

15 (2.05 pm)

16 LADY JUSTICE HALLETT: Mr Patterson, before you continue,  
17 I understand that some of the ladies and gentlemen at  
18 the back of the court are finding it difficult hearing.  
19 It's not just you, I think it's everybody, because  
20 people are speaking forward, and the acoustics in this  
21 court are not great.  
22 So I think we've made arrangements for some  
23 additional help with hearing to come, but it can't come  
24 until tomorrow. So in the meantime, if everybody can  
25 remember, please, to speak loudly. Thank you.

1 MR PATTERSON: Of course. Madam, I had indicated that I was  
2 about to turn to scope, and in relation to this topic  
3 I'm grateful for the ground that's been covered already  
4 by Mr Coltart, and I adopt his submissions, and if,  
5 madam, you do agree to resume these inquests, you will  
6 of course have to decide how far back before 7 July 2005  
7 you take the evidence, and the four families that  
8 I represent strongly ask you to look into that  
9 background issue of preventability. It's been described  
10 by different parties in a number of ways, but, as I'm  
11 sure you will appreciate, what we mean by that is the  
12 ability from the spring of 2004 onwards for the various  
13 agencies to identify these two bombers in particular and  
14 to put them under surveillance and to carry out  
15 appropriate investigations in the hope that these bombs  
16 might have been prevented.

17 The sequence of events has been dealt with by  
18 Mr Coltart and I, I'm grateful for that, and you might  
19 think that whenever those sorts of facts and events are  
20 considered by the bereaved families and by the public at  
21 large that there will be understandable concerns and  
22 perhaps bewilderment and perhaps even, in some cases,  
23 anger on the part, not only of the bereaved families,  
24 but the wider public.

25 By way of example, in a victim impact statement that

1 was prepared in the investigation by the daughter of the  
2 deceased Mrs Mozakka, her daughter wrote of her anguish  
3 and stated that:

4 "Due to the manner of my mum's death and its violent  
5 and arbitrary nature, it is even more difficult to  
6 accept. Life becomes a constant question of 'what if'  
7 and 'why'."

8 So although we're focusing on Article 2 and all  
9 those legal matters, I know that you will, madam, bear  
10 in mind from the families' perspective how anxious they  
11 are that those background matters are properly looked  
12 into in their interests and in the interests of the  
13 wider public.

14 All, in essence, that they have had of any degree of  
15 substance is really the second attempt to look at this  
16 by the ISC, if I can abbreviate it like that. It's been  
17 covered already by Mr Coltart. The institutional lack  
18 of independence and the practical features of that  
19 review by the ISC, which are such that we submit there  
20 has not been an adequate investigation and that the  
21 Article 2 procedural obligation to investigate hasn't  
22 been adequately discharged.

23 One point, if I may, on the ISC. Not only is it  
24 a committee which has membership appointed by the  
25 Prime Minister, but after the members receive their

1 appointments, they have no security of tenure. You will  
2 find this, madam, in the bundles. I don't ask you to  
3 turn to it now, but it's divider 4. It's the  
4 Intelligence Services Act 1994. It's section 10 and  
5 schedule 3, and so they owe the continuation of their  
6 appointment onto the Committee to the Prime Minister and  
7 in essence, therefore, he can dismiss them at any time.  
8 Therefore, the members will have been aware of that  
9 position, that power to dismiss which is vested in the  
10 Prime Minister, and doubtless that may have caused some  
11 of them to lack the confidence that would go with  
12 knowing that they did have security of tenure, something  
13 which of course is an important feature of judicial  
14 decision-making in the context of public inquiries and  
15 the like, where of course there is, in that sense, an  
16 independent judicial figure with security of tenure.  
17 That's all I propose to say about the ISC. It's  
18 been covered already. It was evidence that was taken in  
19 private and so no attendance at the giving of evidence,  
20 no access to the documents, no sight of transcripts  
21 after the event or anything of that sort, and although  
22 some individuals were able to provide questions, three  
23 of the four families that I represent were unable to  
24 have any participation in that review by the ISC.  
25 LADY JUSTICE HALLETT: When you say "unable", how were those

1 who were able to make submissions selected?

2 MR PATTERSON: My understanding is that one firm of  
3 solicitors acting for a group of individuals, at that  
4 stage bereaved and survivors, contacted the --

5 LADY JUSTICE HALLETT: Is that the solicitors for whom  
6 Mr O'Connor acts?

7 MR PATTERSON: Exactly. So that it's clear, one of the four  
8 families that I act for was involved in that, but the  
9 other three weren't.

10 LADY JUSTICE HALLETT: I follow, thank you.

11 MR PATTERSON: In relation to Article 2, and the Osman test,  
12 our prime submission is that there is clearly an  
13 arguable breach having regard to the sequence of events.

14 Could I associate myself with Mr Coltart and his  
15 submissions as to whom the threat must exist, and  
16 I, too, note the analysis of this by Counsel to the  
17 Inquest and his observations as to this argument which  
18 the Home Secretary has advanced as to the identifiable  
19 nature of the targets.

20 So I say no more about that other than that, of  
21 course, the Security Services operate under a statutory  
22 duty to protect all of us, the 1989 Act, under the Human  
23 Rights Act there is a statutory duty to comply with  
24 Article 2 in the duty to protect the lives of everyone.  
25 Therefore, I would suggest that it's inaccurate to

1 suggest that there have to be clearly identified victims  
2 for there to be an arguable breach.

3 Another discrete point, if I may, please, madam, and  
4 that's in relation to arguable breach: what must the  
5 state agent have known, what must MI5 have known?

6 In Osman, the test, as it is formulated, limits the  
7 scope of the test. The test is met if the agent knew of  
8 the particular risk, but Strasbourg also went further  
9 than that and said that the test would be met if the  
10 agents ought to have known of the existence of the risk,  
11 and in relation to this -- and I don't propose to go to  
12 any authorities if I can avoid it, but the case of  
13 Van Colle in the House of Lords looked at this, and  
14 a minority opinion of Lord Phillips was that this meant  
15 that we should consider only what they ought to have  
16 known on the information available to them.

17 Even if that were to be your approach, madam, if it  
18 becomes relevant to focus on it in this depth, clearly  
19 that would include, not only what they have seen with  
20 their own eyes through surveillance or the likes in the  
21 spring of 2004, but it would also focus on what was  
22 available on databases and the like.

23 So even if it's said on behalf of the Secretary of  
24 State that, for instance, a particular record held by  
25 the West Yorkshire Police wasn't accessed, nevertheless

1 it was there and available. So even then that should be  
2 factored into the consideration.

3 But, madam, the point is this, it goes beyond that,  
4 because the majority in the House of Lords represented  
5 by the opinion of Lord Bingham said that you should  
6 consider what they would learn as a result of reasonable  
7 investigations.

8 So when focusing on the months that followed the  
9 spring of 2004 through that year, and into the spring of  
10 2005, and then the bombings in July, Mr Coltart touched  
11 upon the development of events and I don't propose to  
12 get into the detail of it, it is in the timeline in the  
13 official account, but the movements and actions of the  
14 four individuals, learning about attendance at training  
15 camps, the commencement of the lease at the bomb  
16 factory, the reconnaissance trip, all of those matters,  
17 with what would appear to be a limited degree of  
18 investigation, could have been unearthed, the dots could  
19 have been joined. That's the significance of the  
20 Van Colle approach, that we should look at what would  
21 reasonably come to their attention.

22 Turning then to the key question for you, madam, is  
23 there an arguable breach having regard to the facts and  
24 the law, I would submit that there is clearly an  
25 arguable breach, and could I highlight the low threshold

1 which arises at this stage?

2 The case law has helpfully been set out by Counsel  
3 to the Inquest and the various references to different  
4 authorities speaking of the possibility of a breach,  
5 a plausible breach, there may have been a violation of  
6 Article 2, reasonable grounds for thinking, a potential  
7 case, an arguable case. All of those considerations in  
8 the different cases highlight the low threshold that we  
9 are engaged in at this stage.

10 So to trigger the investigative obligation, all that  
11 is needed is possibility of a breach and in regard to  
12 that, madam, could I invite to you make allowances at  
13 this preliminary stage for what might reasonably be  
14 unearthed, and Mr Keith makes this point, that further  
15 material might emerge during your inquests, if you were  
16 to explore these issues. We mustn't assume that the ISC  
17 did unearth everything of relevance, that every relevant  
18 witness was questioned and that all relevant topics were  
19 fully explored, that all disclosure issues were properly  
20 addressed and that everything available was brought to  
21 the attention of the Committee.

22 The difficulty, of course, is that it would be wrong  
23 for us to try to litigate fully this suspected breach  
24 this week over the course of three days of oral  
25 submissions, and so, for those reasons, I would invite

1 you to make allowances for that.

2 By way of example, in the case of Hurst, although it  
3 went all the way to the House of Lords, at first  
4 instance the approach of Lord Justice Rose and  
5 Mr Justice Henriques, an approach which at no stage was  
6 overturned on appeal, was along the lines of that -- and  
7 this is at C/46 for your note, madam. Paragraph 109:  
8 "It seems to me crucial to bear in mind that it is  
9 not for this court, which has heard no witnesses, to  
10 evaluate the strength of the case against either of the  
11 interested parties."

12 In that case it was an analysis of a physical  
13 attack.

14 So what Lord Justice Rose was saying was that it's  
15 a low threshold and that we mustn't expect full  
16 litigation at that preliminary stage. He said it would  
17 be entirely inappropriate for the court to embark on  
18 analysis of the particular strengths and weaknesses of  
19 the case against the interested parties.

20 To similar effect, Mr Justice Henriques. So  
21 although, of course, you have to analyse whether the  
22 threshold test is met, and to a degree that requires an  
23 analysis of the facts, nevertheless I would submit that  
24 it was clearly enough to trigger the procedural duty to  
25 investigate.

1 Madam, again moving on, if I may, to another  
2 discrete point. Even if there is no arguable breach,  
3 might the duty to investigate arise? As you know,  
4 madam, I think on behalf of some of those parties, that  
5 submission has been advanced. That, even if you found  
6 no arguable breach, you should still conduct an  
7 Article 2 investigation.

8 A number of authorities have been cited and I don't  
9 propose to go into them. Mr Keith takes a different  
10 approach in his document and appears to suggest that an  
11 arguable breach must be established, and so my  
12 submission is this: in this case, clearly there is an  
13 arguable breach, but if I'm wrong about that and you  
14 conclude that there isn't, there is this alternative  
15 point to consider.

16 Could I make a few observations as to that point?  
17 I know that Mr O'Connor will be developing it. There's  
18 an analogy -- it comes to this, madam, there's an analogy  
19 that you may feel in the unprecedented inquests that you  
20 are dealing with that it would be an analogy that you  
21 should bear in mind in favour of having a Middleton  
22 inquest.

23 First of all, quite a few authorities touch on this  
24 issue and the principles are not clear and easy to  
25 establish, I would suggest.

1 Second, the context is always very relevant. So  
2 deaths in custody, deaths arising out of  
3 hospitalisation, whether mental health detainees or  
4 patients in a hospital.  
5 Soldiers in the army, whether conscripts who are, in  
6 a sense, there against their wishes or voluntary  
7 privates. When we analyse all of those cases and all of  
8 those particular individual contexts, what seems to be  
9 relevant in suggesting that there will automatically be  
10 a need for the inquiry is the particular relationship  
11 and the particular relationship between the agents of  
12 the state, on the one hand, and the vulnerable  
13 individual, on the other hand; so the prisoner who's  
14 entrusted to the jailer or the patient who in a sense is  
15 entrusted to the doctor, or the private soldier who is  
16 subject to the rules and the discipline of the  
17 Ministry of Defence.  
18 Madam, it may be that all of those decisions can be  
19 explained on the basis of that special relationship  
20 which triggers the need to have the investigation, so  
21 that, even if there's no arguable case of Osman fault,  
22 but some mere suggestion of a lesser degree of fault or  
23 perhaps negligence, nevertheless there is the need for  
24 the full investigation.  
25 In the recent case of Humberstone, it was described

1 as a case where the state is sufficiently implicated.

2 So pausing there, madam, it seems that what is at  
3 play in those cases is a lesser degree of fault, no need  
4 to show an arguable breach, but nevertheless  
5 a particular special nature of the relationship which  
6 gives rise to the acute need to have the investigation.

7 LADY JUSTICE HALLETT: What do you say is the particular  
8 special relationship here?

9 MR PATTERSON: The analogy is this, that in our particular  
10 case, the public cannot easily protect themselves  
11 against terrorism, terrorist attacks on this scale.  
12 They have no sufficient resources in any way practically  
13 to protect themselves against that kind of attack. They  
14 are unable to assess the sorts of risks that might  
15 arise. They have no legal powers whatsoever to  
16 investigate for themselves. Indeed, they would be  
17 committing perhaps, indeed, a host of criminal offences  
18 if they tried to.

19 So, therefore, the vulnerable position that the  
20 public is in is that they pay their taxes, entrust their  
21 safety to MI5, MI5 have the statutory duty to protect  
22 the public, and, therefore, the individuals are in  
23 a sense powerless or without any control similar to the  
24 prisoners in the custody cases, the soldiers in the MOD  
25 cases, and the like.

1 So that's how I put it. I perhaps don't put it as  
2 highly as Mr O'Connor. I simply say it is an analogy  
3 and, for example, if you were to find arguable breach  
4 difficult or perhaps a borderline decision, the  
5 particular vulnerable nature of the public is a relevant  
6 factor to add to the balance, I would suggest.  
7 Madam, on scope, could I conclude? Mention has been  
8 made of difficulties and the possible difficulties that  
9 you might face if you were to go down this route and  
10 have an Article 2 inquest. Mr Coltart touched upon  
11 sensitive documents and the like, and I would agree with  
12 his submissions as to the ability of this inquest to  
13 manage the documents. Redactions, summaries, all of  
14 those techniques which are frequently used in complex  
15 criminal prosecutions and terrorist prosecutions, all of  
16 those techniques are available. Rule 17 and the power  
17 to sit in private if necessary. The public interest in  
18 withholding can be weighed against the public interest  
19 in disclosure, and your statutory obligations to conduct  
20 the inquest and to answer the four questions under the  
21 Coroners Act.  
22 So there is nothing which cannot be overcome, in my  
23 respectful submission, if you do go down this route.  
24 Certainly, given the importance of Article 2, these  
25 procedural difficulties, if they are in reality

1 difficulties, cannot trump the Article 2 obligation to  
2 hold the appropriate investigation.

3 The families are anxious, as I've said madam, for  
4 you to explore these issues, these "what if" issues, as  
5 that victim impact statement termed it, and the  
6 questionnaire had these as the main topics that they  
7 would ask you to explore.

8 The public interest would also benefit by  
9 pinpointing lessons to be learned. Further terrorist  
10 attacks are highly likely, the recent Moscow Metro  
11 attacks, the Mumbai attacks and, in a little over two  
12 years from now, the eyes of the world will be on London  
13 with the 2012 Olympics, and so this inquest provides  
14 a perfect opportunity for you to ensure that everything  
15 possible can be done to improve our procedures and  
16 minimise the chances of any kinds of repetition.

17 Madam, may I move on to joinder? In essence, I've  
18 said everything I want to say on this in the document,  
19 the key point being that the families would find it  
20 extremely distressing if there were to be joinder, and  
21 I would suggest that that factor or that consideration  
22 is a highly material one.

23 Then finally, madam, jury.

24 Our submission is that section 8(3)(d) clearly does  
25 apply and that a jury is mandatory in this case. Sadly,

1 if there ever were to be a recurrence, further suicide  
2 bombings, that the safety of a section of the public  
3 would be prejudiced. The risk of further terrorist  
4 attack is high. There has been recent suggestion of  
5 institutional inertia on the part of the  
6 Security Services and at page 28 of the document there's  
7 a citation from a recent House of Commons report to that  
8 effect saying that there appears to be a degree of  
9 complacency in relation to anti-terrorist policies. So  
10 I would ask you to bear that in mind.

11 So the failings that could occur, as Mr Keith has  
12 highlighted in his document, relate not just to the  
13 investigative agencies, but also the emergency services  
14 and the possible recurrence of operational failings.

15 Despite arguments to the contrary that have been  
16 advanced by the British Transport Police and the  
17 Metropolitan Police and the Yorkshire Police, could  
18 I align myself with Mr Keith's observations at page 77  
19 of his document that the argument that 8(3)(d) does  
20 apply is a respectable argument and I would submit that,  
21 for that reason, a jury is mandatory.

22 If you are against us on that, madam, then 8(4)  
23 needs to be considered in the discretionary power and  
24 the essential point there is that, if you are having an  
25 extended scope to the inquest, public confidence in the

1 outcome of the inquest is generally regarded as being  
2 such that there is a need to have a jury, and that's the  
3 case of Paul and, indeed, that's echoed by the change to  
4 the statute, although that's not in force yet. At some  
5 stage, it may be that section 7 of the 2009 Act will  
6 come into force making a jury obligatory in those sorts  
7 of cases.

8 LADY JUSTICE HALLETT: If your enquiry is extending to  
9 operational failings -- for example, communications  
10 under ground and the like -- is that the kind of enquiry  
11 that you say is best dealt with by a jury?

12 MR PATTERSON: Yes, for the fact that perception matters  
13 significantly in these sorts of cases. Whether it's  
14 extended or not, the perception is particularly acute in  
15 this case, I would submit, but focusing on your question  
16 madam, yes, if a jury are handling those sorts of  
17 issues, they can properly handle them with summarising  
18 of materials, with analysis of only that which needs to  
19 be analysed, and there are no insuperable problems that  
20 we can perceive that would prevent a jury from being  
21 able to handle those things properly.

22 As I say, heavy terrorist trials take place up and  
23 down the land day in, day out without difficulties about  
24 handling those sorts of issues. They can give full  
25 answers to the questions that arise, rather like in the

1 recent inquest into the shooting of  
2 Jean Charles de Menezes, questions that can be carefully  
3 framed with the help of counsel. Then, at the end of  
4 the inquest, you, if you feel it appropriate, can write  
5 a detailed Rule 43 report.

6 So for all those reasons, we would invite you to  
7 summon a jury.

8 Madam, I don't know if I can assist you further on  
9 any specific topics.

10 LADY JUSTICE HALLETT: No, that's very helpful, thank you,  
11 Mr Patterson. Mr O'Connor?

12 Submissions by MR O'CONNOR

13 MR O'CONNOR: Madam, we represent the bereaved of four  
14 deceased persons from the Edgware Road bombing, and the  
15 15 survivors from three of the bombings: Aldgate,  
16 Edgware Road and Kings Cross.

17 Madam, just in passing, you've had, I could see,  
18 a little query about this meeting with the Intelligence  
19 and Security Committee and it may be convenient for me  
20 just to explain how that occurred --

21 LADY JUSTICE HALLETT: Certainly.

22 MR O'CONNOR: -- because most of our clients, our current  
23 clients, started judicial review proceedings nearly  
24 three years ago of a refusal by the then Home Secretary  
25 to convene a public inquiry, and indeed those judicial

1 review proceedings, that challenge, has repeatedly been  
2 stayed and is still stayed.

3 But in the course of communications with the  
4 Treasury Solicitors, after a change of Home Secretary to  
5 the slightly more user-friendly -- a Home Secretary of  
6 a different gender, there was a meeting between our  
7 clients and the new Home Secretary, and she suggested  
8 that our clients might wish to ask to meet the  
9 Intelligence and Security Committee as part of the  
10 process of giving them information and participation by  
11 them in the state's investigations, and that they did  
12 with the legal team and it's that that led to the many  
13 questions which were put in writing and which are  
14 appended to our overall submissions.

15 So that's how it happened and why.

16 LADY JUSTICE HALLETT: But that is just the one group that  
17 you and your solicitors represent?

18 MR O'CONNOR: Exactly, exactly. A minority of bereaved and,  
19 of course, of survivors. But those who happened to have  
20 taken an initiative and been legally active in pursuing  
21 remedy.

22 Madam, by chance, it is actually three years ago  
23 this week that they first asked for a public inquiry.  
24 Our overall submissions are at A2 in your files,  
25 madam, at tab 12B.

1 Our submissions on behalf of the survivors are at A.

2 I put those to one side for the moment. So it's A2.

3 They were split up because they were so voluminous.

4 LADY JUSTICE HALLETT: I have them, thank you.

5 MR O'CONNOR: I'm most grateful. It's at 12B and, madam, at

6 page 4 is the summary that you've invited us to take you

7 through in each case. May I just go through that now?

8 As regards resumption, we submit that there is

9 plainly sufficient cause to do so within section 16(3).

10 We, of course, expand on that in our part 2 of this

11 document.

12 As regards joinder, our submissions are that the

13 inquest into the deaths of the 52 victims should be

14 joined together but should not be joined with the

15 inquests into the deaths of their killers.

16 I say that with equal force, both for our bereaved

17 and survivor clients. There is, of course, the

18 additional factor for our survivor clients that it may

19 well be that several of them may be called to give

20 evidence. Just about every single one of them has

21 suffered or is continuing to suffer from post-traumatic

22 stress disorder. They are finding it almost impossible

23 even to read the scene reports. They know it's there.

24 They know at some time they're going to do so. They

25 know the contents are terrible and they can't face doing

1 it yet.

2 My instructing solicitor is talking around ways of  
3 helping them, easing them, towards doing so, perhaps  
4 with other survivors, perhaps with my instructing  
5 solicitor.

6 If that is the understandable degree of their  
7 current state of mind and their trauma, the idea that  
8 they could face a lawyer representing the perpetrators  
9 of these atrocities is a terrible prospect for them and,  
10 indeed, may well disable many of them from being able to  
11 face giving evidence at all.

12 The answer to that, we submit, is as follows: that  
13 they should not be joined and that they should not be  
14 recognised -- of course, subject to submissions they're  
15 entitled to make, but we have none at the moment -- they  
16 should not be joined as interested parties either.

17 Just at this very preliminary stage, it's only fair  
18 to say, is it not, that it's difficult to imagine  
19 a proper and relevant question that a lawyer on behalf  
20 of those men could ask of those witnesses.

21 LADY JUSTICE HALLETT: It's one of the reasons I questioned  
22 in my own mind whether, when people -- some people in  
23 their written submissions have suggested that it would  
24 be plainly arguable they could be properly interested  
25 persons in the inquests into the deaths of the 52,

1 because, at the moment, the scope seems to be  
2 intelligence failings and aftermath, and at the moment  
3 I'm grappling or grasping to try to find what basis the  
4 four could have in asking questions on those two fronts.  
5 MR O'CONNOR: Madam, we entirely agree. It's almost  
6 impossible to think of a proper basis for it. One can  
7 imagine -- we hope this doesn't enter anyone's mind.  
8 One can imagine some people perhaps thinking that your  
9 proceedings could be abused in order to open up some  
10 kind of political platform as to why they acted as they  
11 did, what their motivation was, how they became  
12 radicalised, way outside.  
13 I note I'm out on a limb a little bit about scope.  
14 I think even I can't imagine any kind of credible  
15 argument --  
16 LADY JUSTICE HALLETT: What if the families of the four  
17 wished to pursue the motivations? Is that anything that  
18 I ought to bear in mind?  
19 MR O'CONNOR: The motivations of --  
20 LADY JUSTICE HALLETT: Of the four --  
21 MR O'CONNOR: They cannot properly do so.  
22 LADY JUSTICE HALLETT: -- and the influences upon them.  
23 MR O'CONNOR: Exactly. They cannot properly do so in an  
24 inquest. The only -- well, the only complete verdict  
25 that could conceivably be brought in in relation to

1 their deaths is that they died by committing suicide and  
2 deliberately so.

3 When one knows, none of this material -- we know  
4 this from our general knowledge of these terrible  
5 events, not from evidence we've had -- but we know that  
6 Mohammed Sidique Khan of course made that chilling,  
7 whatever it may be called, film, declaring his  
8 intentions and his motives. We know that all four of  
9 them travelled together. We know they each had  
10 a backpack. We know they each had a bomb. We know they  
11 each had to be deliberately detonated, no question of  
12 accident or anything like that.

13 This may all go as to whether, in the end, their  
14 inquests should be resumed, and that's way beyond what  
15 I want to say now. But I'm talking around how quite  
16 extraordinary and unrealistic is the possibility that  
17 they should be recognised as interested parties in our  
18 inquests or have any claim to be joined to our inquests,  
19 and those are my primary concerns.

20 LADY JUSTICE HALLETT: Thank you.

21 MR O'CONNOR: Madam, that is joinder. So far as a jury is  
22 concerned, that comes after scope, but our submissions  
23 are in summary from this page, that the mandatory  
24 provisions of this Act apply and, even if they don't,  
25 your discretion applies. Then we come to scope and I'm

1 going to focus my submissions upon that. So the bottom  
2 of our page 4 we submit there are three proper areas  
3 that fall within the scope of a lawful inquest into  
4 these deaths.

5 The first is the basic information about the  
6 circumstances of each individual death. I think there  
7 is unanimity, really, on that, madam, and thus -- and  
8 that of course founds resumption in principle.

9 Secondly, reasonable preventability by state  
10 agencies. I'm going to focus my submissions on that.  
11 This is the bottom of page 4 of our overall submissions.  
12 Then over the page, aftermath, may I deal very  
13 briefly with that indeed, madam? Our mitigation is that  
14 we, I'm afraid, felt we needed time to consider the  
15 scene reports and also have a conference with our  
16 clients, so we've filed our aftermath skeleton argument  
17 and I'm not going to come back to that, so could I just,  
18 if you have it conveniently to hand, madam -- I'm not  
19 going to go through it or come back to it, so I'll just  
20 headline -- this was handed in today.

21 LADY JUSTICE HALLETT: I have it.

22 MR O'CONNOR: I'm most grateful. It's simply on the first  
23 page, having prepared this as best we can, we submit  
24 emergency response and whether there were any delays.  
25 Secondly, inadequate equipment on the Tube trains to

1 facilitate the response, for example first aid kits and  
2 emergency lighting, and, thirdly, delays in removing the  
3 bodies from -- well, most particularly from the  
4 Edgware Road bombing, and that process. I recognise the  
5 hesitation you've had, madam, over some of that. All we  
6 would say is that it does seem that those delays may  
7 have hindered the thoroughness and efficacy of the  
8 post-mortems.

9 Now, that impacts upon your ability in detail to  
10 reach findings precisely as to how each deceased died,  
11 who has been subjected to those delays and impaired --  
12 or limited post-mortems.

13 So that's all we say about that.

14 May I go straight to scope and reasonable  
15 preventability, and, madam, go -- really I'm going to  
16 invite you, please, to have open the relevant section of  
17 our submissions but I'm very much going to address you  
18 in my own terms and not necessarily follow that text.

19 Now, reasonable preventability and scope.

20 May I, with your leave, give you twelve striking  
21 features of these atrocities which call for  
22 investigation into preventability, and I'm deliberately  
23 starting with the factual circumstances of these events,  
24 and the reason for that is that it's become clearer and  
25 clearer with every House of Lords case on this point

1 that the practical end investigation is highly  
2 fact-sensitive, and actually that the apparently strict  
3 legal boundaries of whether it's an Article 2 Middleton  
4 inquest or a common law Jamieson inquest are actually  
5 breaking down, and they're breaking down -- really the  
6 best illustration I can give of that is of one end and  
7 the other.

8 So, for instance, in the hospital death case of  
9 Takoushis, which for your note is at C/26 -- the court  
10 found that an Article 2 investigation had to be carried  
11 out.

12 However, in the circumstances of that case, it did  
13 not call for an enhanced Middleton inquest. Article 2  
14 in that case was satisfied by having a Jamieson inquest  
15 but with system being thoroughly investigated as  
16 a common law inquest.

17 So my point in saying this is that you can argue  
18 until the cows come home whether the Article 2 duty to  
19 investigate is engaged, but actually, in the end,  
20 depending on what other investigations may have  
21 uncovered, depending on what issues are apparent to the  
22 court, you won't necessarily end up with an enhanced  
23 inquest.

24 Now, the converse of that mirrors it.  
25 Jamieson inquests, it seems, are increasingly

1 encompassing systemic faults and, as we will see from  
2 the cases of Hurst and Lewis, the common law scope for  
3 Jamieson inquests is expanding and perfectly properly,  
4 so as, in the end, to cover what everyone might a while  
5 ago assume could only be covered by an expanded  
6 Article 2 Middleton inquest.  
7 So that is why, I submit, strict boundaries are, if  
8 not dissolving, then certainly coming together as  
9 a confluence, and that's why I'm not quite sure that we  
10 are going to have an endless merry-go-round of  
11 House of Lords cases because they are simply going to be  
12 differing on their facts and the House of Lords -- the  
13 Supreme Court, sorry -- is going to say "No more, we  
14 don't have to go into" -- these are no longer questions  
15 of law. They are questions of the practical application  
16 of principles to very widely varying facts.  
17 So that is my rather lengthy excuse for starting  
18 with my list of twelve striking features, and some of  
19 them are obvious, but they need to be stated and  
20 separated and set out.  
21 The first is that there were 52 deaths in four  
22 coordinated attacks. The largest criminal fatalities in  
23 London, it is said, since the Second World War.  
24 Secondly, the first example of the appalling  
25 phenomenon of suicide bomb attacks.

1 Thirdly, the number of injured and very close  
2 survivors -- hundreds -- in the same carriages and the  
3 same bus as the murderers as the bombs went off.  
4 Fourthly, the horror of the circumstances of these  
5 deaths which have yet to be publicly exposed and of the  
6 suffering of the survivors.  
7 It was recognised in *Edwards v United Kingdom*, cited  
8 in paragraph 45 of JL in the House of Lords, that the  
9 horror of a particular death -- in that case it's one  
10 murder of a defenceless cellmate -- as the European  
11 Court and the House of Lords has endorsed, that horror  
12 founds the need for the widest public scrutiny of the  
13 circumstances.  
14 Fifthly, there are the effects on the rest of  
15 society of these atrocities, the division between  
16 communities, the psychological impact, the economic  
17 impact, the legal changes that follow. A profound  
18 earthquake.  
19 Sixthly, the vulnerability of the public so that it  
20 is truly impossible to guarantee protection, but it is  
21 all the more absolutely necessary that the best and most  
22 effective efforts at protection are put into practice.  
23 Seventh, how close and how preventible these  
24 atrocities were, how close the state agencies could have  
25 come to preventing it.

1 Increased surveillance. They could have discovered  
2 the bomb factory in Leeds. Increased surveillance.  
3 They could have detected the reconnaissance missions  
4 which were carried out around the public transport  
5 system in London. The ISC reports give a solid  
6 foundation for serious criticisms of not -- of state  
7 agencies not succeeding in preventing these atrocities.  
8 A lot was known 15 months before 7 July 2005. These  
9 are very unusual facts where that length of time is  
10 available as an opportunity for prevention. This isn't  
11 an Osman- or a Hurst-style phone call to the police on  
12 the day of a murderous attack from a neighbour. This is  
13 15 months of our state agencies not effectively  
14 following up on a lot of information they had at the  
15 beginning of 2004.  
16 Eighth, it is imperative that lessons are learnt in  
17 the most effective way. Not behind closed doors with an  
18 amateur committee with no real bite and with far too  
19 comfortable a relationship with the agencies, but as far  
20 as possible in public and with the widest possible  
21 concentration.  
22 Ninth, the lack of confidence in the process of  
23 investigation that has taken place so far. The second  
24 ISC report at paragraph 10, which only came out eleven  
25 months ago, records the concern that there had been

1 a profound lack of confidence in their efforts so far,  
2 and our submissions are that those concerns and that  
3 lack of confidence in the process remain, not least  
4 because -- and this is my tenth point -- of the calls  
5 that have come for a public inquiry into these issues.  
6 Now, an inquest is not a public inquiry, madam. You  
7 won't accuse me of confusing those two. But you can, we  
8 submit, go a very long way towards answering the  
9 questions which found these calls for a public inquiry.  
10 Those calls have come from both opposition front  
11 benches, from the London Assembly, most eloquently, in  
12 their report at page 14 on behalf of the people of  
13 London saying they deserve more, and really quite  
14 tellingly in the immediate aftermath of the second ISC  
15 report, Dame Pauline Neville-Jones went into print,  
16 having seen that report, to say that the Intelligence  
17 and Security Committee is not up to its role.  
18 Why is that so telling? She is a former chairman of  
19 the Joint Intelligence Committee, and of course, madam,  
20 you have well in mind the questionnaire of Dr Reid, your  
21 predecessor, as to the wishes of the bereaved.  
22 Eleventh, we submit that it's plain from the second  
23 ISC report that the first steps in learning proper  
24 lessons have not been taken because the first step in  
25 learning lessons is to acknowledge failings, and that is

1 the last thing that the second report of the ISC does.  
2 It leaves criticisms implicit. It explains changes,  
3 fundamental changes of policy by MI5 in footnotes. It  
4 doesn't explain why there have been changes in policy  
5 and it takes a careful reading to realise MI5 themselves  
6 have realised that they had to change policy in, for  
7 instance, their targeting practices, because they had  
8 not performed effectively between February  
9 and March 2004 and July 2005.  
10 It's very unfortunate to have to make this  
11 submission. The Intelligence and Security Committee  
12 plainly couldn't face the implications of setting out  
13 explicitly those criticisms and MI5 certainly has not  
14 publicly come out and faced up to them.  
15 So first steps have not been taken in learning  
16 lessons effectively.  
17 Finally, madam, there is no realistic other  
18 mechanism by which lessons can be learnt. On the facts  
19 of this case, the prospect of civil proceedings in order  
20 to explore those issues is wholly unrealistic and, of  
21 course, criminal proceedings too, though that is -- may  
22 I take this opportunity of repeating that the terms of  
23 the police investigations, these were the most  
24 wide-ranging possible efforts. They could not, of  
25 course, put the killers on trial. They effectively

1 investigated and put on trial alleged accomplices. The  
2 results of those trials do not matter and don't reflect  
3 on anyone. The fact is that the criminal justice system  
4 was invoked to its limit in this case but can't help us  
5 on the outstanding questions which really matter here.  
6 We submit that with those striking features of these  
7 atrocities, it would be quite remarkable if, neither  
8 under Article 2, nor at common law, there was not public  
9 scrutiny at this inquest into reasonable preventability,  
10 and there are three possible routes to our achieving  
11 that.

12 The first is that absolutely conventionally that  
13 Article 2 -- the Article 2 duty to investigate applies  
14 because there is an arguable violation of the state's  
15 duty to protect life. Osman territory.

16 The second submission in the alternative is that  
17 there is indeed here an Article 2 investigative duty  
18 even though there is no such arguable violation and the  
19 submission there must be that the law doesn't require  
20 any such arguable violation.

21 The third route is that, even if Article 2 doesn't  
22 apply at all, then the common law Jamieson inquest into  
23 how each deceased came by his or her death requires an  
24 investigation into reasonable preventability and allows  
25 for it.

1 Now before moving on, madam, may I enter a caveat  
2 and adopt Mr Coltart's suggestion which has a lot of  
3 practical common sense to it?  
4 He submits, if I may paraphrase it in my own  
5 terms -- I hope I do justice to it -- that it is  
6 actually premature now to resolve whether we are in  
7 Article 2 arguable violation territory. We don't, of  
8 course, have any of the raw material. All we have is  
9 the second ISC report. Its conclusions, we submit,  
10 plainly contrast with the material that is there  
11 exposed. The material justifies very real concerns on  
12 the issue of reasonable preventability, and we submit it  
13 would be procedurally wrong, madam, for you to judge  
14 that question and, as it were, for us to be expected to  
15 satisfy the burden of demonstrating an arguable breach  
16 when we don't really have the ammunition to do so.  
17 If I could put it in a slightly odd way, it is  
18 arguable that we may have an arguable case on violation  
19 if we get the proper material.  
20 Now, that's not a bad intro into this territory.  
21 Really, what Mr Coltart is suggesting, as I understand  
22 it, is that it's perfectly proper for you to include  
23 preventability within scope at the moment on  
24 a prima facie basis. Plainly because worse may emerge  
25 from the raw material which we've only seen secondhand,

1 and it's a pretty poor secondhand, in the ISC report.  
2 Now, this could be approached in a number of ways.  
3 Madam, you may be reluctant actually to start the full,  
4 formal, resumed inquest, if you are going to resume  
5 these inquests, without resolving this question. But it  
6 may be there's a halfway house there, that there is you  
7 obtain, madam, and of course through your team, sift the  
8 raw material we're talking about and serve it, subject  
9 to any necessary limitations upon the properly  
10 interested parties, and invite submissions  
11 before October, if that were to be the resumption date,  
12 on that material and saying, "Right, now you have a fair  
13 chance of demonstrating there is an arguable violation,  
14 let us see where this takes us", and then you are in  
15 a satisfactory position and in a sense the parties are  
16 in a fair position to discharge or not discharge this  
17 apparent burden.  
18 Of course, the real impact of whether this is an  
19 Article 2 inquest or not, the real impact is on the  
20 verdict, and that's what Jamieson and Middleton made  
21 very clear. If it's not an Article 2 inquest, it's far  
22 less likely the verdicts can reflect reasonable  
23 preventability. As the House of Lords have been at  
24 pains to emphasise, verdict doesn't limit scope, and  
25 very often the scope of the investigation is wider than

1 what could be reflected in the verdicts, and may I add  
2 now -- because of the case of Lewis -- scope can serve  
3 a very important function as to informing the coroner on  
4 Rule 43 reports.

5 May I start by going through the three routes to  
6 reasonable preventability being investigated, if this  
7 has to be decided now, but these are certainly our  
8 submissions as at the moment?

9 The first is to the effect that we accept that we  
10 have to show an arguable violation of Article 2 duty to  
11 protect life and this is the way in which we submit that  
12 we can do so.

13 You will have well in mind, madam, the well-trodden  
14 passages from Osman, limiting, for all sorts of good  
15 reasons, the duty of the state to protect the right to  
16 life, most particularly in that case, of course, the  
17 police.

18 Could I ask you to look at D/10, please, Osman v The  
19 United Kingdom?

20 LADY JUSTICE HALLETT: Is that D1/10?

21 MR O'CONNOR: It's D1. It's the last tab in D1, madam.  
22 The central passages are at page 305, if you have it  
23 in the European human rights reports, page 305,  
24 paragraphs 115 and 116.

25 Really paragraph 116 is the basis for the balanced

1 approach of the Strasbourg court to this duty to protect  
2 life.  
3 The first section of paragraph 116 sets out the  
4 policy reasons for it having serious limits:  
5 "For the court and bearing in mind the difficulties  
6 involved in policing modern society, the  
7 unpredictability of human conduct and the operational  
8 choices which must be made in terms of priorities and  
9 resources, such an obligation must be interpreted in  
10 a way which does not impose an impossible or  
11 disproportionate burden on the authorities.  
12 Accordingly, not every claim to risk to life can entail  
13 for the authorities a Convention requirement to take  
14 operational measures to prevent that risk from  
15 materialising. Another relevant consideration is the  
16 need to ensure that the police exercise their powers to  
17 control and prevent crime in a manner which fully  
18 respects due process and other guarantees which  
19 legitimately place restraints on the scope of their  
20 action to investigate crime and bring offenders to  
21 justice, including the Convention guarantees under  
22 Articles 5 and 8."  
23 So there is the recognition of the policy reasons  
24 not to be too demanding or stringent, the difficulty of  
25 predicting the onset of a particular crime, the

1 practical resource difficulties of the police and the  
2 legal limitations on what the police can and can't do.  
3 To continue:  
4 "In the opinion of the court, where there is an  
5 allegation that the authorities have violated their  
6 positive obligation to protect the right to life in the  
7 context of their above-mentioned duty to prevent and  
8 suppress offences against the person, it must be  
9 established to its satisfaction that the authorities  
10 knew or ought to have known, at the time, of the  
11 existence of a real and immediate risk to the life of an  
12 identified individual or individuals from the criminal  
13 acts of a third party and that they failed to take  
14 measures within the scope of their powers which, judged  
15 reasonably, might have been expected to avoid that  
16 risk."  
17 That's the core sentence on which much reliance is  
18 placed by the Secretary of State.  
19 "The court does not accept the government's view  
20 that the failure to perceive the risk to life in the  
21 circumstances known at the time or to take preventive  
22 measures to avoid that risk must be tantamount to gross  
23 negligence or wilful disregard of the duty to protect  
24 life. Such a rigid standard must be considered to be  
25 incompatible with Article 1 of the Convention and the

1 practical and effective protection of the rights and  
2 freedoms under Article 2.  
3 "For the court, and having regard to the nature of  
4 the right protected by Article 2, a right fundamental in  
5 the scheme of the Convention, it is sufficient for an  
6 applicant to show the authorities did not do all that  
7 could be reasonably expected of them to avoid a real and  
8 immediate risk to life of which they have or ought to  
9 have knowledge. This is a question which can only be  
10 answered in the light of all the circumstances of any  
11 particular case."

12 Madam, the first point I make here is that there is  
13 a tension between an over-stringent approach to the  
14 first sentence "knew, at the time, of the existence of  
15 a real and immediate risk to the life of an identified  
16 individual" and the court's rejection of a test of gross  
17 negligence or wilful disregard.

18 Madam, you will see that if one elevates the  
19 requirement of awareness staring in the face real and  
20 immediate risk to the life of an identified individual  
21 too high, then that is almost always going to involve  
22 gross negligence or wilful disregard. So there's  
23 a tension and a balance there.

24 A critical finding on the facts of Osman appears at  
25 paragraph 121. May I please just invite you, madam, to

1 read 121, which sets out the practical difficulties the  
2 police had in relation to this potential attacker, what  
3 they could and couldn't do, and what they tried to do,  
4 paragraph 121.

5 LADY JUSTICE HALLETT: Right.

6 MR O'CONNOR: In detail, the court is there recognising that  
7 actually the police had -- there was very little else  
8 they could have done and nothing effective, because no  
9 court would have convicted him or ordered his detention  
10 in a psychiatric hospital. So they could not have  
11 deprived him of his liberty and, therefore, of the  
12 opportunity of carrying out this crime.

13 Now, that is a striking contrast with the facts of  
14 this case where, as we've already pointed out, the  
15 discovery of a Leeds bomb factory, the watching of  
16 a reconnaissance trip on the London Underground, the use  
17 of proper information and resources over the 15 months  
18 between March 2004 and July 2005, and, may I say, the  
19 legal powers of the police and the prosecution in  
20 terrorism cases which contrast very starkly with this  
21 kind of neighbour dispute, mean that there were indeed  
22 practical and effective measures readily available to  
23 state agencies in this case as opposed to in the Osman  
24 case.

25 Nevertheless, none of that detracts from the clear

1 statement of principle at paragraph 116:  
2 "... knew or ought to have known, at the time, of  
3 the existence of a real and immediate risk to the life  
4 of an identified individual or individuals."  
5 The law has moved on, madam, in relation to  
6 identified individuals at risk, and most sensibly, as we  
7 shall see, it would be quite irrational not to recognise  
8 that you do not need a potential victim of a threat to  
9 life, you do not need the state to know of that person's  
10 name and address and specific identity.  
11 This really arises out of the environmental disaster  
12 cases before Strasbourg. I need only take you to one of  
13 them and it really was a mudslide from government-owned  
14 and controlled land on to a nearby slum.  
15 It's the case of -- I'm going to get the  
16 pronounciation wrong -- Oneryildiz v Turkey. It's at D2,  
17 tab 19. Oh, D3, sorry.  
18 Can I take you to paragraph 10 which sets out that  
19 since the early 1970s, a household refuse tip had been  
20 in operation in a slum area and the City council had  
21 been in control of that land.  
22 It started off as being an uninhabited area, but,  
23 slowly, dwellings developed near the refuse tip.  
24 Can I take you then to paragraph 18 which sets out  
25 that a methane explosion occurred causing a landslide.

1 Ten slum dwellings were engulfed and 39 people died.  
2 Then, madam, it should be reflected at paragraphs 34  
3 and 40 that there were successful criminal proceedings  
4 against the responsible officials who were sent to  
5 prison, paragraph 34, and compensation was given after  
6 civil proceedings, paragraphs 40 and 41, against the  
7 government.  
8 So justice was done in the criminal and civil  
9 context there.  
10 But then at paragraph 111, please, that reflects the  
11 court saying that the criminal and civil proceedings  
12 that had been taken were not an answer to the need for  
13 accountability in an investigation.  
14 We come to 117 and 118. Because the criminal trial  
15 did not involve an allegation of a serious enough  
16 offence, in particular responsibility for death, at 117:  
17 "Accordingly, it cannot be said that the manner in  
18 which the Turkish criminal justice system operated in  
19 response to the tragedy secured the full accountability  
20 of state officials or authorities for their role in it  
21 and the effective implementation of provisions of  
22 domestic law guaranteeing respect for the right of life,  
23 in particular the deterrent function of the criminal  
24 law. In short, it must be concluded in the instant case  
25 that there has also been a violation of Article 2 of the

1 Convention in its procedural aspect on account of the  
2 lack in connection with the fatal accident provoked by  
3 the operation of a dangerous activity of adequate  
4 protection by law safeguarding the right to life and  
5 deterring similar life-endangering conduct in the  
6 future."

7 So there was a violation of Article 2 because the  
8 civil and criminal proceedings had not satisfied the  
9 investigative duty under Article 2.

10 The point of this, madam, is that when, therefore,  
11 Osman says an identified potential victim, it does not  
12 mean literally that, and what Oneryildiz does is show us  
13 that all you need is an identified class of potential  
14 victims.

15 So, madam, I hope you can see we're already getting  
16 away from the domestic violence aspect, or neighbourhood  
17 violence aspect, tightly identified and very narrow  
18 risk.

19 LADY JUSTICE HALLETT: I'm sorry to interrupt you,  
20 Mr O'Connor. I understand that argument. Here the  
21 problem is that "identified class" has to become members  
22 of the public. It can't be members of the travelling  
23 public, because the risk was thought to be towards  
24 nightclubs and shopping centres.

25 MR O'CONNOR: Madam, that is the way in which my learned

1 friend Mr Coltart explained the perceived intentions  
2 behind the Crevice plot.

3 LADY JUSTICE HALLETT: Once you're linking these four with  
4 Omar Khyam, that looks as if, as I understand the  
5 argument, that's what should have alerted the  
6 Security Services to the fact there could be a plot  
7 between Khyam and at least two of the four we have here.

8 MR O'CONNOR: Not quite so, madam, if I may say so, with  
9 respect, because the Crevice plot involved obviously  
10 a consignment, a large consignment, of fertiliser in  
11 a secure storage thing, actually for some months, it had  
12 been there for some months, and evidence of  
13 conversations from audio surveillance between those  
14 plotters during which there were odious conversations  
15 about girls dancing in a particular nightclub and them  
16 deserving it, I mean just absolutely appalling stuff,  
17 but there was also evidence of a wide range, even within  
18 that plot, a wide range of potential vague targets.  
19 A football ground. Poisoning the drinks and hamburgers  
20 at Old Trafford. In other words, my answer to my Lady's  
21 intervention is that, first of all, this is not the  
22 Crevice plot. The Crevice plot is finished, effectively  
23 and brilliantly pre-empted by police and  
24 Security Service intervention at the end of March 2004.  
25 Even within that plot, there was a very great deal

1 of uncertainty about potential targets. There was  
2 a wide range of discussion. The Bluewater shopping  
3 centre was one, for instance. I have to say I don't  
4 think that there was specific mention of a public  
5 transport target. I don't think there was.

6 LADY JUSTICE HALLETT: I understand how you would say, well,  
7 it is ridiculous to restrict the words in Osman to too  
8 great an extent, but when the court in Osman uses the  
9 word "identified", how should I interpret that word in  
10 the context of this case?

11 MR O'CONNOR: Madam, that's what I'm coming to. I'm going  
12 to address you in three different ways about how  
13 "identified" actually can't be interpreted in a narrow  
14 way. One is the class of potential victims, the second  
15 is location, and the third is timing. But I'm just  
16 dealing with the first one now.

17 In terms of the class of potential victims, we've  
18 already got slum dwellers living in particular houses at  
19 risk from a mudslide and a methane explosion. I dare  
20 say you could say, well, that is an identified class or  
21 group of people.

22 What if this methane explosion and mudslide was  
23 hanging over a public highway? Not dwelling houses, but  
24 a public highway. So that a perpetually shifting  
25 population of drivers, driving by, could potentially

1 have been killed from a lethal explosion and mudslide,  
2 would the European Court say: ah, no, no, you're not  
3 a sufficiently defined group of people, we draw a line  
4 here. Only if you're actually living underneath the  
5 risk rather than you happen to be passing by. That  
6 would be a nonsense, absolute nonsense. You can have  
7 a shifting population by way of a class of potential  
8 victims to whom the state owes a duty of protection  
9 under Article 2.  
10 So we've dealt with identity as a class or group of  
11 people.  
12 May I then turn to timing, because Osman talks of  
13 a real and immediate risk.  
14 Now, of course, that, on Oneryildiz terms, can only  
15 sensibly mean a continuing immediate risk, and the fact  
16 that the risk comes to terrible fruition six months,  
17 five years later, is irrelevant to whether the duty is  
18 owed, because that's absolutely random, and doesn't  
19 detract from the fact that the risk is immediate.  
20 So the actual -- I mean, as it so happens, in Osman,  
21 the killing happened, all the events, within hours and  
22 a very few days, but the principle cannot possibly be so  
23 limited.  
24 May I again come up with a hypothetical example? Of  
25 course, any of these landslides could have been five or

1 ten years after it became dangerous. But let us say  
2 a state-owned transport utility deliberately chooses to  
3 save money by buying dangerous railway carriages, and  
4 they're told in some email, which they hide away, the  
5 axles on these carriages are going to go any time, they  
6 may go any time between now and 10,000 miles, and they  
7 save the money, they put the public at risk, a shifting  
8 population of people at any time who may be on that  
9 train, and seven and a half years later or 7,500 miles  
10 later the axle goes and there's a fatality.  
11 Now, in terms of time, that was an immediate risk  
12 which happened to come to fruition after a delay, but it  
13 doesn't dispose of the Osman principle in any way.  
14 May I finally come to location? These are all -- as  
15 my third area of class definition, if you like. These  
16 are not extensions of principle. They are practical  
17 applications of the same principle to facts where the  
18 European Court would plainly not draw a line.  
19 So let's come to location. Let us say the state,  
20 instead of getting railway carriages which are  
21 defective, is running a chemical plant and buys a huge  
22 chemical storage tank and they are told the same  
23 information, "It could go any time. We're selling it to  
24 you cheap. It could last for five years, if you're  
25 lucky. It could go any time", and it goes four and

1 a half years later, whatever. Where is this class of  
2 people who may be the victims? Absolutely random. It  
3 could be six miles one way, depending on which way the  
4 wind is blowing, it could be 15 miles the other way.  
5 Location is not a definition of the group of people who  
6 are entitled to protection from the state of their  
7 Article 2 rights.  
8 Each one of these examples would involve gross  
9 anomaly if the principle and the protection did not  
10 apply to those people.  
11 Here, concluding my submissions on arguable  
12 violation here, here we have an immediate threat of  
13 terrorist atrocity, we submit, which have been  
14 appreciated from the time of the association between  
15 these bombers and the Crevice plotters. It should have  
16 been tracked and assessed. It was an immediate risk,  
17 and the fact that it came about a year later, 15 months  
18 later, is absolute chance.  
19 The fact that one couldn't, as of March 2004, name  
20 the people who had happened to be on the first carriage  
21 of a particular Tube train, which patently obviously one  
22 couldn't do, or even as, madam, you have pointed out,  
23 necessarily say that there was information that users of  
24 public transport in London were at risk, we submit does  
25 not break the principle.

1 LADY JUSTICE HALLETT: Does the word "identified" mean  
2 anything?

3 MR O'CONNOR: It means all those who may be victims of the  
4 perceived risk, and that will vary with the nature of  
5 the risk. With the mudslide, it's those who are living  
6 close to it. With the weak bank of mud over the road,  
7 it's anyone who may be driving past that at any time  
8 when the mud starts sliding. It's children who may be  
9 playing on it, yes. It's anyone who may foreseeably be  
10 at real risk from a failure to take reasonable steps to  
11 protect them.

12 In my submission, the principle in Osman has to be  
13 applied to wider facts than arose in that particular  
14 case.

15 Hence, we have arguable violation of that duty here  
16 of the protection of the right to life of these bereaved  
17 and survivors.

18 Madam, my second submission is that, if I'm wrong on  
19 that, then Article 2 still applies because we do not  
20 concede that we need to show an arguable violation of  
21 the protective duty.

22 May I just map how the investigative duty has  
23 started from a little acorn and has developed across  
24 many different areas? I'm just going to use headings  
25 here, because all of them will be familiar, but it's

1 interesting to track through the development.  
2 The investigative duty first, of course, was  
3 expressed under Article 2 in McCann, the Gibraltar  
4 shooting case, and Jordan v The UK, alleged involvement  
5 of state agents in a fatal shooting there.  
6 So it begins with cases where there's the direct  
7 involvement of state agency in a killing.  
8 Positive act by state agents directly causing  
9 a fatality.  
10 Next, we get the investigative duty arising where  
11 there is murder by a third party in state custody, the  
12 cell sharing cases, Edwards v United Kingdom and Amin.  
13 Next, we get the investigative duty arising in cases  
14 of suicide in state custody, Keenan v UK and Middleton,  
15 in cases where the state has failed to protect. So  
16 omission in custody.  
17 Next, we get the Osman cases, unlawful killing in  
18 the community, not in custody, by a third party, but  
19 subject to the limitations we've just discussed.  
20 Negotiation, we get the case of JL in the  
21 House of Lords where the investigative duty applies to  
22 attempted suicide, near-miss suicide cases in state  
23 custody where life was endangered and serious injuries  
24 followed.  
25 Next, we have a recognition that there is an

1 investigative duty by the state, even where there's  
2 murder in the community and absolutely no allegation of  
3 fault by state agents at all, and I'll come back to this  
4 because it's important, the Menson case.

5 Then finally, we get deaths in hospital in state  
6 hospitals as recognised in Goodson at C/23 and  
7 Humberstone very recently in C/44.

8 But also in private hospitals, as in Vo v France  
9 which is cited in Humberstone and other cases.

10 So we get a steady expansion of the investigative  
11 duty under Article 2 into these other territories.

12 We submit that that expansion has gone so far that  
13 there is plainly no longer any legal requirement for  
14 there to be an arguable case of violation of the  
15 protective duty, and JL in the House of Lords, which is  
16 at C/38 -- may I invite you, madam, please, to go to  
17 that? It's C3, tab 38.

18 Madam, in paragraph 1 you can see that the core  
19 question was the nature of the investigation that must  
20 be carried out by the state whenever a prisoner in  
21 custody makes an attempt to commit suicide that nearly  
22 succeeds and which leaves him with serious injury.

23 Paragraph 3 records that the investigation of the  
24 Prison Service is carried out by a retired prison  
25 governor. Paragraph 8 in the middle, what the claimant

1 seeks and the defendant refuses is an enquiry by  
2 a personal body institutionally and practically  
3 independent from those implicated in the circumstances  
4 which led to the life-threatening injury, who or which  
5 takes steps to ensure all relevant evidence in relation  
6 to them is open to public scrutiny involving the next of  
7 kin.

8 So an Article 2 enhanced investigation.

9 At paragraph 7, the first instance judge,  
10 Mr Justice Langstaff, had concluded that Article 2  
11 applies and required an investigation where a state or  
12 its agents potentially bear responsibility for loss of  
13 life, an unexpected death or life-threatening injury in  
14 custody will usually, though not always, require an  
15 investigation sufficient to satisfy Article 2  
16 obligations.

17 Now, madam, moving from that, the general  
18 submissions of the Secretary of State are here at  
19 paragraph 13, because the Secretary of State's concern  
20 was about the resource implications of having to have  
21 full-blown, what are called D-type investigations into  
22 all the very many near-suicide cases in custody, and  
23 thus raised, at paragraph 13, the following  
24 propositions:

25 (i):

1 "It is conceded that the same principles apply where  
2 a suicide or a near-suicide takes place in prison."

3 (ii):

4 "Where a suicide or a near-suicide takes place in  
5 prison, the relevant facts must first be considered by  
6 the prison authorities in order to determine whether  
7 there is an arguable case that there has been a breach  
8 of the substantive duty imposed on the state by  
9 Article 2 to protect life."

10 (iii):

11 "If there is no such arguable case, no further  
12 investigation is required."

13 That is our stark issue that the Secretary of State  
14 raised for decision.

15 That proposition at (iii) was decisively and  
16 unanimously rejected by all their Lordships.

17 Paragraphs 26 to 28:

18 "The duty to investigate imposed by Article 2 can  
19 arise even where there is no question of any direct  
20 involvement of a state agent. In *Menson*, a black man  
21 was killed as a result of being set on fire by an  
22 assailants during a racist attack. The court held that  
23 in such circumstances there is an obligation for some  
24 form of effective judicial investigation, adding: 'Where  
25 death results as in Michael *Menson's* case, the

1 investigation assumes even greater importance, having  
2 regard to the fact that the essential purpose of such an  
3 investigation is to secure the effective implementation  
4 of the domestic laws to protect the right to life. It  
5 seems to me that the obligation to have an investigation  
6 in circumstances such as these is not so much  
7 a secondary procedural obligation, but rather part of  
8 a positive obligation also noted by the court to have in  
9 place effective criminal law provisions to deter the  
10 commission of offences backed up by law enforcement  
11 machinery'."

12 Over the page:

13 "Menson was cited by Lord Bingham in Amin."

14 Madam, this is so important I might as well use this  
15 opportunity to cite this critical paragraph, which is of  
16 very wide significance really to all our submissions.

17 That is the function and purpose of an investigation:

18 "The state's duty to investigate is secondary to the  
19 duties not to take life unlawfully and to protect life  
20 in the sense that it only arises where a death has  
21 occurred or life-threatening injuries have occurred.

22 The purposes of such an investigation are clear: to  
23 ensure, so far as possible, the full facts are brought  
24 to light, that culpable and discreditable conduct is  
25 exposed and brought to public notice, that suspicion of

1 deliberate wrongdoing, if unjustified, is allayed, that  
2 dangerous practices and procedures are rectified and  
3 that those who have lost their relative may at least  
4 have the satisfaction of knowing that lessons learnt  
5 from his death may save the lives of others."  
6 That is an expression of policy which really applies  
7 across the board. It very much mirrors the  
8 Jamieson-stated purposes for an inquest.  
9 Then having cited, Lord Phillips then cites from  
10 Lord Bingham in Gentle, which was the very different  
11 case of the attempt to use Article 2 to obtain an  
12 investigation into the legality of the Iraq war.  
13 Lord Phillips says that that passage from Gentle:  
14 "Those observations were directed to the obligation  
15 imposed by Article 2 to hold a public investigation.  
16 They should not be read as suggesting that the State  
17 never has a duty to carry out an investigation into  
18 a life-threatening incident unless there is reason to  
19 believe that it may demonstrate that state agents have  
20 failed to perform the substantive obligations imposed by  
21 Article 2."  
22 LADY JUSTICE HALLETT: There he's explaining Lord Bingham's  
23 use of the expression "parasitic upon", is he not?  
24 MR O'CONNOR: Yes, indeed he is:  
25 "Still less do they support an argument that the

1 only object of such an investigation is to ascertain  
2 whether or not state agents have been in breach of duty.  
3 The investigation will be concerned to seek what lessons  
4 can be learned for the future, whether or not there has  
5 been fault in the particular case."  
6 Then Lord Slynn in Amin is cited as saying that  
7 system issues need just as effective investigation,  
8 indeed sometimes more so than individual crime.  
9 Then really Lord Phillips goes very widely:  
10 "Many activities today carry with them so great  
11 a risk to life that the duty of the state to put in  
12 place 'a framework of laws, procedures and means of  
13 enforcement' will include a duty to require  
14 investigations of one form or another to be carried out  
15 in the event of a mishap, even if this does not actually  
16 result in loss of life. The investigations will not  
17 necessarily be independent or held in public.  
18 Requirements of such investigations can readily be found  
19 in the regulations governing carriage by rail, sea, air,  
20 Health and Safety at Work. The primary purpose of such  
21 investigations is to learn lessons for the future. It  
22 was for this reason that in the present case  
23 Mr Justice Langstaff rejected the Secretary of State's  
24 submission the function of the investigative obligation  
25 imposed by Article 2 was simply to secure the

1 accountability of those agents of the state who might be  
2 said to be at fault."  
3 Then quotes from Mr Justice Langstaff.  
4 Then paragraph 31:  
5 "The duty to investigate imposed by Article 2 covers  
6 a very wide spectrum. Different circumstances will  
7 trigger the need for different types of investigation  
8 with different characteristics. The Strasbourg court  
9 has emphasised the need for flexibility and the fact  
10 that it is for the individual state to decide how to  
11 give effect to the positive obligations imposed by  
12 Article 2. In this jurisdiction, every death calls for  
13 a certificate of the cause of death. In specific  
14 circumstances, an inquest is required. These include  
15 where there is reasonable cause to suspect that  
16 a deceased died a violent or unnatural death, that the  
17 death was sudden and the cause unknown, or where the  
18 death occurred in prison. In further circumstances,  
19 there must be a jury. I have already described the  
20 nature of such an inquest where the death in prison was  
21 caused by suicide. Thus death ..."  
22 Talking in the broadest possible terms here, madam.  
23 "... requires a spectrum of different types of  
24 investigation, depending on the circumstances of the  
25 particular case. This regime is part of the way in

1     which the UK gives effect to the obligations of  
2     Article 2. The regime makes no provision for near-death  
3     and suicide", because inquests can't apply to  
4     near-death. "This appeal raises the question of how  
5     such an event is to be accommodated within the  
6     spectrum."

7     The rejection of the submission of the Secretary of  
8     State is repeated by Lord Rodger at paragraph 58:

9     "Precisely because the obligation on the prison  
10    authorities to protect a prisoner from himself is not  
11    absolute and depends on the particular circumstances,  
12    a suicide can occur without there having been any  
13    violation of the prison authorities' obligations under  
14    Article 2 to protect the prisoner.

15    "Focusing on that point, Mr Giffin argued on behalf  
16    of the Secretary of State that Article 2 did not require  
17    an independent investigation to be held unless there was  
18    some positive reason to believe that the authorities had  
19    indeed been in breach of their obligation to protect the  
20    prisoner. That argument is mistaken. Whenever  
21    a prisoner kills himself, it is at least possible that  
22    the prison authorities who are responsible have failed  
23    either in their obligation to take general measures to  
24    diminish opportunities for harm or in their operational  
25    obligation to try to prevent suicide. Given the closed

1 nature of the prison world, without an independent  
2 investigation, you might never know."

3 Madam, we could apply that very much to dealings  
4 between the state agencies involved in this case.

5 "So there must be an investigation of that kind to  
6 find out whether something did indeed go wrong. In this  
7 respect, a suicide is like any other violent death in  
8 custody."

9 At paragraph 87, Lord Walker, having cited from  
10 Lord Bingham in Middleton, says:

11 "Lord Bingham did not, therefore, restrict the  
12 purpose of an independent investigation to establishing  
13 a past violation of the state's substantive obligations.  
14 He included the wider purpose of learning from  
15 experience, whether or not there had been identifiable  
16 failures, systemic or operational for which the  
17 management as a whole or particular individuals must  
18 take responsibility."

19 Then 100 to 101, Lord Brown --

20 LADY JUSTICE HALLETT: I think I have the point,  
21 Mr O'Connor.

22 MR O'CONNOR: Yes, they unanimously reject that submission.  
23 Now, the question is plainly -- I don't want to shy  
24 away from this -- those statements, taken at face value,  
25 enormously support our position.

1 Inevitably, the counter-submission is: well, this is  
2 a prison custody case. The question arises, madam, for  
3 you to resolve, how much are those very broad,  
4 broadly-stated sentiments confined to a prison custody  
5 case? We submit they are plainly not, and it's perhaps  
6 plainest from Lord Rodger at paragraph 58, where he  
7 indicated that a suicide can occur without there having  
8 been any violation of the obligation under Article 2.  
9 So it's not -- the reasoning of their Lordships is  
10 not there always is an arguable violation, because it's  
11 prison custody, and the state controls the environment.  
12 The rationale is there doesn't need to be an arguable  
13 violation, and on the facts of that case, there is  
14 sufficient to justify an Article 2 investigation.  
15 Lord Phillips' reference, wide-ranging reference, to  
16 all those statutory enquiries that have to take place at  
17 the accident, familiar really to all civilised advanced  
18 societies, where a state puts in place the process of  
19 investigation after accidents. No involvement of the  
20 state necessarily at all.  
21 May I take a step further back in a sense, because  
22 none of this is terribly dramatic? I mean, our coroners  
23 legislation since the middle of the 19th century, has  
24 provided for public scrutiny, public investigation by an  
25 inquest, into all violent or unnatural deaths, and

1 Lord Bingham in Amin went right back to a 13th Century  
2 text. In Amin we went back to some records from  
3 Nottingham Prison where there were investigations in the  
4 13th and 14th Century.

5 One somehow despairs at the focus upon Article 2 of  
6 the convention when we have -- when there were still  
7 Goths and Visigoths in the rest of Europe, we had the  
8 glorious common law in positions of duties on the state  
9 to investigate and, actually, may I say, with a jury --  
10 quite remarkably with a jury -- into unnatural deaths,  
11 with a particular provision for deaths in custody.  
12 So there's nothing terribly dramatic over saying the  
13 state always has an investigative duty, whether the  
14 state has been at fault or not, or it's demonstrable or  
15 arguable that they have been.

16 Madam, I'll try to limit what I'm saying. May I  
17 really conclude this by looking at Humberstone, the  
18 recent decision of Mr Justice Hickinbottom because he  
19 does give a very helpful overview. This was a death in  
20 hospital case. C/44, so it's C3, tab 44.

21 This is really a dispute about legal aid for  
22 representation at an inquest.

23 From paragraph 2, madam, you can see this was the  
24 tragic death of a young boy aged 10 in hospital after an  
25 asthma attack. The question arose of whether Article 2

1 applied to a death in a public state hospital.  
2 Mr Justice Hickinbottom obviously has to consider  
3 why should the state finance representation at an  
4 inquest into an issue like this, how far is the inquest  
5 going to go.

6 Paragraph 45:

7 "The obligation on a state under Article 2 also  
8 encompasses a duty in some circumstances to investigate  
9 a death. That has sometimes been phrased as a discrete  
10 procedural obligation to investigate, but particularly  
11 after Goodson, more usually as part of the positive  
12 obligation to establish a framework of legal protection  
13 of the substantive right."

14 That's a hospital case, madam, Goodson.

15 "However, to distinguish it from the more direct  
16 primary duty I have described, purely for convenience  
17 I shall refer to this as 'the secondary duty' of the  
18 state under Article 2.

19 "In the context of deaths of patients, the secondary  
20 duty has been described by the European Court of Human  
21 Rights in *Vo v France* [2005]. 'They [the principles  
22 under Article 2] require an effective independent  
23 judicial system to be set up so that the cause of death  
24 of patients in the care of the medical profession,  
25 whether in the public or private sector, can be

1 determined and those responsible made accountable ...'"

2 Takoushis is cited at paragraph 47 where the Court

3 of Appeal says -- the Master of the Rolls, says:

4 "'It seems to us, however it is analysed, the

5 position is, where a person dies as a result of what is

6 arguably medical negligence in an NHS hospital, the

7 state must have a system which provides for the

8 practical and effective investigation of the facts and

9 for the determination of civil liability'.

10 "In the context of a death whilst under medical

11 supervision, what triggers the obligation ...? Of

12 course, where the state has (or may have) breached its

13 primary duty under Article 2 and state agents are (or

14 may be) responsible ... the obligation to investigate

15 arises. That was common ground before me. In the

16 context of the death of a patient, that might arise if

17 there was gross negligence or the systems are not

18 adequate to protect the life. Central to these cases is

19 the function of an investigation to ensure that

20 accountability of state agents ..."

21 LADY JUSTICE HALLETT: I am on to paragraph 51, Mr O'Connor.

22 MR O'CONNOR: I'm very grateful. Madam --

23 LADY JUSTICE HALLETT: I mean, the final line of

24 paragraph 51:

25 "The state may be sufficiently implicated in a death

1 to trigger the obligation of investigation even without  
2 any likelihood or even possibility of the state having  
3 breached its primary duty."

4 MR O'CONNOR: Yes. Madam, that was a state hospital case  
5 and Vo v France, in 2005, just going back to that  
6 citation from paragraph 46, refers to a private sector  
7 hospital as well. So the state is even more distanced  
8 from involvement.

9 We have -- may I hand it up to your team -- but we  
10 have the report of Vo v France for you to look at at  
11 your -- whatever leisure you get, madam, over the next  
12 few days, but we have Vo v France.

13 LADY JUSTICE HALLETT: But it goes back --

14 Mr Justice Hickinbottom goes back in paragraph 53  
15 saying: well, it's unnecessary to go that far, because,  
16 for the purposes of deciding that case, the deceased was  
17 in the special care, so we go back to well-established  
18 principles anyway.

19 MR O'CONNOR: I couldn't agree more, but he recognises  
20 perhaps -- Mr Justice Hickinbottom takes to its logical  
21 conclusion that process which I tried to set out, the  
22 growth of the oak from the acorn, where he says in the  
23 last sentence of 52:

24 "Indeed, the trend in these cases", having referred  
25 to public or private hospitals, "is towards recognising

1 the state has an obligation to ensure that an effective  
2 investigation is conducted into any death in which there  
3 may be doubt as to the circumstances of the death, see  
4 Takoushis."

5 Madam, we come full circle, because that is really  
6 what the Coroners Act says happens in our system. It's  
7 not so shocking at all. In a sense it's Article 2  
8 catching up with our common law and our statutory duty  
9 since the middle of the 19th Century imposed on the  
10 state, with which we are very, very familiar.

11 So those are my submissions on no need for an  
12 argument case of violation, and, madam, my third route  
13 is, under a conventional Jamieson inquest anyway, there  
14 could and should be included within scope reasonable  
15 preventability, and really this puts together many  
16 passages as to rigorous investigation, making sure that  
17 public suspicion is allayed, maintaining public  
18 confidence, not interpreting the limitations on verdict  
19 so as to frustrate the purposes of Rule 43 reports, and  
20 can I keep my citations to a minimum and give to you,  
21 madam, four -- I'll just give you four references and  
22 then take you to Hurst and Lewis.

23 The four citations which I'll keep to citations are  
24 Ex parte Dallaglio at C/6, pages 154 to 5 and 164.  
25 Jamieson at C8. Madam, you will remember those

1 principles set out by Lord Bingham. At page 24,  
2 paragraph 5, and at page 26, paragraph 14.  
3 Then Amin at C/20, and there is a very particular  
4 thing I'd like to point out hidden away in Amin. It  
5 does require my taking you to it madam at C/20. So it's  
6 C2, tab 20.

7 It's at paragraph 16 that Lord Bingham sets out that  
8 very ancient history going back to the Statute de  
9 Officio Coronatoris, 1276, but what I really wanted to  
10 take you to is at paragraph 31, where, having reviewed  
11 the state of the inquiries as they had taken place when  
12 the House of Lords were considering the need for  
13 a public inquiry, the House of Lords found not only that  
14 there had been a violation of Article 2 Convention  
15 standards -- this is the last sentence of  
16 paragraph 32 -- but a violation of domestic standards of  
17 investigation.

18 Now, that's very interesting because that is  
19 Lord Bingham recognising the parallel between the common  
20 law and Article 2, and in this particular case  
21 recognising the history saying there is a common law  
22 duty here to investigate, just as important as the  
23 Article 2 duty to investigate, and here it has been  
24 violated.

25 So that's the only thing I wanted to point out from

1 Amin.

2 The fourth reference which will, I hope, now just be  
3 a pure reference, is Takoushis which is at C/26. So  
4 that's at C2, tab 26, and it's paragraphs 41 to 48.,  
5 it's a Court of Appeal decision, a hospital death.  
6 Then the two cases I would like to cite properly to  
7 you, madam, are Hurst and Lewis.

8 So C/33, so C3, tab 33.

9 This was an Osman type of complaint where a boy was  
10 stabbed by a neighbour and the neighbour was convicted  
11 of manslaughter, and the family of the victim wanted the  
12 coroner -- I'm looking at the beginning of the  
13 headnote -- to resume the inquest in order to make  
14 findings about failures by public authorities to protect  
15 the deceased from the attack.

16 The coroner refused. The divisional court upheld  
17 the challenge and said there was a duty to investigate  
18 further.

19 There was of course notoriously -- and this is -- an  
20 irrelevant major issue in Hurst, from our point of view,  
21 is the fact that the death occurred before the Human  
22 Rights Act came into effect and so counsel were  
23 straining might and main to find their way round the  
24 non-retrospectivity of the Human Rights Act, and that  
25 was one of the major issues in that case.

1 Now, therefore, the whole case had to proceed on the  
2 basis that Article 2 did not apply. Thus, the court had  
3 to examine whether the common law and Jamieson required  
4 an investigation into this issue.

5 To summarise, two of their Lordships plainly said  
6 that it could and should, and two of their Lordships  
7 didn't dissent from that and one of their Lordships  
8 reluctantly doubted it. So I think we get a sort of win  
9 on points on this. On points, this is worth citing  
10 because of what Lady Hale and Lord Mance say.

11 May I start with them? Paragraph 21, Baroness Hale:  
12 "Jamieson was not directly concerned with the scope  
13 of the inquiry at an inquest. That has always been  
14 a matter for the coroner to determine. The scope of the  
15 inquiry is almost always going to be wider than the  
16 verdict eventually reached [that is Dallaglio]. To  
17 limit it to the last link in the chain of causation  
18 would defeat the purpose of holding inquests at all ...  
19 it is not only that the facts have to be fully  
20 investigated in order to discover which of a variety of  
21 verdicts is possible. The function of an inquest is to  
22 investigate and, if possible, to answer full questions  
23 [citation from the Act and the rules] ... Jamieson made  
24 clear that 'how' meant 'by what means' rather than in  
25 'what broad circumstances'. But it did not disapprove

1 of previous statements such as that from Ex parte Hicks  
2 that 'the word "how" is wide and it is not possible to  
3 foresee every way in which someone may meet his death'.  
4 Nor did Jamieson cast any doubt on the words of  
5 Lord Chief Justice Lane in Thompson ... 'the function  
6 of an inquest is to seek out and record as many of the  
7 facts concerning deaths as the public interest  
8 requires'."

9 Then there's a citation from the Brodrick Committee  
10 and from paragraph 14 of Jamieson, "fully, fairly and  
11 fearlessly to investigate the relevant facts".  
12 Baroness Hale then goes into what happened in that  
13 case and the neighbourhood dispute and how dangerous  
14 a person seemed to the police.

15 Just above G on page 207:

16 "All this suggests there was an acute public  
17 interest, not merely the private interest of a grieving  
18 mother, in a full investigation of how it came about  
19 that Troy Hurst met his death. This is so, to my mind,  
20 irrespective of the Convention, but the Convention  
21 values are also some guide to what facts are in the  
22 public interest to investigate. Although the scope of  
23 the inquiry is for the coroner to determine and his  
24 decisions will rarely be subject to review, it is  
25 difficult to imagine that any resumed inquest in this

1 case would not examine the conduct of the police and the  
2 Housing Authority that fateful day, if not before.  
3 Nothing in Jamieson which precludes or is inconsistent  
4 with such a conclusion. All that Jamieson precludes is  
5 a verdict of unlawful killing caused or contributed to  
6 by police neglect. To be fully compliant with Article 2  
7 some such verdict would have had to have been available.  
8 But the nonavailability of such a verdict does not  
9 inexorably lead to the conclusion that a resumed inquest  
10 would serve no useful purpose. Insofar as the Court of  
11 Appeal reached a different conclusion, I beg to differ.  
12 There is clearly a useful purpose to be served, albeit  
13 a less useful one than there might have been."  
14 Lord Mance at paragraphs 70 and 75, agrees, if I can  
15 accelerate a little bit. Paragraph 70 at E down to G,  
16 and paragraph 75.  
17 Really, perhaps the words at paragraph 74 are  
18 helpful:  
19 "Like my noble and learned friends Lord Rodger and  
20 Baroness Hale, I am not persuaded that the distinction  
21 between a Middleton inquest and a Jamieson inquest is as  
22 stark as I believe Lord Brown to be suggesting. In the  
23 light of the reasoning in Jamieson and its affirmation  
24 in Middleton, the present coroner could not be faulted  
25 if he thought that a resumed inquest should lead only to

1 a simple verdict of unlawful killing. A quite different  
2 matter is, however, the scope of the investigation which  
3 the coroner might undertake during a resumed inquest."  
4 Now, those are the views of two of their Lordships.  
5 Lord Brown did not dissent from that, but indicated  
6 that, without a verdict, there was no point in resuming  
7 in investigating these matters. So he didn't dissent  
8 over scope, but he did say that there shouldn't be  
9 a further inquest because the verdict is the critical  
10 thing.  
11 So he, as it were, leaves undisturbed the rulings  
12 about potential scope of Baroness Hale and Lord Mance.  
13 He does that at paragraphs 27 and 34 really at F,  
14 where he says:  
15 "The value of such an inquest may be doubted ..."  
16 Paragraph 34 at F:  
17 "... where there cannot be a verdict."  
18 But he does not dissent from scope being as --  
19 potential scope being as stated as Baroness Hale and  
20 Lord Mance did. Lord Bingham agrees with Lord Brown and  
21 Lord Rodger at paragraph 7 is absolutely torn over this,  
22 agonised.  
23 At paragraph 8, sorry, at B:  
24 "It is not self-evident -- to me at least -- that  
25 any failures by police to respond to warnings would be

1 too remote to be considered at an inquest simply because  
2 Reid committed precisely the kind of violent act which  
3 the people giving the warnings feared would happen.  
4 Indeed, uninstructed by the case law, I, too, might have  
5 found it difficult to imagine that a resumed inquest  
6 would not examine at least some of the authority's  
7 alleged failures, but I have to accept that the cases  
8 show that in relation to Jamieson inquests how is to be  
9 interpreted narrowly. On that basis, it can be said  
10 that the authority's failures would lie outside the  
11 scope of a resumed inquest."

12 So it's a very reluctant recognition that it's  
13 arguable that the failures of the authorities would fall  
14 outside the inquest. Lord Brown and Lord Bingham say  
15 nothing about that in terms of scope, and Baroness Hale  
16 and Lord Mance are in our favour.

17 So it's a lot of time and effort I'm afraid to draw  
18 that from this, but this is one of the reasons why  
19 I indicated that for Jamieson inquests the boundaries  
20 are bending and expanding a little and there's  
21 a confluence with Article 2, enhancing.

22 LADY JUSTICE HALLETT: Is Lord Rodger supporting your  
23 confidence in paragraph 8?

24 MR O'CONNOR: He's not. He's --

25 LADY JUSTICE HALLETT: He seems to be doing the opposite.

1 It seems he wants to support it, but suggests that he's  
2 bound by case law not to.

3 MR O'CONNOR: Correct, but he's the only one to say that.

4 LADY JUSTICE HALLETT: Then he agrees with Lord Brown on  
5 each point.

6 MR O'CONNOR: Yes, on each of the other points. So we have  
7 Lord Rodger extraordinarily reluctantly saying it could  
8 be argued on the cases that this can't be investigated;  
9 Lord Brown and Lord Bingham saying nothing;  
10 Baroness Hale and Lord Mance saying "yes".

11 Finally on this, tab 42, is the case of Lewis which  
12 was a prison suicide case where the adequacy of the  
13 inquest was challenged on the basis that, paragraph 9,  
14 the coroner didn't ask a question about action taken  
15 after Mr Lewis was found hanging in his cell.

16 Madam, this may just tangentially assist you as to  
17 the aftermath submissions in this case because it could  
18 not be shown -- as Lord Justice Sedley says, a custody  
19 officer turned up at the door, saw poor Mr Lewis  
20 hanging, didn't try to get into the cell, didn't have  
21 a knife with him to cut him down, didn't have the  
22 equipment or training, and at paragraph 5

23 Lord Justice Sedley acknowledges that the position at  
24 the inquest was that nobody could show it might have  
25 made a difference.

1 Paragraph 5:

2 "There was, and still is, no way of knowing whether  
3 appropriate and swifter intervention by the officer  
4 would have saved Karl's life. It might have done, but  
5 it cannot be said that it probably would have done.  
6 What can, without the slightest doubt, be said is that  
7 the failures of training, equipment and procedure  
8 described in the preceding paragraph ought not to have  
9 occurred."

10 The coroner did not ask any question of the jury  
11 about that and thus the function of the jury reaching  
12 a conclusion on such an issue was litigated.

13 At paragraph 20, Lord Justice Sedley says:

14 "Ought the coroner to have put the issue to the  
15 jury?"

16 "The ambit of the claim has been significantly  
17 reduced ... Mr Owen has limited his case before us to  
18 a narrower version of the argument: that in order for  
19 the jury's verdict to be required on it, a factual  
20 circumstance does not have to have been a probable cause  
21 of or contributor to the death so long as it is capable  
22 of having had such a bearing. The facts of the present  
23 case clearly fit this template: it could not have been  
24 shown to be probable, but it was undoubtedly possible,  
25 that better training and equipment and swifter

1 intervention would have saved Karl's life."

2 Paragraph 27:

3 "Apart from the possible eloquent silence in  
4 Middleton, there is nothing in the extensive range of  
5 authority ... which resolves this difference. For my  
6 part, I see no reason to doubt the propriety of the  
7 ruling we have been shown of the City of London coroner  
8 in the case of Waite that 'the jury may, in addition to  
9 finding the direct or indirect causes or contributions  
10 to the death, also find facts relevant to the exercise  
11 of the coroner's power under Rule 43'."

12 So this is scope and scope including verdict, that  
13 the scope of an inquest and, indeed, of the jury's  
14 verdicts, can properly be directed to informing the  
15 coroner in his or her Rule 43 jurisdiction and, indeed,  
16 the facts in this case were agreed and established, but  
17 to carry on in that citation of paragraph 27:

18 "This is likely to be more useful, as the  
19 House of Lords suggested in Middleton, where facts are  
20 disputed or uncertain. Indeed, it may be in such cases  
21 that a finding by verdict is the desirable or even  
22 a necessary foundation of any Rule 43 report. Here,  
23 perhaps unusually, the relevant facts were clear and  
24 undisputed."

25 So there is an encouragement, we submit, in Lewis,

1 for scope and verdict to cover issues which can arise in  
2 Rule 43 reports.

3 Lord Justice Etherton agreed at paragraphs 40 and  
4 41.

5 So we submit an ample basis in the common law for  
6 preventability to be investigated, at least as to scope  
7 even if not verdict.

8 Madam, I've finished my submissions on the law and  
9 I know not when you wish to adjourn. But this will be  
10 a dividing point in a sense.

11 LADY JUSTICE HALLETT: Right, and how are we doing on  
12 timing, Mr O'Connor?

13 MR O'CONNOR: Well, I will be less than an hour and I wish  
14 to address you on the ISC report.

15 LADY JUSTICE HALLETT: Very well.

16 I'll ask Mr Smith to stay for just a few minutes  
17 after I've risen, in case there are any questions that  
18 those who are unrepresented would like to ask him today.

19 It may be that, before they speak to him they'd like to  
20 hear the rest of the lawyers' submissions, but they're  
21 very welcome to speak to him today if they want to.

22 Very well, 10.30 tomorrow, please.

23 (4.15 pm)

24 (The case adjourned until 10.30 am the following day)

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