 2005 Act, could not receive this sort of material. Indeed, my learned friend Mr Keith positively relies, it appears, at least implicitly, on the fact that that could occur, because he says the answer to my fairness and effectiveness problem is provided by section 17(a), ie set up a public inquiry.

So he positively asserts, as I think no one quibbles with, that if you were in public inquiry context under RIPA, that sort of material could not merely be received, but could be taken into account, and that prompts the question: well, how is that permissible having regard to the language of the Act? The answer to that is: through section 8, subsection (8A)and through the concept of disclosure in section 18.7(c).

That is the mechanism, the doorway, through which RIPA material would be received in a public inquiry. So the second point that we make orally is to pose a question: are the tests set out on the face of the statute so different? I say "so different", so different as to lead to the fundamentally different conclusions, ie you can receive it and take it into

account in the public inquiry, but not at all in an inquest.

The answer to that, we submit, is that they are not so different. The same word "disclosure" is used in 18.7(b) and 18.7(c), and the statutory precondition to such disclosure is, of course, cast in different language as between subsection 8 and subsection (8A), but they are not so fundamentally different as to lead to that sort of radically different conclusion. They simply reflect the different functions and the different nature of the exercise that is being performed by, on the one hand, the public inquiry and, on the other, the relevant judge.

That isn't a difference, ie the difference between the language in 8 and (8A), given that the same language we suppose was used in the earlier provision, but the difference between 8 and (8A) isn't, to put it this way, a difference which would lend itself to a "yes" answer in the context of a public inquiry, but a "never" answer in the context of a relevant judge.

The third submission we make orally on this is that the test does focus on, and centrally focuses on, the nature and function of the proceedings and the nature of the functions that are, in fact, being performed.

I made submissions on the nature of the interests of

justice in the specific and special context -- and I emphasise "specific and special context" -- of this sort of inquest. We say it's a very parallel sort of process in its fundamentals to the public inquiry process, inquisitorial, no lis between the parties, the need to be effective, the need to be fair and so on. We say that there may, therefore, be very different results in terms of the relevant judge analysis as between, on the one hand, inquests, with all its special functions and purposes, and, on the other hand, what the Court of Appeal described in Al Rawi as ordinary civil proceedings with their adversarial nature, with their lis between the parties and so on. So there may well be different facets, different features, of the interests of justice in those two very different contexts. One perhaps doesn't need to worry unduly about that here, because the central question for you in this context is whether, in this special context of inquests, interests of justice does contemplate something more than simply receipt for the purpose of policing gisting, and we submit that, in that special context, it does.

LADY JUSTICE HALLETT: Can we go back, Mr Eadie, I would be grateful for your help on, what does section 17 and 18 achieve in your submissions?

MR EADIE: What are they designed to achieve?

LADY JUSTICE HALLETT: What have they in fact achieved?
MR EADIE: They have achieved a situation in which Parliament has sought to protect, by a series of special rules, this category of highly sensitive information and, in doing so, there is a strict preclusion in section 17.1, backed by a criminal sanction in section 19, but Parliament has also recognised that there may be certain circumstances in which it is appropriate and necessary for that preclusion to be lifted by way of permissive provisions.
LADY JUSTICE HALLETT: The certain circumstances, you say the Inquiries Act under 7(c) is clear and you say that "a disclosure to" must inevitably mean "and reliance upon"?
MR EADIE: In that context, yes.
LADY JUSTICE HALLETT: We seem to have it fairly clear what happens in criminal proceedings, which is the usual -- what criminal lawyers called PII, although it's in a slightly different context, they usually use it according to informants. So in criminal proceedings, the judge sees it and then essentially has it gisted, if possible. Is that right?
MR EADIE: It is possible, yes, and there are certain specific rules dealing with criminal proceedings in subsections 9 and 10.

LADY JUSTICE HALLETT: Indeed.
MR EADIE: But, yes.
LADY JUSTICE HALLETT: Then, of course, there's always the ultimate option in criminal proceedings that the prosecution can be pulled.
MR EADIE: Yes.
LADY JUSTICE HALLETT: I follow those, subject to what a disclosure to the panel of an inquiry means. What is -- what does (b) "a disclosure to a relevant judge in case in which that judge has ordered the disclosure be made to him alone" mean?
MR EADIE: That means that in the context of a context such as this, there can be disclosure for whatever purpose. That is the subject obviously of argument, but there can be disclosure to him, but to no one else.
LADY JUSTICE HALLETT: (a) is dealing with a person conducting -- 7(a) is a person conducting a criminal prosecution.
MR EADIE: Yes.
LADY JUSTICE HALLETT: So that's the normal criminal PII-type situation.
MR EADIE: Yes.
LADY JUSTICE HALLETT: (b) is "a disclosure to a relevant judge", which seems to be the judge, probably in a criminal trial, but you say it goes further.

MR EADIE: But not restricted to criminal, because otherwise, one has the special provisions dealing with crime and criminal proceedings in 9 and 10. So no one, I think, asserts before you that (b) is restricted to criminal judge alone.

LADY JUSTICE HALLETT: (c) we have "disclosure to a panel of inquiry", and as far as the use of the material is concerned, the only help we get from RIPA --

MR EADIE: Is from 8 and (8A) and the word "disclosure". The word "disclosure" doesn't help you with for what purpose.

LADY JUSTICE HALLETT: The only help is whether or not the judge can let other people see it under 8 and (8A) and then, under 9, a gisting process.

MR EADIE: No, pause there, 8 and (8A) aren't dealing with the limits of -- aren't dealing with the limits of disclosure outside the judge. What they are doing is to provide the statutory precondition to the sorts of disclosure that are referred to in 7(b) and (c).

LADY JUSTICE HALLETT: Right. So, so far, all we've got is the material has got into the hands of a person conducting a criminal prosecution, a relevant judge or a panel of inquiry. What I want to know is what help I get from the Act on the next step, because you make what seems to be a leap from disclosure to the judge to "and

use of and reliance upon".
MR EADIE: Yes, and --
LADY JUSTICE HALLETT: Where do I get this from RIPA?
MR EADIE: From sections 8 and (8A), because we say that the -- we say that those are -- those statutory preconditions to the sorts of disclosure in 7(b) and (c) inform the purpose for which that disclosure can be made. On the face of the legislation, the purpose for which the disclosure is to be made in 7(b) and (c) is not specified, but the question is: are there statutory indications -- which I think is the question my Lady poses -- are there statutory indications, on the face of it, which assist in determining what purpose disclosure can be made for to that category of person? That, I think, is the question you're posing.
LADY JUSTICE HALLETT: It is. You say, if it's disclosed to the inquiry, and there's nothing else said about an inquiry, it has to be for use and reliance upon because, otherwise, what's the point of disclosing it to the inquiry?
MR EADIE: Moreover, if you look at the statutory gateway to disclosure, that helps you, because what (8A) says: "A panel shall not order disclosure, except where it is satisfied, in the exceptional circumstances of the case, to make the disclosure essential to enable the

inquiry to fulfil its terms of reference."
So in order to get through the door, as it were, you have to satisfy that test, but that test doesn't merely, we respectfully submit, provide you with the statutory precondition, it helps to inform the answer to the "what purpose" question.
LADY JUSTICE HALLETT: So the inquiry orders disclosure to itself --
MR EADIE: Yes.
LADY JUSTICE HALLETT: -- in exceptional circumstances, because it is essential to enable it to fulfil its duty?
MR EADIE: And its terms of reference will say: enquire into the circumstances in which -- or enquire into the allegations made by Iraqi prisoners of British forces that they were ill-treated, and lessons learned. In order to fulfil their terms -- their terms of reference, they may need to see sensitive information.
LADY JUSTICE HALLETT: Then we have -- we know from the criminal provisions that a criminal judge can order disclosure to himself for the purposes of seeing if gisting is possible, or admissions made, it comes to much the same thing.
MR EADIE: Yes.
LADY JUSTICE HALLETT: There seems to be this gap for other proceedings.

MR EADIE: There isn't a gap, there isn't a gap, unless you construe "relevant judge" in 7(b) as applying only to relevant judge in criminal proceedings, which is not the interpretation that could possibly be put on 7(b) and no one asserts to the contrary.

So you have to assume for this purpose -- without trying unduly to blur the issues, you have to assume for this purpose that "relevant judge" refers to a judge in civil proceedings, whatever that may mean. Assume that refers to you -- and I know we have an argument about "relevant judge" in the coronial context, but leave that on one side, assume that it's you. The question then is: for what purpose can you receive it? Can you receive it only for the purpose of the same purpose that the criminal judge could receive it, ie checking the gisting, policing? We're all concerned, I think, and are happy that, if you are a relevant judge, you can do that.

The question then is: can you do more? And the answer to that, we say, is informed by the nature of the test that is set out in 8 and (8A).

LADY JUSTICE HALLETT: High Court, Crown Court, circuit.

MR EADIE: We're back on "relevant judge".

LADY JUSTICE HALLETT: I'm just going through what judges, Parliament had in mind. A crown Court judge is usually

a circuit judge, but may be a recorder. Is there any distinction there? Does a Crown Court judge include a recorder?

MR EADIE: It would do, I think, because of 11(d).

LADY JUSTICE HALLETT: Right.

MR EADIE: Which, again, is cast in terms of status rather than jurisdiction.

LADY JUSTICE HALLETT: Do I have any other assistance on whether this is meant to apply to criminal prosecutions and inquiries and not civil proceedings? Is there anything else?

MR EADIE: You have the indications that you have in the section itself, which make specific provision for criminal proceedings, what it means to restrict things to criminal proceedings, and I don't think anyone before you is arguing -- rightly, we respectfully submit -- that "relevant judge" is confined to relevant judge in criminal proceedings.

LADY JUSTICE HALLETT: So what we have is Parliament just hasn't helped us, if I happened to be a civil judge, as to what --

MR EADIE: In my respectful submission, Parliament has indeed helped you, and it has helped you because it has set out the precondition for your receiving the information in the first place, and that precondition,

in the context of civil proceedings, is to be found in subsection 8, which is "essential in the interests of justice".

So what has to be said is: well, it's essential in the interests of justice that the judge should look at it for the purpose of gisting in the special context of an inquest, but not essential in the interests of justice that you should receive it for any purpose, ie to take it into account.

LADY JUSTICE HALLETT: If you are right, if RIPA material existed, if I received it, if I acted upon it, what I would say at the end of these inquests is, if -- which I neither confirm nor deny -- I was shown RIPA material, I have or have not taken into account.

I mean, my findings at the end become somewhat Alice in Wonderland-ish, don't they?

MR EADIE: You may be forced into that Alice in Wonderland-ish and rather difficult position, or it may well be that RIPA material would help inform the judgment that you make about particular broad issues without any need to make specific reference to them.

LADY JUSTICE HALLETT: I cannot tell you why, but I'm satisfied of X?

MR EADIE: Yes, that is the limit of it. But that is the parliamentary compromise. Of course, it is difficult,

but that flows -- that is simply a consequence of the information being of the particular and special -- specially needed for protection. I mean, there isn't -- that is simply a function of that. In my submission, it would be quite difficult, however, to reason from that difficulty -- my learned friends make some points about verdicts, fair enough, it does create some difficulties in relation to verdicts, but it's very difficult, in my submission, to reason from that difficulty to the point where you're saying: I assume -- test it in this way. Assume there is a piece of RIPA material which you look at, assume you look at it for the purpose of gisting and, on the basis of all the other material, apart from the RIPA material, you would have concluded that A said X to B on a particular day, but the RIPA material makes it quite clear that A did not in fact say X, A said the direct opposite of X, and that that's critical to your finding, so you would conclude, if you were free to do so, that it's essential, for the purpose of reaching a proper finding on the issue to which that material goes, that you know and understand the true content of that telephone conversation.

LADY JUSTICE HALLETT: How does anybody ever challenge what I find or do anything about it? It all has to be, what, a closed hearing before a Divisional Court, a Court of

Appeal?
MR EADIE: Yes, exactly so.
LADY JUSTICE HALLETT: My counsel wouldn't know what to do, would they?
MR EADIE: You would be friendless, everyone accepts you would be friendless in this endeavour. You would have us to help. That may be no comfort at all. Indeed, Mr O'Connor accuses us of being a battery of Home Office lawyers. You would have us, but that is the consequence. That is -- I mean, one can't get out of that, because there a plain contrast between the provisions which govern public inquiry, which do allow disclosure to the Counsel to the Inquiry, and those which apply in this context where that provision doesn't exist, and one can't get out of that.
In my submission, the point that you were truly -- the point that you were on before, which is really at the nub of the issue, is the "For what purpose, and do we get any help from the statute?", and my short answer to that is, "Yes, we do", and we get that help from "essential in the interests of justice" or "essential for fulfilling the terms of reference in 8 and (8A)".
My Lady, as I say, the friendless consequence, I'm afraid, is a consequence of the legislation. That isn't a good argument, however, for your not receiving

information that you might otherwise regard as being essential in the interests of justice and, indeed, the fact that that is so is evident from a series of cases where the court has itself looked at closed material without the benefit of a Special Advocate, and we've got some authority, if you need it, Murungaru, for example, in a case which I managed to lose, called Malik, in which the court said "Don't worry about that. We'll look at the information, we'll do the best we can. We're not going to have a Special Advocate, because we don't think we need one. We think we're quite capable of looking at this information and taking it into account."

So the fact that you might be friendless is not, with respect, a good argument for excluding information which you might otherwise judge is essential for to you receive and consider in the interests of justice. You just have to do the best you can, faced with a battery of Home Office lawyers.

LADY JUSTICE HALLETT: I am not scared of being friendless, Mr Eadie. What I don't take kindly to is the thought of providing a ruling, for which I would normally provide reasons and explain the evidence justifying my conclusions. That is what I find is an unsatisfactory prospect.

MR EADIE: I do understand that, but that is a difficulty under concern which we don't diminish. That is a difficulty and a concern which exists in any context in which there is information which can't be made public. In the end, there is a choice. That is, of course, a difficulty, and it is a compromise on the important principle that everyone accepts as an important general principle, which is open justice. But there is on the other side of the equation an equally compelling set of circumstances, namely, those I identified at the outset: are you prepared to go down a process where you are going to make a decision, performing an investigative and inquisitorial function, on the basis of material which is not the complete picture? Indeed, excluding material which might be utterly critical to a particular issue.
They are not easy issues and no one is pretending otherwise.
LADY JUSTICE HALLETT: One final question, sorry to interrupt you, but I think -- it's probably my fault -- we've gone over time. One final question.
MR EADIE: Yes.
LADY JUSTICE HALLETT: Why is it that (8A) says that the inquiry can order disclosure essential to enable the inquiry to fulfil its terms of reference, but the

relevant judge just says "makes disclosure essential in the interests of justice" and doesn't say "to enable the judge to carry out his function"?

MR EADIE: I suspect that the answer to that is because the interests of justice rubric, as it were, is deliberately broad and would encompass taking it into account in the context of an inquest, but as I said earlier, there may be very different circumstances that play on what the interests of justice do and don't require in particular contexts.

So, for example, it does not follow from a conclusion that you could receive it in the context of this sort of inquest, it does not follow from that that a judge, in an ordinary adversarial civil claim for damages, could receive it. The interests of justice might be different in those contexts, and that explains why there is that difference of language.

Again, one can ask that question in a rather different way. Assume for the sake of argument that Parliament did indeed intend, as we submit, that public inquiries should be entitled to receive and take into account, is that difference of language so significant as to lead to the "yes" answer in one context in the public inquiry and the "never" answer in the civil context or the inquest context? We submit the language

simply can't bear that weight.
LADY JUSTICE HALLETT: Right.
MR EADIE: My Lady, that's it from me. I'm sorry I've gone over time.
LADY JUSTICE HALLETT: No, I've asked questions as well, Mr Eadie. Estimates are always intended to have some flexibility.
Let me just check with Mr Smith, as far as my timetable is concerned. Did we allow a break?
Shall we shorten the break? I'll break for just ten minutes.
(11.30 am)
(A short break)
(11.40 am)
MR EADIE: My Lady, I'm very sorry, just before I sit down, I mentioned a case in my submissions culled Murungaru and another one called Malik. Hopefully, they've been distributed now. I've had put on your desk, if that's acceptable, both of those judgments and I've put a blue line down the relevant paragraphs which we would invite you to have regard to.
LADY JUSTICE HALLETT: Thank you, it looks as if Mr Smith already has them inserted, thank you very much. Now, who's next?
It looks as if it is Mr Skelt.

MR SKELT: I understood I was next on the order, but if that's inconvenient, then I'm content to give way.
LADY JUSTICE HALLETT: That's fine, thank you very much.
Submissions by MR SKELT
MR SKELT: My Lady, West Yorkshire Police support the position just outlined by my learned friend Mr Eadie. Whilst we have stated in our written submissions the reasons for that stance, it's perhaps important to briefly say in open court, for those who may be interested, why, so that they may know why.
This argument is, of course, all on the assumption that there is significant material that can be taken into account and should be taken into account by you in performing your judicial function and, however it's described, the materials being described, or at least the assumption has been described as material that is either critically important, potentially crucial, or words along similar lines.
It's our short submission, given the purpose of this inquest and the nature of that material, that it cannot be right and, indeed, cannot be the law, that you are denied, as the coroner, my Lady, from taking into account that material on crucial issues.
What my learned friend Mr Eadie has submitted, both in writing and today, provides, we respectfully submit,

a mechanism whereby you can both receive and rely on, if appropriate, that material whilst crucially avoiding any collateral damage to the protection of the public at large.

The unhappy alternative would be that crucial material is effectively ignored in this inquest process, which we respectfully submit would significantly undermine it.

Whilst this is centred really solely on preventability, that is a crucial issue, one of the key issues, in this whole process.

My submission is, my Lady, that we have now an inquest, and it appears likely to be the last and only public examination of these issues, principally preventability. There is no public judicial inquiry pursuant to section 17(a), and all indications, certainly that I've seen or heard to date, suggest that there will never be one.

I make no comment on that. It is purely a fact of where we are at the moment. To that end, I'd respectfully submit that references to the section 17(a) public judicial inquiry providing the answer are mistaken and unhelpful.

Much criticism has been made earlier on in submissions relating to scope of the ISC report, that,

of course, itself being addressed solely to preventability.

There is, we'd respectfully submit, a real risk that in fact, if my learned friend Mr Eadie's submissions are not correct, that the ISC report will have been conducted on a more informed basis relating to preventability than this inquest, and perhaps that, with respect, underlines the reduction in effectiveness of this inquest if this material cannot be received and relied upon, if appropriate.

My Lady, we do have an inquest. We do not have a public inquiry. Within this inquest, preventability is being considered, but it has, of course, taken us five years to get to this critical stage, and certainly the West Yorkshire Police would wish, if at all possible, to avoid any further delay at all in the resolution of the questions and the issues that have been identified, and we, through supporting my learned friend Mr Eadie's submissions, would seek to put this inquest in the most or best informed position to give the necessary answers and that is why we support what he has submitted.

It's been pointed out already, helpfully, I think, by my learned friend Mr Coltart and others, that, whilst the procedure being advocated at this moment is

described as closed, in fact, in many ways it's the reverse. It affords an ability for a more informed process than is otherwise available and, to that extent, it must be extremely attractive.

There is something, I respectfully submit, of an anomaly in this case that seems to me, at least, that the Security Services are arguing in favour of additional disclosure, at least to you my Lady and your team, depending on the precise analysis, and others are arguing against that disclosure process, but that is the reality of what is being submitted.

We, of course, accept that it is always preferable for relevant matters to be heard in public, but of course, not only West Yorkshire Police, but the Security Services and others are bound by the provisions of section 17 of the 2000 Act and also bound by the application of the doctrine of public interest immunity. I, I hope not too obviously, have set out in my written submissions the nature of public interest immunity. It is not something that a party can waive at their own whim. It exists independent of the assertion by an individual party and, madam, even if no party in this case were asserting it, it would still be your duty, with the utmost respect, to ensure that it was respected.

So the issues attaching to public interest immunity do not arise as a matter of the choice of the properly interested parties. It is there and has to be dealt with.

But, as I've submitted, there is a mechanism which we endorse which allows such material to be received whilst not breaching the embargoes either in section 17 of RIPA or the authorities in relation to public interest immunity.

Whilst we, of course, acknowledge that this process may cause difficulties, they are difficulties which we respectfully submit can and should be overcome.

To the extent that there is any suggestion that you, madam, either with or without your team are not capable of dealing with this difficulty, we wholly disagree.

You are, we would submit, uniquely in a position to deal with it, and also the reality, we suspect, is that, after the process of gisting has been performed, there will not be an overburdensome amount of documentation, although, to be quite open about it, I cannot say that for sure at this moment in time. The reality is we suspect it will be a relatively small amount of detail that has to be dealt with.

Turning briefly to what has been submitted on behalf of the Secretary of State in relation to section 17, we

can add very little. We will only endorse the submissions that have been made principally in reference to section 18.8 of the Regulation of Investigatory Powers Act. We would submit that the definition of "disclosure" is, perhaps, the important issue to be addressed. What is the definition of disclosure? That is referable within subsection 8 to the interests of justice. That is case dependent. It is drafted in a way, we would submit, that is obviously case dependent.

Here, the interests of justice is the performance by you, my Lady, of your judicial function. My learned friend has already highlighted what that is for the purposes of an inquest such as this.

We acknowledge that Counsel to the Inquest have themselves accepted in paragraphs 127 onwards of their submissions that you would be entitled, on one view, to take into account this material in some way in fulfilling your judicial functions, and the question I would respectfully pose is: well, how far can my Lady go?

My submission would be that your judicial function in this arena is the fearless inquiry of the sort set out in the authorities, and to that end, subsection 8, the interests of justice, would allow or permit

disclosure of a sort that includes reliance by you upon the material.

Turning to the closed process, we submit that you have the power to receive that and, also, insofar as it's matter of discretion, you should exercise your discretion in favour of receiving and relying on it.

Turning to the power briefly, first of all, we would respectfully repeat what has been said about the central purpose of this inquest. We would submit that the rules should be read as to give effect to that central purpose rather than frustrate it.

Secondly, interpretation of rules or the applicable statutes.

My Lady, this is a Coroner's Court, albeit blessed by a more senior member of the judiciary, but it remains an inferior court of record able to determine its own procedure insofar as is compliant with the applicable statutory instrument rules.

It's my submission, adopting what has been said already very briefly, that the primary legislation and the secondary legislation can both be read appropriately so as to allow you to do what is suggested.

In relation to primary legislation, you have heard submissions already that the mechanism within the 2000 Act sets a way that this can be achieved. That

would, we submit, take precedence over any inconsistency with the Coroners Rules, but insofar as the Coroners Rules are concerned, everything, we would submit, turns on the interpretation of rule 17 and particularly the rider to the national interest.
We would agree with my learned friend Mr Eadie that that must extend beyond just in camera proceedings, as it's submitted by my learned friend Mr Keith.
Otherwise, for the reasons that have already been eloquently stated, the rider in rule 17 would be of little or no effect.
If Mr Eadie's analysis in relation to rule 17 is correct, we would also strongly submit that everything else, insofar as it would be inconsistent with rule 17, has to be seen within that light, and also seen within the light of the effect of the primary legislation: namely, the 2000 Act.
Perhaps by way of historical context, it is important to bear in mind what went before the Coroners Rules, and that underlines perhaps the difference which is often forgotten between coronial law and the law that's applicable to other forms of legal proceedings.
There is clear authority that this has been considered prior to the imposition of the

Coroners Rules, and we submit that the analysis which has been submitted already shows that the rules can be read in keeping with that early historical context and also allowing the mechanism that's now submitted by the Secretary of State.

LADY JUSTICE HALLETT: Are you relying on the common law power that seems to have been acknowledged many, many years ago to exclude everyone?

MR SKELT: Yes, it's referred to by my learned friend Mr Keith within his submissions. Obviously there's a difference of opinion between the Secretary of State and Counsel to the Inquiry as to the purpose behind the rule in rule 17 and whether it codifies or narrows. I align myself obviously with what my learned friend Mr Eadie says. But the historical context is relevant and, moreover, the context of this being a coronial case rather than any other form of case is also very important.

LADY JUSTICE HALLETT: What is it in the 2000 Act you say I should be looking at? You've mentioned it a couple of times now.

MR SKELT: Purely that, as my learned friend Mr Eadie has submitted already, when one looks at the mechanism that he would submit is afforded by section 17 and section 18, that provides through primary legislation

a mechanism whereby you could receive and/or rely on this material within these proceedings. Insofar as the Coroners Rules run contrary to that, the 2000 Act would take precedence over the Coroners Rules.

LADY JUSTICE HALLETT: Oh, I see, I follow. Thank you.

MR SKELT: Turning lastly, if I may, please, to discretion, this I hope can be dealt with more speedily.

The need, if at all possible, to have this type of material taken into account is, I would respectfully submit, overwhelming and that should, to use my learned friend's phrase, trump any other factor in relation to the exercise of that discretion.

There is -- and this may be important -- a degree of protection to those who would be excluded from any proceedings and, of course, I have to contemplate that those whom I represent may well be on the list of those excluded from at least parts of that process.

The protection would, of course, be assisted --

LADY JUSTICE HALLETT: Let's just pause there.

MR SKELT: Yes.

LADY JUSTICE HALLETT: If it were material that had come from those whom you represent, but you would be excluded from the hearing?

MR SKELT: If it's material that's come from some other agency, it may well be that we are excluded from that

part of the process. If it's material that has emanated from us, then we probably wouldn't be. But certainly it's well within my contemplation that, if there is a closed process, there may be aspects of it from which we are excluded. So naturally, I would look towards what protection can be given to those who are excluded as relevant to the exercise of a discretion.

In addition to the protection obviously afforded by you, my Lady, there will be the ongoing vigorous assessment of whether, first of all, the process continues to be justified and, also, in relation to the material, whether any claims relating to its sensitivity or the application of section 17, the 2000 Act, are or continue to be justified, and that is very real protection to those who are absent.

My Lady, there has been introduced the spectre of perhaps Special Counsel being appointed. We know not whether that is an attractive option. But if that is something that the Secretary of State is relying on, that would provide, obviously, a further level of protection to those who are excluded.

LADY JUSTICE HALLETT: I don't understand anyone is arguing for Special Counsel. I think if there's any scope for Special Counsel, I think everyone is proceeding on the basis that Counsel to the Inquest would perform that

function.
MR SKELT: Yes. It's not referred to in any of the written submissions, but if it is, there is another layer of protection there.
So, my Lady, in short, for those reasons, and I apologise for being so brief, but in keeping with the time estimate we had, we support the submissions that have been made by my learned friend Mr Eadie with the hope that the ultimate result of that, whilst not without its difficulty, would put this inquest in its best informed position, ultimately, when you have to make the decisions you have to on the issues that have been identified.
LADY JUSTICE HALLETT: Thank you very much, Mr Skelt.
Mr Coltart?
Submissions by MR COLTART
MR COLTART: My Lady, these submissions are advanced on behalf of those bereaved families who have instructed Kingsley Napley, Russell Jones & Walker, Sonn Macmillan Walker and Hogan Lovells to represent their interests and, between us, we represent 26 such bereaved families.
My Lady, given the level of publicity which these proceedings are attracting and the importance of our clients' position being accurately reported, I hope I may be permitted to embark upon my submissions by

setting out in terms what our clients' position is and, really, it boils down to this: our clients have no set agenda as far as these proceedings are concerned. This inquest for them is not about winning or losing or getting the right answers. It is simply a search for the truth.

Now, at times, that will involve counsel instructed on their behalf asking difficult questions about some sensitive issues, but in doing so, our objective is simply to get to the bottom of what went on, both before 7 July and, indeed, on the day itself.

My Lady has undertaken to conduct this inquest fearlessly, fairly and independently, and our clients have every confidence that you will do so, but in order that you may achieve that aim, you need to have all of the relevant material before you and you need to be given the opportunity to assess it. That is what our clients want, and one might be forgiven for thinking that that was the very least to which they were entitled.

Ideally, of course, it goes without saying, the entirety of that evidence would be heard in public, but our clients recognise that there is likely to exist at least some material which, if made public, would significantly damage the interests of national security

and our clients, of all people, would not want such matters to be aired, if it meant other innocent lives being put at risk.

However, they would still want you to consider that material, even if they were unable to play any part in that process, and they are prepared to agree that you should do so in the course of these proceedings, this inquest.

That would mean no need for any satellite litigation, no need for any unnecessary, in our submission, trips up and down to the Supreme Court and no disruption to the timetable which you have carefully set and which we are all working hard to comply with.

We can simply get on with the inquest.

However, there is some resistance to that course of action from some of the families, which means that the matter cannot be dealt with by way of consent.

Equally, the Secretary of State, for her part, remains reluctant to open up a possible alternative route, namely, a public inquiry, and that leaves our clients stuck in the middle of what is a very significant legal argument.

We do not, for present purposes at least, propose to adopt sides in the debate as to whether, in relation to those families whom we do not represent and who do not

agree to the proposed course, that course of action can be imposed upon them against their will. That is a matter between them and the Secretary of State, and my Lady will appreciate that there are delicate relationships between the families as a whole and, unless directed to do so, our preference would be not to engage in the merits at this stage, as I say, of that particular legal issue.

My Lady has received, I know, written submissions from us and I'm sure it will come as a relief to learn that I don't propose to plod laboriously through those submissions again, but I would like to highlight, if I may, one or two particular issues which arise in relation to both RIPA and the consequences, the practical consequences, of the course which is now presently proposed.

So firstly, in relation to RIPA, one of the few areas upon which the arguments presented by Mr O'Connor and by ourselves may coincide is the urging upon the Secretary of State to consider whether a RIPA issue really does arise in the context of this case, and by that I don't mean as to whether there might be any RIPA material, what I mean is whether it is absolutely necessary to put that material before you, and the reason why I say that -- and we've set this out in our

written submissions -- is that, on a proper construction of section 17, it does not impose a blanket ban on the disclosure of RIPA material, it is a qualified ban, and the disclosure would only be prohibited as long as the source of that information could be inferred.

I don't understand anyone to demur from that interpretation of the statutory provisions. So the consequence of that is that it would be open to the Secretary of State to make voluntary disclosure in relation to the material, provided that such disclosure neither attracted PII nor would reveal its source, and one is entitled, in my submission, to pose the question: to what extent does there still exist material which might satisfy both limbs of that test?

In relation to PII, we are now dealing with matters five years ago. Some of the material which might well have been sensitive back in 2004 may no longer be sensitive now, and an excellent example, if I may say so, is in relation to the Crevice matter. One can well understand why there might have been sensitive RIPA material in relation to that investigation in early 2004, but those individuals have been arrested and prosecuted and convicted since that time, and as regards whether or not disclosure of the material would necessarily reveal its source, well, there are many ways

of disguising the source of the material: admissions, gists, summaries and, properly done, in my submission it is almost impossible to tell if the original source of that information was informant, participating informant, probe, observations or any other form of non-intercept surveillance.

Now, that's an exercise which may involve a little imagination and a great deal of effort, but again, in my submission, that's the very least which the bereaved families deserve.

So if it can be done in that way, if the gist of what's in the RIPA material can fairly and accurately be disclosed without infringing section 17, then this argument goes away, and it's important -- and again, I've set this out in the written submissions, but to put the Secretary of State's mind at rest, if it needs putting at rest on this point, we're not just talking about disclosure of material which might be adverse to the interests of the Security Service. That might be the test in criminal proceedings, if one is dealing with the CPIA, but that isn't the test for disclosure in these proceedings.

So disclosure may involve material which is both helpful or adverse to the interests of the Security Service but, if disclosed, it would be

available for use by all parties in the proceedings and we needn't trouble ourselves with the tricky interpretation, as it appears, of whether you can receive this material or not.

Anyway, only Mr Eadie at present knows whether the material in question is susceptible to that form of voluntary disclosure, and my remaining submissions are advanced on the unhappy basis that that may not be so.

Dealing with the issue of whether or not you can receive this material, Mr O'Connor relies upon the legislative history, in part at least, in answering the question as to whether you can receive it or not. Those arguments have been adopted in part by Mr Keith and his team as well.

But before you're taken down yet another long and difficult jurisprudential path, I respectfully urge you to consider what is the relevance of that draft legislation to which reference has been made? Does it answer the question which has been posed by Barracks v Coles? And that, in my submission, should in fact be the starting point and ending point of this particular argument, because the draft legislation which was rejected by Parliament, doesn't, in my submission, unlock the door. Two draft bills are referred to: the Counter-Terrorism Bill 2008 and the Coroners and Justice

Bill of 2009.
LADY JUSTICE HALLETT: To be fair to Mr Keith, I don't think he's saying I should look at the legislation -- the Bills that haven't been passed. He's saying I can look at those that have been passed.
MR COLTART: He is. He adopted --
LADY JUSTICE HALLETT: Mr O'Connor asked me to look at both.
MR COLTART: Mr O'Connor has asked you to look at both. Mr Keith adopts what Mr Eadie has described as the backdoor approach to statutory interpretation, and I will leave Mr Eadie to expand upon that submission, if need be. But clause 67 of the Counter-Terrorism Bill 2008, that was concerned with whether Parliament ought to extend the provision of RIPA material to coroners generally. It's got nothing to do with the status argument which is at the heart of the decision in Barracks v Coles.
Clause 11 of the Coroners and Justice Bill, on the other hand, concern the possible extension of the RIPA provisions to a class of coroners' inquests: namely, those to be conducted in the absence of a jury on the grounds of national security.
Again, it's not on point and it doesn't deal with the question of whether your status, your dual status as a Court of Appeal judge, permits to you consider this

material and, in my submission, the only proper guidance which you have before you are the observations made by Lord Justice Mummery in Barracks v Coles, and I'm -- I've no doubt, my Lady, you've had an opportunity to consider that authority, but because Mr Eadie didn't take you to it particularly, may I just remind you of the most important paragraphs? It's behind divider 20.

LADY JUSTICE HALLETT: In whose bundle?

MR COLTART: In the bundle provided by the Secretary of State, which was the first of the two bundles we received. The relevant paragraph is at paragraph 50. It's on page 71 of the version we have in this bundle. My Lady will remember the context of this case was an aggrieved appellant in employment tribunal proceedings. The issue arose as to whether or not the RIPA material, if it existed in that case, ought to be considered by the chairman of the employment tribunal. At paragraph 50 Lord Justice Mummery said this:

"These provisions [in other words the RIPA provisions] are potentially relevant to the position of the person who should chair the employment tribunal hearing if we remit the matter to the employment tribunal to proceed to a substantive hearing. A problem on RIPA could arise in the course of the hearing. It would be possible for disclosure of information possibly

covered by sections 17 to 19 of RIPA to be made to a circuit judge if and when the occasion were to arise during the hearing. This suggestion should present no practical problems, as there are circuit judges who double as chairmen of the employment tribunal."

In my submission, Mr O'Connor and, in turn, I must say, Mr Keith, have failed to provide any adequate answer to that observation.

If we just deal briefly with Mr O'Connor's submissions on this point which are very brief in contrast to some of the issues with which he has grappled, if we look at page 11, please, of his written submissions, he says:

"Little or no assistance can be gathered [from that case]. It was a race discrimination claim before the employment tribunal. The RIPA implications are hypothetically considered ... The court clearly suggests that a Circuit Judge sitting in the employment tribunal could fall within section 18. This is the natural meaning, in conventional litigation, between parties, to which article 6 applies, and where a Circuit Judge can perfectly conventionally sit. This is clearly a 'judge in a case'."

I have to confess -- and I don't mean this discourteously -- I don't understand really what that

means, but if it means what Mr Keith seems to think it means, which is that you would have a Circuit Judge sitting as a Circuit Judge in the employment tribunal, then that cannot possibly be right, in my submission. "... a Circuit Judge, in those circumstances, is sitting as the chairman of an employment tribunal", or, as it's now called, an employment judge. He is not sitting as a Circuit Judge. But the fact is he happens also to be a Circuit Judge and that's why, according to Lord Justice Mummery, he would be entitled to receive the RIPA material.

As night follows day, in my respectful submission, that is precisely the position in which my Lady finds herself at present, sitting as a coroner, but with dual status as a Lady Justice of Appeal.

I don't propose to say anything about the question of whether this is a case or whether it isn't, other than to adopt comprehensively, if I may, the observations made by Mr Eadie in his written reply which was served on everybody on Tuesday.

LADY JUSTICE HALLETT: Two questions as far as Barracks v Coles is concerned. One, given what Lord Justice Mummery says in paragraph 43, was it a matter the court was really addressed upon at any length; and, two, is it part of the ratio?

MR COLTART: The answer to both of those questions is, in all likelihood, "no", in which case it is arguably only persuasive rather than binding, but it's pretty persuasive in my respectful submission.

LADY JUSTICE HALLETT: Especially to an inferior court of record.

MR COLTART: I wouldn't possibly have added that observation myself, but the reality is, in the capacity in which my Lady presently sits, and in the absence of any other direct authority on the point, it is pretty persuasive.

My next point under RIPA is what I have rather inelegantly, and late last night, described as the all or nothing point, but it's this: that if a suggestion is to be advanced that, if closed process is not available to you as a matter of law, and if, as a result, you would have no power to review RIPA material from an evidential perspective, then there's no point in it being provided to you at all.

That, in our submission, is not correct. Even if no evidential review would be possible, it could, of course, still be reviewed, that material, from a disclosure perspective. That might be essential in the context of this case. Asking you to make difficult decisions on non-RIPA sensitive material in the absence of having seen the RIPA material is a course of action

which is fraught with danger, particularly when you're being asked to rule on issues of PII.

The final point I wish to make in relation to RIPA is whether or not you have the power to order disclosure under section 18. We say you can. Your legal team say we're wrong about that. I want to be quite clear about what I mean by this suggestion.

I'm not suggesting that you would have the power to order disclosure of anything which either met the test for PII in your judgment or anything which might infringe rule 17; in other words, reveal the source of the material. I am simply suggesting that you would have the power to order disclosure of that which, as everybody seems to agree, the Secretary of State would be able to disclose voluntarily in any event.

Now, it's surprising that that is a contentious proposition.

LADY JUSTICE HALLETT: Wait a minute. We've gone from ordering disclosure to myself?

MR COLTART: Yes.

LADY JUSTICE HALLETT: To ordering disclosure to the world at large?

MR COLTART: Yes. Two -- forgive me, it is my fault, two entirely separate propositions. I'm not now dealing with the power to order disclosure to yourself.

LADY JUSTICE HALLETT: Right.
MR COLTART: I'm dealing with the power that you would have, having reviewed that material, to order onward disclosure of material or to police the gisting of material for use by other interested parties.
LADY JUSTICE HALLETT: I may be wrong, but I didn't detect that there was much of a problem with what might possibly escape PII in section 17. What seemed to be at the heart of the problem was, having ordered disclosure to myself, what do I then do with it? Can I rely upon it, just me?
MR COLTART: Yes, forgive me again, I agree, two completely separate issues. In relation to that point, our position is as follows: firstly, we would agree to you doing that, relying upon it by yourself.
LADY JUSTICE HALLETT: Evidentially?
MR COLTART: Evidentially, we would agree to that.
The second is we respectfully adopt the submissions Mr Eadie makes in relation to having an express statutory power to do that on his construction of sections 17 and 18, we adopt that argument.
The third possible route in is through the closed process argument, and we would respectfully seek to maintain our neutral stance on that, if we may, for all the reasons which I've previously outlined.

So that's that issue, but I am dealing with the question of whether you would be able to order onward disclosure of material which you had reviewed to the parties, that which didn't infringe PII or section 17. As I understood it, your legal team took issue with our suggestion that you had the power to do so, even though it's not expressly set out in the body of section 18. We're simply submitting that you would have the power to do so and the basis for that submission being, if it could be disclosed voluntarily by the Secretary of State, you must have a power to order them to do so.

LADY JUSTICE HALLETT: I may be wrong, Mr Coltart, but I didn't think that was a point being taken against you. If it escapes PII and RIPA, I'm not sure -- let's wait and see what Mr Keith says and see whether you wish to address it at any stage. If so, you can come back to it.

MR COLTART: I don't want to pick any unnecessary fights and, if that is unnecessary, then I'll leave it to one side. We can always come back to it, if need be. Those are the submissions on RIPA.

Closed process.

Part of the problem, in our respectful submission, is the pretty unappetising title which this particular

issue brings with it. Closed process conjures up all the worst images, as far as the families are concerned, of the bad old days of the ISC as they might regard it, everything being done behind closed doors and they being excluded from any consideration of the preventability issues, and it's important, in our submission, that that misconception, if it does persist in any quarters, is dispelled, because that's not what it means.

In truth, closed material procedure is part of a two-stage process, the first of which is PII and, as my Lady well understands, but for the benefit of those who may be observing the proceedings, that is, as you know, a process by which the Secretary of State is entitled to put material before you which is deemed to be sensitive and non-disclosable in the national interest, and seek a ruling from you that that material should not be disclosed to the families or anybody else under any circumstances. There is nothing novel or unlawful about that process and, indeed, it's routinely adopted day in, day out, up and down the country.

The question, the central question, is what use you can make of that material which you have seen on that basis, but which has not been disclosed to anybody else, and a closed material procedure is one way in which you would be entitled to make use of that material from an

evidential perspective. In other words, witnesses could be called to give evidence before you, in private, would give you an opportunity and your team an opportunity to question them, to test their account, and to form your own view about the merits of that evidence, and with that procedure we have no difficulty at all.

As I've indicated, some of the families not represented by us take issue with that prospect and we've set out the reasons, as we've understood them to be, for that objection in our skeleton argument at page 10 of our skeleton argument.

It's a paragraph that we've cited from Mr O'Connor's skeleton argument. The position is this, that:

"If they [in other words, his clients] acquiesce in the Secretary of State's position, they might promote the possibility of the inquest privately gaining some more information. However, this would be at the price of transparency, their own ability to participate and the quality of their own knowledge, they would be accepting a passive position of trust that others can look after their interests and have properly assessed the relevant closed material."

Well, we do put ourselves in that position of trust on behalf of our clients. We do trust you and your team to look after our interests in that process. We would

urge the court respectfully to consider the possibility of Special Advocates, if that were the way of unlocking this particular dilemma.

I know that we have the very able Mr Keith, independent Counsel to the Inquest and, as I say, we put our faith in him. But if it made life easier for others to have a Special Advocate represent their particular interests, then, well, for our part, we could see the attraction in that particular course. We simply raise that for consideration to see whether that might make a difference.

What would not make a difference, though, in our respectful submission, not necessarily make a difference, is transforming this into a public inquiry.

Again, we don't know whether there's any misunderstanding about the term "public inquiry", it's terribly alluring, particularly when it's considered in contrast to a closed process. But the practical consequences of it may well be precisely the same, that the course which Mr O'Connor says can't be imposed upon his clients in the context of a coroner's inquest could be imposed upon him in the context of a public inquiry.

You would have the ability, on our limited understanding of the Inquiries Act -- and this is not

something we've considered carefully -- but you would have the opportunity to sit in private to hear from witnesses in private.

LADY JUSTICE HALLETT: It shouldn't be assumed that, if a public inquiry were called, I would be the person appointed. If anybody thinks that we could just seamlessly move into the position where I go from being a coroner to an inquirer, they are wrong. The prospect of a public inquiry, people have to understand, is the prospect of these proceedings grinding to a halt.

MR COLTART: We respectfully agree with that observation. It's important that these things are aired. Today is the opportunity to do so.

LADY JUSTICE HALLETT: Indeed. I just think people need to be aware of that. So if the Lord Chancellor were to decide to order a judicial inquiry and I was then obliged to adjourn these proceedings, it should not be thought that we could just -- whoever chaired the inquiry could just take into account all the evidence we've heard, all the distress that has been caused to the witnesses. It may be that that would have to be gone over all over again.

MR COLTART: In our submission, we ask rhetorically, why go through all those hoops and all that difficulty if the net result would be precisely the same as the course

which is now advocated?
Mr O'Connor seeks to divine some comfort, as we understand it, from rule 12 of the Inquiries Act rules, but in truth that doesn't advance the position in any material sense. The reality is that, come the day, the evidence which had met the test for PII -- and that would be our submission; that's the only evidence which should be heard in a closed material proceeding -- that evidence would still be heard behind closed doors and he would play no part in that process.
Before I leave this topic, and at the risk of embarking upon what might sound like a "cake and eat it" submission, we do formally reserve our position on the question of a public inquiry because, if you rule against the Secretary of State on these issues, and if the Secretary of State doesn't budge in relation to a public inquiry, and if, as a result, there remains a risk that not all the relevant material will be put before whoever is the tribunal of fact in the end, we may wish to make some further submissions in relation to that.
LADY JUSTICE HALLETT: I understand that. I just think that people need to be aware of what the possibilities are.
MR COLTART: Yes.
LADY JUSTICE HALLETT: As I say, I just wanted to slay any

possible thoughts that I could just seamlessly transfer from one to the other, because I can't.

MR COLTART: I am grateful.

My allotted time is up. I had one further topic to canvass with the court which was whether there was any legal or practical impediment to agreeing the way forward in terms of a closed material procedure.

I don't know whether that point is to be taken against me. There's nothing in the written submissions about it, but if it is taken now, then it may be I could address my Lady again for a few minutes at the end of today, or I'm happy to deal with it now, if that helps.

LADY JUSTICE HALLETT: Sorry, you are posing the possibility of everyone getting together and agreeing that I can proceed under a certain basis?

MR COLTART: No, I'm very happy to posit that suggestion, if it would meet with favour, but what I was really suggesting was that, if I'm to be asked by others to make submissions on whether it would be lawful to agree to a closed material procedure, then I am in a position to make those submissions and, in my submission, yes, it would be lawful for us to do so.

The RIPA issue is different. That has to be acknowledged. If you are by law prohibited from receiving that material, the fact that we might all

agree to it is neither here nor there.
LADY JUSTICE HALLETT: So you would wish to argue that an interested person at an inquest is entitled to agree to withdraw, essentially?
MR COLTART: Yes, and that the practical considerations which would have to be taken into account in this case are not so burdensome that they can't be overcome or, at the very least, should not be explored. But, as I say, I've got brief submissions to make on both of those points. I can do that now or I can do it afterwards, if necessary. I'm in my Lady's hands.
LADY JUSTICE HALLETT: You would argue that you could waive your right under rule 20, you could waive whatever other rights the rules give you, is that the essence of it?
MR COLTART: That is the essence of it. Just because the court found in Al Rawi that you can't impose it on an unwilling party, doesn't mean that a party can't agree to it.
LADY JUSTICE HALLETT: I follow. Shall we come back to it if it becomes relevant, Mr Coltart?
MR COLTART: Yes.
MR PATRICK O'CONNOR: My Lady, can I confirm that point will be taken. My Lady, we had wondered how it can be submitted that interested parties can give jurisdiction for an inquest to do something where otherwise it is

posited --
LADY JUSTICE HALLETT: All right, let's come back to it then. It is going to be raised, Mr Coltart, so you've got, I think, probably about two minutes.
MR COLTART: I shall speak quickly.
The position is this: that all Al Rawi decided was that you can't inflict it upon someone if they won't agree to it. The Court of Appeal in Al Rawi expressly left open the possibility of parties agreeing to it, and I won't take my Lady to the judgment, but it's in the very final paragraph, if you need it for your note. In considering whether or not parties can agree to such a course, I respectfully submit the court should consider what is the nature of the agreement which is suggested? It comes to nothing more than this: that the tribunal of fact should have all relevant material before them and be able to take it into account before arriving at a decision, and the day that parties to any form of legal proceedings can't agree on that as a way forward would be a sad day indeed, because that's all that's at the heart of this entire argument. That's all our families want, and that's what they would be prepared to agree to.
LADY JUSTICE HALLETT: I think that probably will suffice, Mr Coltart, if I may say so, because at the moment, it

doesn't seem to me, subject, obviously, to hearing Mr O'Connor in a moment, that I'm really going to be helped by arguments about whether you can or can't agree when I have some families who do agree and some families who don't. So the argument seems to be somewhat hypothetical. So I may or may not listen or agree to listen to Mr O'Connor on that subject in any great detail.

Right. So thank you very much for that, and thank you for the rest of the team who contributed to the submissions.

Now, I gather we have allowed now for anybody who is unrepresented? If Mr Smith could remind me of Mr Taylor's submissions?

I understand that Mr Taylor's submissions, in essence, come much the same as yours, Mr Coltart. They want me to hear as much as possible, but not in a way that would threaten national security. So I suspect, if he were here, he would be making submissions along the same lines.

I don't think we have anybody else who's unrepresented in court.

So I think it's now you, Mr O'Connor?

Submissions by MR PATRICK O'CONNOR.

MR PATRICK O'CONNOR: My Lady, four introductory points,

none of them to do with timing.
First of all, our clients make no submission which reflects upon or detracts from the highest confidence they have in your commitment, your integrity and your skill. This is not a competition for the most abject flattery that we can throw in your direction. It's a pity it even needs to be said, it goes, really, without saying, but it's been asserted on behalf of others and there is a need for us to join in.
My Lady, secondly, our clients want the most effective, the most transparent, the most fair process of investigation as soon as possible under the law. I think all bereaved interested persons share those desires.
Now, there is wriggle room in relation to each of those, how prompt, precisely how transparent, but there is no wriggle room about what is available under the law and that is what we are debating here, the limits of what is lawful under coronial law.
No one, no bereaved interested person, would benefit from an inquest which strays outside the law, which is vulnerable to doubt and challenge and later debate, and that is where, may I just say briefly, whatever our clients' wishes, whatever our clients' wishes, whatever the wishes of any bereaved person, what you are deciding

is the law, and one respects those wishes and one respects the very anxious dilemma they have been placed in by this debate taking place now.

But with respect, they cannot affect what coronial law says, and consent or agreeing to a procedure which would have to involve not just them voluntarily walking out of the room, it's completely unreal. These are public proceedings. They have to involve you having compulsory powers of exclusion against everyone, except for the deeply vetted, et cetera, parties and lawyers that my learned friend Mr Eadie is conceding.

Thirdly, it cannot be pretended that, just focusing for a moment on the assumption that there is intercept material, that we are dealing with RIPA, it be cannot be pretended that the procedure that is being proposed simply involves you looking at documents which are presented to you and assessing them.

What it actually involves, spelling it out, is that you alone, without any legal team at all, during the conduct of this ongoing inquest, will receive and consider documents from MI5, check that they fall within the section 17 prohibition, which is highly technical, there are many, many exceptions, assess their completeness, probe further disclosure, explore the possibilities of gisting, negotiate over the drafts of

those gists, consider redactions, and also then consider, alone, all the witness statements which are based on that intercept material which it's posited hypothetically may be crucial.

Now, it's suggested you should do all that alone and during the continuing hearings of this inquest.

Then, when the time is reached for dealing with preventability, you should conduct hearings with -- I hope -- the term "battery" wasn't intended as offensive towards my learned friend, but it would be -- and we do have a battery, that's not a bad plurality.

LADY JUSTICE HALLETT: Not any more than anybody else.

MR PATRICK O'CONNOR: I'm not sure, actually, there are quite a few there.

All attending with their witnesses, your task, in the absence of any assistance, would be to question the witnesses, in fairness, quote, unquote, to put to them any criticisms which potentially you might wish to include in your later closed ruling, assuming you have a power to give a closed ruling.

One aspect of the mucky business of fairness and trying to work out this legislative programme, which isn't being put through Parliament, but which is being put through you, is the role of your Secretariat. Does disclosure to you alone include -- it certainly excludes

your legal team. Does it exclude or include your Secretariat? Will you have anyone to write your letters? Or does it include the Secretariat, but only if they're deeply vetted?

Days or weeks of the hearings on preventability would be conducted under these circumstances, and may I remind you, my Lady, of the assurance given by Mr Garnham at an earlier hearing that everything beyond that which appears in the ISC reports will be subjected to a claim for public interest immunity on national security grounds.

So the very striking phrase my learned friend Mr Coltart has just mentioned of going back to the bad old days of the ISC, that is precisely what is envisaged.

LADY JUSTICE HALLETT: No, because everything that's redacted in the ISC report is not necessarily all RIPA.

MR PATRICK O'CONNOR: No, I understand. I'm talking about any parts -- I fully accept the correction. I'm dealing here with the absurdities of the implications of RIPA.

But let us assume that, if there is crucial RIPA material on the issue of preventability, it must have been presented to the ISC, unless it was lost temporarily.

Then, my Lady, you raised the quite fantastic

prospect of appeals or judicial reviews. There would be no lawyers to present the arguments. I mean, who would launch an appeal or a judicial review for which permission would be granted? There's no one who could do it, unless, perhaps, in order to assist the artificial credibility of this process my learned friend launched -- he took the extraordinary step of launching a hypothetical judicial review of his own suggested procedure so that the court could consider it, and then the administrative court would then consider without any argument, contrary to my learned friend's, the merits of a judicial review.

I mean, it's absolutely and completely unreal and it takes the concept of multitasking, my Lady, on your part, in this earlier part of the procedure to an unheard of extent.

The question is, surely, as opposed to questions being addressed at us and why we are trying to assist you on the law -- and, as a matter of fact, our view of the law is that coronial law can't be stretched and distorted in this way, why we're doing it, the question is seriously addressed to us why we should be making these submissions, why don't we just go along with it? The question is the other way round. Why is the Secretary of State seeking to take an inquest and you

through these extraordinary and unreal contortions, when many of these consequences would not follow under the Inquiries Act because the panel of an inquiry always has the assistance under RIPA of access to the relevant material.

LADY JUSTICE HALLETT: Why would you be arguing for an inquiry now, this inquest having been set up, Mr O'Connor? Because an inquiry surely has many disadvantages, as far as the families you represent are concerned. The terms of reference are set by the Government, the Government can do all sorts of things that I would have thought you would have argued against.

MR PATRICK O'CONNOR: My Lady, we are arguing the law because this is the genuine, objective, professional view of the law that we have, and it is quite extraordinary for any question to be addressed to a lawyer as to why they're arguing the law as it is. That -- this is our assistance to you as to the limits of coronial law.

LADY JUSTICE HALLETT: At the moment, you put it: "Why is the Secretary of State seeking to take an inquest and you through these extraordinary and unreal contortions when you could just have an inquiry?"

MR PATRICK O'CONNOR: Yes.

LADY JUSTICE HALLETT: Surely Mr Eadie's submissions were

premised on the basis this is all lawful and that is what he has to do?

MR PATRICK O'CONNOR: I understand, but he does accept, and he has faced up to and been taken, with your assistance, down the many contortions and extraordinary twistings of normal procedure which his position involves, and which would not arise if there was a simple choice, by a Cabinet minister, the Lord Chancellor, to set up an inquiry.

The critical difference is efficacy. How can that process be in any way effective in relation to intercept material or practical or real, when, by contrast, it is effective, practical and real in an Inquiries Act context. These anomalies disappear.

LADY JUSTICE HALLETT: Are you not arguing "Heads I win, tails I win"? On the one hand, you're saying it is absolutely essential that I conduct, as an independent person, a thorough, effective, fair and open process. On the other hand, you're saying the answer to Mr Eadie's submissions is just order an inquiry. If an inquiry is ordered, you won't know what this material is. You won't be able to ask questions. Those you represent won't see it. It won't be an independent judge, possibly. It could be somebody entirely different. I don't understand why you're even advancing

these arguments. It's one thing to argue the law, but to go down this path and criticise Mr Eadie in that way seems rather strange.

MR PATRICK O'CONNOR: The critical difference between what is being suggested by the Secretary of State and what could arise down another route is efficacy, and all the anomalies in relation to intercept material that I've pointed out disappear and, my Lady, we have Parliament on our side. Parliament has said that this is precisely what should happen where an inquest cannot work because of the constraints of national security material. This is not some extraordinary argument in relation to which we're out on a limb. We are constitutionally in the right. The --

LADY JUSTICE HALLETT: But Mr O'Connor, my point is this: it's one thing for you to argue "The law is X, please apply the law in that way". It's quite another for you to be advancing what appear to be arguments trying to persuade the Lord Chancellor to order an inquiry. I'm not here to decide that. That's not my decision. It's the Lord Chancellor's.

MR PATRICK O'CONNOR: Absolutely.

LADY JUSTICE HALLETT: What I want to know is: what are my powers and what is the law?

MR PATRICK O'CONNOR: That's right, and that's what we

are -- that's what we are addressing. I strayed into a hypothetical about the Lord Chancellor setting up an inquiry because my learned friend Mr Eadie said "Make no such assumption", and may I move on after one sentence: there surely can be no credible doubt about that in the light of your rulings about scope, that there needs to be an investigation into preventability.

The power to set up the inquiry rests with the Lord Chancellor, the Minister of Justice, who is a Cabinet minister, and this is precisely the circumstance in which Parliament and his predecessor, the Lord Chancellor, Minister of Justice has said "Ah well, we lost in Parliament, we will use section 17(a) of the Coroners Act, in exceptional circumstances, to get around these difficulties."

LADY JUSTICE HALLETT: Right, well I have the point there is an alternative means, but starting from here, which is that we're in the middle of an inquest, what are my powers now?

MR PATRICK O'CONNOR: Yes, that's right. Well, we submit in one sentence that really the debate between my Lady and my learned friend Mr Eadie illustrates how ill-adapted coronial law is to cope with the problems posed by handling sensitive material, and the amount of legislating that my learned friend had to do on his feet

suggesting, "Well, Counsel to the Inquests provided only that they are deep vetted", et cetera, illustrates that. Parliament, as you know -- I'm not going to spend any time, I'll explain what we submit is the role of the legislative history very shortly, and it's quite limited, but there's no question that you can take judicial notice of the fact that there have been two attempts to adapt coronial law by legislation to these very problems. Parliament has rejected those attempts. Coronial law remains unadapted to cope with these problems. But that is not a cul de sac, not an insoluble problem, because the alternative that has been left is plain.

My Lady, we hope it is helpful to have set out at page 5 of our skeleton argument the state of legislation as it does exist, which is, after all, what matters most. As you will see from 1.6, the first stage is the original Coroners Act with the Coroners Rules 1984. We then have the amendment introduced in 1999 by the Access to Justice Act, introducing section 17(a), which we've just been discussing, the power effectively to set up an inquiry which will cover the territory that an inquest would. We venture to suggest it is plain that amongst the primary reasons for that amendment will have been precisely to cater for these problems in

exceptional cases.
The next stage is RIPA 2000, sections 17 and 18. In 2005, this is (d), we get the Inquiries Act amended RIPA section 17.7(c) to add an exception to the prohibition on access to intercept material so that it is disclosed to the panel.
By an oversight, the 2005 amendment did not cater for disclosure to Counsel to an Inquiry. Thus -- this is our paragraph (e) -- by section 74 of the Counter-Terrorism Act 2008, provision was made to rectify that anomaly so that, in an inquiry, intercept material can be shown to Counsel to the Inquiry.
My Lady, may I ask you, finally, just to add, although it's in brackets because it's not yet into effect, but it is passed legislation, so (f) is section 45.3 of the Coroners and Justice Act 2009 -- which, I repeat, is not in force, but we'll look at it -- provides for closed hearings to take place in inquests under very special circumstances with specially appointed coroners and under rules to be passed through Parliament by the usual approval process.
Now, that's there. Legislation that has passed, but it's not yet been brought into effect.
Now, that is the complete state of the relevant legislation.

May I now explain what we say is the relevance of the wider legislative history? We are not seeking to use it to discern -- to interpret rule 7 of the Coroners Rules or section 18 of RIPA. We're not seeking to use statements of ministers, Pepper v Hart.

Secondly, we accept that, though it is embarrassing to the consistency and to the dignity of the Secretary of State that these bills have been advanced on a view of the law which everyone held, which is inconsistent with their current propositions, we accept that the fact that the Home Office, obviously the law offices of the time, Parliament, everyone engaged in the process thought that the law was different is, again, an embarrassment, but doesn't help as to what the state of the law actually is. Constitutionally, that's important. The courts decide what the meaning of the law is, and everyone else -- no one else has a role in that.

It is, however, very, very surprising indeed and set a highly unpropitious context for the contorted arguments that are now being advanced inconsistent with that process.

Now, what do we say is the role of the legislative history involving the Bills which were advanced and failed? And I'm not going to develop what they say.

It's plain what they say. It can be said in two sentences, and it's plain and easily established, as we have on the documents, that they were rejected by Parliament and they were highly controversial.

The role is as follows: the Secretary of State's arguments are replete with arguments from consequences and, effectively, arguments of policy.

May I just quote a few phrases, particularly from paragraphs 23 to 27 in their first skeleton. Phrases such as "intensely problematic consequences", "it is considerably better if", "particularly unfortunate if", and "the need for the power", and in their second skeleton "contrary to the public interest".

Now, nobody seeks to prevent, even if we could, the Secretary of State from arguing these points of interpretation and arguing that there should be an implicit power consistently with the legislation, and they can do that in conventional terms by statutory interpretation methods.

But what the Secretary of State is doing is entering into arguments of policy. If the Secretary of State can do that, then we cannot be prevented from answering them, and this raises a very serious constitutional objection which we advance to the largest proportion of my learned friend's arguments.

A court is very often faced with submissions as to policy, and particularly where the argument is that there is an implicit power to do something. The submissions will be the mischief that arises if the power doesn't exist, the compelling need for the power, and those are arguments of policy, and of course they're particularly sensitive arguments of policy when one is talking about handling intelligence material.

The courts are used to handling these arguments and will do its best. It will weigh the arguments and, if there is some outside material, for example a Law Commission report, a Royal Commission report, it will examine the implications of the submissions on both sides and reach a conclusion.

The fundamental problem here is that Parliament has considered these policy questions and Parliament has several very considerable advantages over what a court can do.

Number one, the committee stages of the bill can take evidence and take a vast account of -- a vast amount of comparative material into account.

Two, the debates in both houses can include contributions from every corner of the body politic.

Three, it's not just a question of resources, but also of democratic accountability on questions of

policy.
And finally, I put in this list fourthly, these are very sensitive issues of policy involving the handling, how one handles intelligence material, and balances the need for confidentiality against the need, the normal needs, of due process and of coronial law, which isn't, of course, adversarial litigation.
The reality is that the institutions of state which are in reality party to these proceedings -- namely, the Home Office and the Security Service -- have lost that debate in Parliament, and what they're trying to do is to relaunch that debate with these policy arguments before the court, and that they cannot do. It is not, in these particular circumstances, for a court to ignore the role of Parliament and its conclusion on these questions and potentially reach a different conclusion.
LADY JUSTICE HALLETT: Sorry, what is the submission?
MR PATRICK O'CONNOR: It is that --
LADY JUSTICE HALLETT: That I shouldn't come to a different conclusion from Parliament?
MR PATRICK O'CONNOR: It's as follows --
LADY JUSTICE HALLETT: Even if I thought there was the power in law that Parliament might possibly have been wrong?
MR PATRICK O'CONNOR: No, no. It is to answer the wider arguments of the Secretary of State, the conventional

straightforward arguments looking at the terms of rule 17, looking at sections 17 and 18 of RIPA are absolutely fine, we have a debate about that and --

LADY JUSTICE HALLETT: Mr O'Connor, I hate to interrupt you, but given the time available, I really would find it, for my part, helpful if we could focus on what are your arguments on what my powers are, on what the law is. I really don't want to go off into wider considerations of policy. If you think Mr Eadie has taken me down that path, let's go back and let's go back to the law of what it is and what you say my powers are, because I really think that's what we need to do, by the looks of it, this afternoon, but I'm not here, really, to start considering whether Parliament got the policy right or anybody else. I can only consider and interpret the law and apply it.

MR PATRICK O'CONNOR: Yes, but -- all right. Can we then put into this particular category of considerable difficulty a large proportion of my learned friend's arguments and focus on the strict conventional arguments about what the Act and the rules mean. We agree, we didn't open this out, but it's a sign of the poverty of the conventional arguments for the Secretary of State that so many of her arguments do indeed involve these arguments of policy.

LADY JUSTICE HALLETT: I'm bound by the law. Whether it creates insuperable difficulties, it's a matter we'll have to face as and when. But I'm bound by the law and what will be, for the time being, my interpretation of it. Let's come back, if we may, to the conventional arguments, as you call them, this afternoon.

MR PATRICK O'CONNOR: Absolutely. My Lady, may I just ask, we were in two minds very much about sequence as well and we decided -- in rather uncharacteristic deference to the Secretary of State, we decided to follow her order in her skeleton argument. My learned friend switched round. Would you like me to switch round as well and deal with implicit closed process first and then come to RIPA?

LADY JUSTICE HALLETT: I've now got used to all the submissions going in different orders. I think Mr Eadie was following the course Mr Keith had adopted.

MR PATRICK O'CONNOR: Yes, he was.

LADY JUSTICE HALLETT: I'm now used to the different issues in different orders, so whichever suits you, Mr O'Connor.

MR PATRICK O'CONNOR: Thank you.

(1.00 pm)

(The short adjournment)