Wednesday, 28 April 2010
(10.15 am)
LADY JUSTICE HALLETT: Mr Garnham, I gather we're missing Ms Sheff at the moment, but in any event, may I, through you, repeat to the representatives of the media present a request to respect the privacy of the bereaved families and the survivors?
We warned them in an operational note that unsolicited requests for interview or comment can cause distress, and I'm afraid I'm told that has been happening. So I really would ask representatives of the media to respect their privacy, not make unsolicited requests for comment or interview, either within or without the precincts of the Royal Courts of Justice.

Are we content, Mr Keith, to proceed without Ms Sheff?
MR KEITH: Mr Sonn, who sits on my right, says he is content to proceed on the basis that he is here.
LADY JUSTICE HALLETT: Thank you, Mr Sonn, I was going to ask if you were here. Thank you very much.
Yes, Mr Garnham, I ought to say to you in respect of your submissions that I understand from Mr Smith that I may be addressed by Mr Keith and possibly others on the decisions of the European Grand Chamber in

Mastramatteo.

Submissions by MR GARNHAM (continued)

MR GARNHAM: Madam, there are two matters I was going to begin with before turning to the next of my topics, which was the investigative obligation.

The first of those two preliminary matters was that I had indicated to you yesterday, in answer to a question from you, that we would do some more work as to the nature of the workload undertaken by the ISC. Those instructing me have spoken to the ISC and been told the following -- the figures are imprecise, I'm afraid, but between 240 and 300 sitting hours were devoted by the Committee to the two reports. That, on our calculation, is equivalent to 50 or 60 court days. In addition, there were 6,000 man hours -- or perhaps person hours -- spent by the Secretariat on the two reports, plus 1,000 hours by the Secretariat in attendance on the Committee. So a total of 7,000 person hours.

I say only this about that: that, of course, was to produce reports which Mr O'Connor and others of my learned friends say were inadequate.

If you were to require rather more investigation than the ISC carried out, that would require further documentation, and the time required to investigate it

would rise exponentially.
LADY JUSTICE HALLETT: Mr Garnham, on that subject, at some stage -- I don't ask you to do it now -- I would welcome your assistance and the assistance of others on whether this is necessarily an all or nothing. I mean, are we talking about, if I do go down this path, looking at all the material relevant to Operation Crevice and whatever the Intelligence Services were doing in the relevant period, or is there any possible halfway house, which is that counsel for the Security Services and their instructing solicitors satisfy themselves from the material that all references to Khan and Tanweer are provided to the inquest, subject to arguments on interests of the national security, and that, thereafter, what the inquest does is just review the material in relation to Khan and meetings with Omar Khyam, perhaps review whoever else Omar Khyam met during the period when the bombing expert was here, and then have a witness who describes the decision taken not to target Khan and Tanweer?
Because I think what most of the families, as I understand the submissions, are wanting, they want to know why the decisions were taken in the way they were and they want to put questions to test the decision. I'm not sure they're seeking this roving brief to go

through all the material that's in the possession of the Intelligence Services.

MR GARNHAM: No, that may be right in respect of some of them, madam. I'm sure that's true.

I will come on at the end of these submissions to deal with practicalities, if I may, but just by way of immediate response to what you say, the difficulty that immediately strikes me without instructions on that point -- I will take instructions, of course -- is that this isn't simply a question of questions being put by the families or by counsel to the inquests to test the response of the Security Service in that way, because it may be -- I don't know -- but it may be the answer to the testing is, "But you're disregarding the 4,020 other leads we were pursuing at the time", and if that is not accepted from the witness whom you're contemplating calling in this scenario, if that is not accepted on its face and that is to be tested, then it's difficult to see how that is to be done without us, metaphorically speaking, handing over the keys to Thames House.

That's the difficulty, but I will take instructions of course, madam, and I plan to return to this subject at the end of these submissions anyway.

LADY JUSTICE HALLETT: Thank you very much.

MR GARNHAM: The second preliminary matter I was going to

deal with was Mastramatteo, that my learned friend Mr Keith showed me about 12 minutes before you came in. Can I say that about it -- perhaps, first of all, I should take you to the relevant passages. Do you have a copy of that?

LADY JUSTICE HALLETT: No, I intended to print it off just before I -- or do I? I do, thank you.

MR GARNHAM: It probably is convenient to go straight to the judgment of the court and to paragraph 74. I will read this out, if I may, madam, partly because it's the first time I will be reading some of it.

LADY JUSTICE HALLETT: Of course.

MR GARNHAM: "It remains to be seen [say the court] whether the adoption and implementation of the decisions to grant MR prison leave and GM semi-custodial treatment disclose a breach of the duty of care required in this area by Article 2. In that regard, it is clear that if MR and MK had been in prison on 8 November 1989, Mr Mastramatteo would not have been murdered there by them. However, a mere condition sine qua non does not suffice to engage the responsibility of a state under the Convention. It must be shown that the death of Mr Mastramatteo resulted from a failure on the part of the national authorities 'to do all that could reasonably be expected of them to avoid a real and

immediate risk to life of which they had or ought to have had knowledge (Osman, 116) ..."

Then these words:

"... the relevant risk in the present case being a risk to life from members of the public at large rather than for one or more identified individuals."

I interpose there the observation that the quotation from Osman is not complete, as you'll understand.

LADY JUSTICE HALLETT: Indeed.

MR GARNHAM: But nevertheless, that's how the court viewed it.

If one then drops down to 76:

"The court considers that there was nothing in the material before the national authorities to alert them to the fact that the release of MR or GM would pose a real and immediate threat to life, still less that it would lead to the tragic death of [Mr Mastramatteo] as a result of the chance sequence of events which occurred in the present case. Nor was there anything to alert them to the need to take additional measures to ensure that, once released, the two did not represent a danger to society."

Then dropping to 77:

"In these circumstances, the court does not find it established that the prison leave granted to [the two

men] gave rise to any failure on the part of the judicial authorities to protect ... the right to life [of that man]."

These preliminary observations, madam. First of all, this decision resulted in -- this judgment resulted in a decision that Article 2 had not been breached, so that the court here was considering the relevant test in the context of a case where, in fact, they found no breach.

Secondly, this decision does not purport expressly to qualify Osman, which we submit still remains sound law. Thirdly, and perhaps, we would submit, decisively for your purposes, Mastramatteo was cited by counsel in Van Colle and, despite citation of that authority, the House of Lords went on to find that the test was as I've set it out, and you will recollect in the submission I made yesterday in relation to the speech of Lord Bingham to the effect that that entire citation from Osman was a complete test to be applied by the courts in all cases.

Madam, to put it bluntly, you're bound by the House of Lords and their reading of Osman in that Van Colle case.

So I maintain the submission that Osman, read to its full extent, is the appropriate test; that that is

English law domestically in any event; and that, in fact, Mastramatteo -- sorry I've mispronounced his name -- doesn't go so far as to suggest that Osman is now no longer good law.

LADY JUSTICE HALLETT: Can you help -- I appreciate you may want to come back to it, because you haven't had that long to consider it -- what did the Grand Chamber mean in Mastramatteo by saying, "The relevant risk in this case is to the public at large" excluding the words "identified individual"?

MR GARNHAM: There are two obvious possible reasons for that. One is that they could have meant we take the view that the court in Osman got it wrong and the additional qualification as added to the test is not apposite.

Alternatively, they could have meant by the word "relevant" what we are having to look at here is that form of unidentified victim.

They then go on to say that there is no breach of Article 2. They don't say one way or the other whether the reason there's no breach of Article 2 was because of non-compliance with the whole of Osman.

I'm conscious, madam, that this is an important point and that I've looked at it for 12 minutes before you walked into court, and I will, if I may, just

reserve my position to reflect a little more on that.
LADY JUSTICE HALLETT: Certainly.
MR GARNHAM: But that's the immediate response that I give --
LADY JUSTICE HALLETT: Thank you.
MR GARNHAM: -- the primary point being that you are still bound by Van Colle.
I turn then to the investigative obligations.
As is, I think, common ground between all those before you today, the Strasbourg court has implied into the express obligations in Article 2 this procedural obligation to initiate in certain circumstances an effective public investigation by an independent official body.
It's important, we submit, to identify the nature of the obligation to investigate, because it will differ from case to case and is central to the question as to the scope of an inquest.
Can I take you to one sentence only in the judgment of Lord Justice Moses in the case of Lin, which is in C2, tab 30, at paragraph 22:
"It is important [said Lord Justice Moses] to focus on the nature of the obligation to investigate to which the House of Lords was referring in both Amin and Middleton. It is insufficient merely to refer to the

obligation to investigate under Article 2 since that says nothing about the extent of the investigation required. Only by identifying with precision the nature of the obligation can the scope of the investigation be discerned. The jurisprudence of Strasbourg and our courts illustrate a scale in which the most intense investigation and the greatest participation of next of kin are required in cases where agents of the state bear potential responsibility for loss of life ... In such cases Article 2 requires the state to initiate an investigation. Even where the state is obliged to initiate ... the intensity of such an investigation will vary according to the subject matter."

Our submission is that if Article 2 is not engaged, then the implicit investigative obligation cannot be engaged, and in that submission we adopt and echo all that Counsel to the Inquest has said.

But it's necessary, nonetheless, for me to respond to what other interested parties have submitted over the last three days.

Counsel to the Inquest suggests, we say correctly, that the investigative obligation does not arise automatically, but only where there's been an arguable or potential breach of Article 2.

Counsel to the Inquests submit at 104 of their

submissions that there's ample authority at the highest level that the obligation arises "at least" where there's an arguable breach. In fact, we submit the case law goes much further than that and, save in a special category of case, requires there to be an arguable breach or perhaps, better expressed, potential responsibility on the part of the state, before that obligation is engaged.

If the submissions I've made on Osman are right, we would submit there can be no prospect of showing either an arguable case or a potential case, because of the lack of any suggestion that the authorities knew of the identified individuals -- the point I've made repeatedly already.

The only exception, we would suggest, to the requirement for an arguable or potential case against the state is where the deceased is in the care or the custody of the state.

In all other cases, the investigative duty has consistently been described as dependent on the existence of at least a potential breach of the substantive obligations.

I will, madam, if I may, quickly show you some authorities in support of that because it is fundamental to our response to Mr O'Connor's submissions on this.

First of all, Amin at C2, tab 20, a case which of course Mr O'Connor knows well. Paragraph 31:

"The state's duty to investigate is secondary to the duties not to take life unlawfully and to protect life. In a sense, it only arises where death has occurred or life-threatening injuries have occurred. It can fairly be described as procedural."

LADY JUSTICE HALLETT: Sorry, which paragraph again?

MR GARNHAM: Paragraph 31.

I'm going to do this quite quickly, because it's set out in your counsel's notes. Then Middleton, same bundle, tab 19, paragraph 3, Lord Bingham:

"The European Court has also interpreted Article 2 as imposing on member states a procedural obligation to initiate an effective public investigation ..."

I'm sorry, I had better read it all:

"... by an independent official body into any death occurring in circumstances in which it appears that one or other of the foregoing substantive obligations has been or may have been violated, and it appears that agents of the state are, or may be, in some way implicated."

In that same speech, paragraph 6, identifying the questions to be asked:

"Question (1). What, if anything, does the

Convention require (by way of a verdict, judgment, finding or recommendation) of a properly conducted official investigation into a death involving, or possibly involving, a violation of Article 2?"

Then 16:

"It seems safe to infer that the state's procedural obligation to investigate is unlikely to be met if it is plausibly alleged that agents of the state have used lethal force without justification, if an effective unchallenged decision has been taken not to prosecute ..."

So again, there's reference to the apparent or plausible allegation of state involvement.

Just as I was flicking across that case I noted at paragraph 12 in the speech of Lord Bingham there's reference to Mastramatteo, so that case was itself referred to in that speech, which, of course, has been followed since and has still led to the adoption of the Osman case in its current form. I apologise madam for drawing your attention to that out of order, but it seems sensible not to overlook it.

Next, please, in C2, tab 26, Takoushis, paragraph 38, where the court said in the second sentence of that paragraph:

"For reasons which will become apparent later in

this judgment, we are satisfied that Article 2 is engaged, in the sense that it gives rise to certain obligations on the part of the state whenever a person dies in circumstances which give reasonable grounds for thinking that the death may have resulted from a wrongful act of one of its agents."

Then finally Gentle in C3, tab 36 --

LADY JUSTICE HALLETT: Just before we leave Takoushis, that doesn't mean there isn't a duty in other circumstances?

MR GARNHAM: No, it doesn't. In fact I'll come on to explain that Takoushis is authority for the proposition that the duty may arise in medical negligence cases.

Gentle, 5 to 6. 5 begins:

"This substantive obligation derived from Article 2 has been supplemented by a procedural obligation ... summarised in Middleton ...

"This procedural duty ... was no doubt implied in order to make sure that the substantive right was effective in practice."

Paragraph 6:

"It is the procedural obligation under Article 2 that the appellants seek to invoke in this case. But it is clear [quoting a number of authorities] that the procedural obligation under Article 2 is parasitic upon the existence of the substantive right and cannot exist

independently. Thus, to make good their procedural right to the enquiry they seek, the appellants must show, as they accept, at least an arguable case that the substantive right arises on the facts of these cases. Unless they [cannot] do that, [this] claim must fail."

I leave it there, because that's as firm a ruling on this point as it's possible to contemplate coming, as it does, in particular from the speech of Lord Bingham.

It's plain, we would accept, that different considerations may apply when the deceased person was in the care or custody of the state. That covers at least potentially prisoners in Police and Prison Service custody, psychiatric patients compulsorily detained, possibly patients in hospital generally, and possibly also soldiers subject to military discipline.

The reason that different considerations apply, we would submit, madam, are these.

First, that the relationship between the state and the person concerned in any of those contexts is one of dependence.

Second, the individual in all those circumstances is, to a greater or lesser extent, subject to the direction or control of the state.

Third, it may well be that the only person or body likely to be able to speak to the circumstances of the

death is the state or its agents.
Fourth, the fact that -- I'm sorry, the mere fact of a death in such custody or such care cries out for an explanation from the body responsible for the care or custody.
We submit that those are the four criteria that one can draw from the cases where it's been found that an automatic investigative duty arises.
In those -- in those categories of case, we accept -- at least in some of them -- it's possible to establish a right to an investigation without establishing an arguable breach of a substantive obligation.
The history of this obligation, from its genesis in McCann through to its explanation by the House of Lords in L is well set out in submissions of Counsel to the Inquest and we respectfully adopt that analysis and don't repeat it.
In responding to this, my learned friend Mr O'Connor placed great stress on the House of Lords' decision in L.
Our short response is that Counsel to the Inquests are right about that and that L does not overrule that long line of cases from Amin to Gentle as to the need for an arguable case if Article 2 is to be engaged in

circumstances other than custody and care.
But because Mr O'Connor places some stress on L, I'm afraid I'm going to have to take you, madam, back to L. It's in C3 at tab 38.
I am conscious of the difficulties I had with citation yesterday, madam. I wonder if I can pass up the Appeal cases version of L, in case you don't have it? I don't know whether you do or don't.
LADY JUSTICE HALLETT: Weeklies.
MR GARNHAM: Weeklies. Can I pass you up the Appeal cases, simply because that includes the argument of counsel which in this particular case is important?
It's important because the argument of counsel set the context for the decision.
Of particular importance is to see the argument of Counsel for the Secretary of State, and for that can I take you to 593 at letter E:
"The enhanced McCann-type duty [says counsel] does not arise in cases other than state agent killings, unless it is at least arguable that the incident involves a breach of one of the substantive rights under Article 2."
Then at 593 at G:
"Without the precondition of arguability, the imposition of a procedural duty in certain Article 2

cases would be anomalous to the structure of the Convention as a whole and would require special justification."

It appears from the speeches of their Lords that Counsel for the Secretary of State also argued that the sole purpose for an Article 2 investigation was to secure accountability of state agents.

In response to that, counsel for claimant, at 598, D:

"The duty to conduct a Jordan-compatible investigation will arise whenever the state potentially bears substantive responsibility under Article 2. Deaths and near-death cases in state custody form a special category because of the vulnerability of those deprived of their liberty and because the state owes a positive duty to protect those in custody. The mere fact that the victim was detained in state custody imposes ipso facto a duty to initiate an independent investigation."

Then at 599, F:

"Before any investigative obligation arises, the death or near-death must be capable of amounting to a breach of the substantive Article 2 duty in the sense that the state is potentially responsible."

So the claimant was acknowledging the need for

potential breach.
Then, finally, the intervenor who, in this case, was the Equality and Human Rights Commission, represented by leading counsel, argued at 602, letter E:
"Deaths or near-deaths in custody constitute a sui generis class cognate with those deaths which have occurred as a result of lethal force by state agents, giving rise to an assumption of responsibility by the state and an obligation to conduct an enhanced investigation. That obligation derives from the recognition that the state bears a particular responsibility for the fate of those it detains, given their peculiarly vulnerable position as persons in custody and the control exercised over them by the state."
So, madam, the context was between the Secretary of State's argument that in all cases the investigative obligation only arose if there was an arguable breach of Article 2, and the alternative that there was a special category of case where the state was responsible for the well-being of the detainee where the investigative obligation arose automatically, and it's in response to those arguments we submit that the speeches in L are to be read.
Can I start with Lord Phillips and the passage to

which my learned friend Mr O'Connor drew your attention? I confess I forget when it was, but in the recent past.

Paragraph 21:

"It is fundamental to the Secretary of State's case that the reason why Article 2 requires an investigation into a near-suicide in prison is to secure the accountability of agents of the state in respect of possible breaches of the substantive obligations ... Thus [so counsel argues], if the state can show that there is no arguable case ... there is no requirement for an investigation. These submissions receive some support from the decided cases ..."

Then he goes on at 26 to refer to Menson. Madam, you may recall that I took you to Menson yesterday, and he observed that that was a case where the duty to investigate was not a secondary procedural obligation but part of the primary duty to have in place effective criminal law provisions.

The point, madam, is obvious. Lord Phillips was citing Menson to make good the point that in certain circumstances -- as it happens, circumstances different from the Osman situation, where an arguable case was not needed, and he was doing that in order to demonstrate the error in Counsel for the Secretary of State's argument that it was always required.

That, we would submit, was necessary to lay the groundwork for his conclusion that no arguable case was required in custody cases.

He goes on to refer, in paragraphs 27 and 28, to Amin and Gentle, and then at 29 he holds:

"These observations were directed to the obligation imposed by Article 2 to hold a public investigation. They should not be read as suggesting that the state never has a duty [I underline the word 'never'] to carry out an investigation to a life-threatening incident unless there is reason to believe that it may demonstrate that the state agents have failed to perform the substantive obligations ..."

With respect, Lord Phillips was plainly right in saying that, namely, there will be cases where there's a duty to investigate when there's no question of failures by the state, and the two classic examples, when it will, are death in custody -- the one which Lord Phillips was addressing at the time -- or the Menson-type case which he, shortly before, referred to.

What we would submit Lord Phillips' speech does not do in any sense is to eliminate the requirement for an arguable case or a potential case which is referred to repeatedly in the line of cases I've shown you, in the type of case where the deceased has no such relationship

with the state.
Certainly, as my learned friend Mr Keith demonstrates in his written submission, the speeches of the other members of the judicial committee in L give no support to an argument that the requirements of an arguable case has gone outside the custody-type case.
If I may, I'll just give you the reference for two of the speeches and just show you the third.
Lord Brown, paragraphs 100 to 101, and Lord Mance at 113.
I'll just show you, if I may, Lord Rodger's at paragraph 59. It's necessary to pick it up at 58, halfway through:
"Focusing on that point, Mr Giffin argued on behalf of the Secretary of State that Article 2 did not require an independent investigation to be held unless there was some positive reason to believe that the authorities had indeed been in breach of their obligation to protect the prisoner.
"That argument is mistaken. Whenever a prisoner kills himself, it is at least possible that the prison authorities, who are responsible for the prisoner, have failed, either in their obligation to take general measures to diminish the opportunities for prisoners to harm themselves, or in their operational obligation to

try to prevent the particular prisoner from committing suicide. Given the closed nature of the prison world, without an independent investigation you might never know. So there must be an investigation of that kind to find out whether something did indeed go wrong. In this respect, a suicide is like any other violent death in custody. In affirming the need for an effective form of investigation in a case involving the suicide of a man in police custody, the European Court held that such an investigation should be held 'when a resort to force has resulted in a person's death'."

In my respectful submission, despite the valiant efforts of Mr Patterson on Monday, it's quite impossible sensibly to equate the position of the victims of the atrocity on 7 July with the position of those detained in prison.

First, the relationship between the state and those victims was not one of dependence at all. Secondly, the victims were not detained by the state. Thirdly, they were not in the care of the state. Fourthly, the state was in no special position that enabled it to speak to the circumstances of the deaths, and, fifth, these were not deaths in some closed institution where the very fact of death cries out for an explanation from the body responsible for the institution.

As to Goodson, Takoushis and Humberstone, we respectfully submit that Counsel to the Inquest are plainly right for the reasons they set out in paragraph 111 of their submissions to the effect that those three cases don't change the rule applicable in cases such as this.

Goodson and Takoushis are medical negligence cases and they say nothing to the effect that a need for an arguable case has gone in cases concerning murder by third parties.

It would in fact, we would submit, be frankly astonishing if those cases did say anything about that, given the House of Lords rulings on this issue in a case that I've taken you to.

As to Humberstone, Counsel to the Inquest are again correct, because although it's true to say -- as was revealed in the exchange between you, madam, and Mr O'Connor yesterday or the day before -- that the judge floats the possibility of some wider principle, as you observed he then comes back to well-established principles in reaching his ultimate decision.

Counsel to the Inquest correctly refer in their submissions to the fact that different language is used in different cases to describe the nature of the case that has to be established to engage the investigative

obligation.
Madam, it may well be that nothing turns on that point here, but for the avoidance of doubt, we submit that the expression "potential breach" rather than "arguable case" better captures the point, because the trouble with "arguable case" is it becomes circular. If it's said you need to have an arguable case to lead to the investigative obligation and if the purpose of the investigative obligation is to discover what the circumstances of the case is, it becomes circular, which is why we say the better expression is "potential". We gain some support for that submission from the decision in Takoushis. I will just, if I may, quickly show you that paragraph -- at least I would if I could remember which divider it's at. 26 in C2.
I only need to take you to paragraph 91. I preface what I'm going to say by pointing out again that this is a medical negligence case. C2, tab 26 madam.
LADY JUSTICE HALLETT: I have it, thank you.
MR GARNHAM: Paragraph 91:
"The court adopt much the same approach in Sieminska v Poland ... The court again declared the application as inadmissible. It repeated but (as Richards J put it) also built on what has been said in Erikson about the need for effective investigation.

"'The court considers that Article 2 of the convention imposes that, even in cases such as the present one, in which the deprivation of life was not the result of the use of lethal force ... but where agents of the state potentially bear responsibility for loss of life, the events in question should be subject to an effective investigation ...'."

This is cited -- 91 is part of the judgment of the court in Takoushis and we say provides a neat encapsulation of what the test is. But I don't pretend that much turns on this point, madam, on the facts of this case, because whether the test is potential breach of the substantive obligation or arguable case or any of the other alternatives used in the case law, if we are right on our analysis of what Article 2 requires in the case of offences against the person, the arguments of my learned friend to the families in this case don't come close.

So I turn then to scope and to the question of whether there should be a Jamieson or Middleton inquest. If all those submissions are correct, we submit that this inquest must be of the Jamieson, not the Middleton type. That means of course that you'll be concerned to answer the question "by what means", and not the question "in what broad circumstances" the deceased met

their deaths.
That means, we submit, that investigating the conduct of the Security Service will be outside the scope of these inquests.
The question to be asked, we suggest, in considering whether any potential line of enquiry or issue should be investigated is whether it is too remote causally from the death.
It was put in this way in Takoushis and I won't trouble to take you to it again, but it's paragraph 47, where the court summarise what Sir Thomas Bingham, as he then was, in Dallaglio said:
"At what point the chain of causation becomes too remote to form a proper part of the investigation."
Certainly we submit that if Article 2 doesn't apply, investigating the role of the Security Service is manifestly too distant from the question "by what means" the deceased died.
We would go further and submit -- in this we differ from Counsel to the Inquests and their submission at paragraph 125 -- that if Article 2 is not engaged, it would not be open to you properly to conclude that, nonetheless, you could call evidence within a Jamieson inquest going to the question of preventability. So we say that's not open to you on a Jamieson inquest.

Of course, we accept that your enquiry is very likely to stretch beyond the immediate cause of death. It's a matter, of course, for you, but it may well cover what precisely happened at each bombing site. It may well -- in fact almost is bound to cover -- what the MPS scene reports reveal, what steps were taken by passers-by to assist the injured and the dying, what steps were taken by the emergency services and whether that had any part to play in the occurrence of any of the deaths.

Because all of those are likely, we would respectfully submit, to fall within your remit in a Jamieson-type inquest because, whilst they go wider than what might strictly be needed for the purpose of answering the question "by what means", they are at least relevant to that question if it's broadly construed, as you're injuncted to do in a number of the cases to which you have already been referred.

But we submit that it's not open to you, in a Jamieson inquest, to go beyond that, to call evidence that's not relevant to the statutory questions at all.

If, madam, you're persuaded by our submissions about Article 2, the premise for your consideration of the scope of these inquests would be that the state's Article 2 obligations are not engaged. You will, on

that premise, have decided to adopt the non-enhanced format of inquest. You will have accepted that the verdicts are limited as explained in Middleton to those in the rules. It would, in our submission, in those circumstances be extraordinary to go on and call and consider precisely the sort of evidence going to precisely the same issue as you've decided is not required by Article 2, and in those circumstances, the public interest -- however light or heavy it is -- in not seeking to have adduced the sort of highly-sensitive information from the Security Service would be, we submit, overwhelming.

Counsel to the Inquests, and others of my learned friends, have referred in their submissions to the power in Rule 43 to make recommendations. But in our submission that power cannot widen fundamentally the scope of the inquest. It does not, to put it colloquially, provide a back door by which evidence ruled inadmissible through the front door by Jamieson can be admitted, because we submit to do so would undermine the statutory scheme as interpreted by the House of Lords in Jamieson.

Can I remind you first of the terms of Rule 36? I'm not going to be impertinent enough to turn it up. I know you'll know it well. 36 says:

"The proceedings and evidence at an inquest shall be directed solely to ascertaining the following matters: who the deceased was, how, when and where the deceased came by his death and the particulars required by the Registration Act. Neither the coroner, nor the jury shall express any opinion on any other matters."

Madam, in a Middleton inquest where the scope is expanded to accommodate the performance of the state's Article 2 investigative obligation, it might well -- in fact, almost certainly is -- be entirely legitimate to use the interpretative provisions in section 3 of the Human Rights Act to read down that provision so as to permit the calling of evidence to wider effect.

But otherwise, the rule prevents, we submit, the adducing of evidence that goes beyond the limits of a traditional Jamieson inquiry.

That's not to say, I repeat, that it's not open to you to read "by what means" with sensible width to encompass the sort of issues I've already mentioned. But to disregard it, to disregard that rule in the inquest rules, would be to subvert the effect of Jamieson.

In support of that submission, can I take you first to Jamieson itself and remind you -- although it hardly needs me to remind you -- that Jamieson remains the

governing authority for the sort of inquests you would be conducting. In that regard, I do just remind you that Middleton upheld Jamieson as setting out good law in respect of non-Article 2 cases.

Jamieson is in CC1, tab 8.

If you go to 23, H, to find the conclusions of the Court of Appeal in Jamieson, I think this is Sir Thomas Bingham, as he then was, saying:

"This long survey of the relevant statutory and judicial authority permits certain conclusions to be stated.

"(1) an inquest is a fact-finding inquiry conducted by a coroner, with or without a jury, to establish reliable answers to four important but limited factual questions."

Those are then set out:

"Rule 36 requires that the proceedings and evidence shall be directed solely to ascertaining these matters and forbids any expression of opinion on any other matter."

Madam, that remains the governing authority, if what you are conducting is a Jamieson inquest, and all of the authorities to which you've had your attention drawn in the last couple of days on the use of the Rule 43 power, none of them suggest that that is not still good law,

and none of them do more than to say that, when you interpret "how", in the "by what means" sense, you can use good sense so as to cover the sort of matters I've canvassed.

Can I then take you to Mr Justice Beatson's judgment in Butler which is in C3 at tab 45?

Can I begin at paragraph 61 in the learned judge's judgment:

"In determining the width of the investigation a coroner should take into account that a coronial inquest is a fact-finding inquiry."

Reference to the statement of Lord Lane, Chief Justice, set out above, and to Jamieson and Middleton.

"Where Article 2 is not engaged, Rule 36 of the ... rules provides that ..."

It's quoted. I'm sorry, I should read it all:

"Where Article 2 is not engaged, Rule 36 of the ... rules provides that 'the proceedings and evidence' at an inquest are constrained by its provisions and, in relation to 'how' the deceased came by his death to 'by what means' he did so rather than the broader circumstances that may be necessary where Article 2 is engaged.

"It is clear that the scope of a Jamieson inquest is

not limited to the last link in the chain of causation: see ... Dallaglio ..."

I don't think I need to read anything more in that, although I will if anybody wants me to. But I'll then go on to paragraph 74:

"The coroner also relied on the need to consider the evidence in order to enable the jury to consider whether they ought to return a narrative verdict and to enable him to consider whether he ought to issue recommendations under Rule 43 ... With regard to the latter, as was recognised by the coroner in Takoushis ... the possibility of a Rule 43 recommendation or report is ancillary to the inquest, the primary purpose of which is to determine by what means the deceased died by the full, fair and fearless investigation of the relevant facts referred to by Sir Thomas Bingham in Jamieson. I do not consider that Rule 43 enables a coroner to admit evidence he cannot properly admit having regard to the provisions in the rules and his common law duties."

Then he refers again to Lord Lane in Thompson.

LADY JUSTICE HALLETT: What does that mean? On the one hand, Rule 43 doesn't enable you to use the back door where the front door is not open, but in assessing all the factors relevant in determining the scope, bearing

in mind Thompson -- I'm not quite sure I'm necessarily following -- what in practicality is the effect of this?
MR GARNHAM: What in practicality we submit that means is that the judge in that case has said that you -- that a coroner cannot -- can only admit evidence for the purpose of the provisions of the rules, so the three questions.
LADY JUSTICE HALLETT: That I follow.
MR GARNHAM: That's the point upon which I rely for this case. If this is right, you cannot admit evidence at these inquests that goes to any issue other than the Jamieson questions, those set out in the rules, including for the purpose of a Rule 43 recommendation.
LADY JUSTICE HALLETT: Is Rule 43 irrelevant to the question of deciding scope?
MR GARNHAM: No. But it has to be read as an ancillary power, ancillary to that which is necessary to answer the statutory questions.
If it is not possible properly to conclude that a piece of evidence goes to one of the three -- one of the three questions in the -- four questions in the rules. Construing those words with sensible width, then you cannot admit the evidence is the effect of this judgment, and in our respectful submission, despite the senior judicial position you ordinarily hold, for

today's purposes you are a coroner and, therefore, I say, with the greatest of respect, subject to the supervisory jurisdiction of the High Court and bound by decisions of a High Court judge. It's a very odd submission to be making to a member of the Court of Appeal.

LADY JUSTICE HALLETT: Deputy Assistant Coroner.

MR GARNHAM: I had toyed, madam, with describing you in that way, and I thought I might possibly be pushing my luck a little. It doesn't much matter whether you're a Deputy Assistant or a full Coroner; you're subject to the supervisory jurisdiction of the High Court and bound by decisions of High Court judges and you are in particular bound by this decision of Mr Justice Beatson, which is plain: you cannot admit evidence for the purposes of formulating a Rule 43 recommendation that goes beyond the proper scope -- interpreted in accordance with Dallaglio -- of the questions set out in Rule 36.

Counsel to the Inquests point in this context to the Court of Appeal's decision in Lewis. You've already seen Lewis and I'll only take you to it, madam, if you ask me to. They suggest, Counsel to the Inquest, suggest that that case provides support for the proposition that evidence can be called to provide the

foundation for a Rule 43 recommendation. We say with respect that that reliance is misplaced here for two reasons.

First, because Lewis was an Article 2 case, and it says nothing at all about the proper scope of a Jamieson inquest. Second, that, properly read, the ratio in Lewis doesn't support a conclusion that Rule 43, even in those circumstances, enables a coroner to call evidence going to issues beyond the verdicts legitimately open to him or her.

Counsel to the Inquest, and Mr O'Connor, have referred you to the two minority speeches in Lewis -- namely, the speeches of Lady Hale and Lord Mance -- but they haven't taken you to the views of the majority. I'm so sorry, forgive me, the apparent seamless segue from one point to the other has just been destroyed by the fact that my friends properly point out that, in fact, I've moved on to another case. I apologise.

For clarity, I repeat the point about Lewis, that, for the two reasons I've identified, it doesn't provide support.

LADY JUSTICE HALLETT: Right, so that's the end of Lewis.

MR GARNHAM: Correct.

LADY JUSTICE HALLETT: It's an Article 2 case and there's

nothing about the scope of Jamieson. Right.
MR GARNHAM: Then I wanted to move to Hurst and I apologise that I did it so inelegantly.
Hurst is at C3, tab 33, and it is in this case that Counsel to the Inquests and Mr O'Connor have taken you to the two minority speeches but haven't taken you to the views of the majority.
It's necessary to put the facts of that case into brief context.
The appellant Commissioner of Police appealed against a decision of an inquest into the death of the son of a respondent to be resumed. Mrs Hurst's son had been killed by a neighbour. There had been previous incidents between them that had been drawn to the attention of the police and the local housing authority. The inquest was adjourned when the neighbour was charged with murder. Following the neighbour's subsequent conviction, Mrs Hurst asked the coroner to resume the inquest. The coroner refused.
It should be pointed out, at least in passing, that the alleged failure by the authorities in this case was a very different order, very different type, to that which is being suggested in our case.
In Hurst, it was being said that the stabbing of the deceased was the culmination of a long series of events

which demonstrated the violent nature of the assailants and his particular hostility to members of the Hurst family. Those incidents, many of those incidents, had been drawn to the attention of the local authority and the police.

So in this -- in other words, this was a case in which the Osman criteria were met.

LADY JUSTICE HALLETT: Is that really a very different argument from -- the police, according to Mrs Hurst, had been alerted to a series of events which should have triggered a proper investigation which might have prevented the death of her son. Is that very different from the argument here which is against you, that, had the meetings between certain people -- when a bomb expert was over here in particular -- triggered a proper investigation, that might have led to the prevention of the bombings by --

MR GARNHAM: Fundamentally different, madam, for two reasons: one, because of the identified victim; and, two, because of the remoteness argument. As I attempted to explain yesterday, the remoteness argument in the present case is very convoluted. It needs a whole series of things to have happened in the conduct of the investigation by the Security Service to have got to a point where that would be a possibility.

So, for the remoteness argument, it's very different. Here they were told the person, they were told what was being threatened.

But secondly, and we say fundamentally, because in this case the victim was identified, the potential victim was identified, in advance of the crime occurring.

Madam, I can go back to that, but that's the whole essence of the submissions I've been making thus far about Osman.

LADY JUSTICE HALLETT: Right.

MR GARNHAM: I was saying that you have been shown this case before. The Divisional Court overturned the coroner's decision and the Court of Appeal upheld that judgment. The Commissioner then appealed to the Lords who by a majority allowed the appeal.

The principal issue, as you were told correctly yesterday, concerned the retrospective operation of the Human Rights Act and the common law obligation to reflect the effect of the Convention, but the House of Lords also made some important observations about the scope of a Jamieson inquest. You've been shown Lady Hale and Lord Mance's speeches, and so I won't repeat that exercise, but can I take you to extracts from the speeches of the other members of the

Judicial Committee?
First, Lord Brown and I note in passing that Lord Bingham agreed with Lord Brown, so Lord Brown's views reflect that of two members of the Committee. 34. Part of this was referred to by Mr O'Connor but not all of it:
"My noble and learned friends, Baroness Hale ... and Lord Mance, whilst accepting all this, would nevertheless dismiss the Commissioner's appeal and so leave in force the Divisional Court's order that the inquest into Troy Hurst's death be reopened (or require at least that the coroner retake the decision ...), on the basis that even a Jamieson inquest would be likely, although of course at the coroner's discretion, to 'examine the conduct of the police and the housing authority that fateful day if not before' ... Given, however, as both Lady Hale and Lord Mance in terms accept, that, upon the conclusion of such an inquest, the jury would be debarred from expressing any views whatever upon the conduct which they had been examining (the whole point of a Middleton inquest being, as I have explained above, to enable the jury to state their conclusions on the important underlying issues such as what risks should have been recognised and what precautions taken) the value of such an inquest may be

doubted. It might, indeed, be thought the worst of all worlds. Lady Hale and Lord Mance expressly acknowledge that it would not satisfy the United Kingdom's [Article 2 obligations]. Nor would it satisfy the respondent's understandable desire for detailed findings to be made upon the circumstances leading to her son's death. At best, it would occasion a report ... to a responsible authority under Rule 43 ... Small wonder that such an inquest was not one for which [counsel for the claimant] has ever contended."

I draw particular attention to the observation "nor would it satisfy the respondent's understandable desire for detailed findings to be made upon the circumstances leading to her son's death". The point being obvious, that, were you to conduct a Jamieson inquest and were you to call evidence relating to the Security Service's role and conduct, you would not, if this is right, be entitled to provide detailed findings as to the circumstances leading to the death, and that of course reflects Rule 36.

Then Lord Rodger's, page 202.

LADY JUSTICE HALLETT: Sorry, Lord Rodger, paragraph?

MR GARNHAM: Forgive me, my note is defective.

It's paragraph 6. I apologise, because I think I may have done Mr O'Connor a disservice, because it may

be that he did draw this paragraph to your attention and, if I got that wrong I'm sorry, but I want to take -- draw your attention to it in any event.

Paragraph 6:

"What Mrs Hurst had not done, however, was to challenge the Court of Appeal's decision that the allegations against the police could not have come within the scope of an inquest of the Jamieson type. For that reason, her counsel explicitly acknowledged at the hearing before the House that he could not reopen that aspect of the Court of Appeal's decision. The decision itself is understandable, given that the earlier decision of this House in Middleton ... a case of suicide in prison, proceeded on the basis that Jamieson correctly identified the (limited) scope of a verdict under English domestic law. In particular ..."

Then Rule 36 is quoted.

"Therefore, any right to a wider inquiry ... was to be obtained via the application of section 3 of the 1998 Act."

Paragraph 7:

"The scope of the inquiry, as opposed to the verdict, is a matter for the coroner.

Lord Justice Buxton [held] that, although the coroner in

this case had not asked himself 'at what point the chain of causation becomes too remote to form a proper part of his investigation', nevertheless, if he had done so, the question could only have been answered in one way -- viz, that, applying the approach in Jamieson, the chain of causation was indeed too remote to form part of his investigation in this case. At an earlier point in his judgment, Lord Justice Buxton had held that any failings of the police to respond to urgent reports of incidents involving the Hurst family were too remote for consideration at any renewed inquest because 'any direct causal connection between the failings of the police and the death was broken by the violent intervention of Mr Reid'."

Then paragraph 8 which I think Mr O'Connor did show you:

"Often, of course, the law does treat a deliberate act of a third party as breaking a chain of causation. But not always."

He refers to some case law.

"Here the need for causal connection between the alleged failure and Mr Hurst's death is being used as a way of determining the scope of an inquest. It is not self-evident -- to me at least -- that any failures by the police to respond to warnings would be too remote to

be considered at an inquest simply because Reid committed precisely the kind of violent act which the people giving the warnings feared would happen. Indeed, uninstructed by the case law, I, too, might have found it difficult to imagine that a resumed inquest would not examine at least some of the authorities' alleged failures. But I have to accept that the cases show that, in relation to Jamieson inquests, 'how' is to be interpreted narrowly ... On that basis it can be said that the authorities' failures would lie outside the scope of a resumed inquest."

Mr O'Connor, in dealing with that passage, suggested that Lord Rodger reached his conclusion reluctantly and it may well be he did. But nonetheless, he reached them very clearly and he found as a matter of law that it's not open to a coroner in these circumstances to call evidence going to that issue, even though it may be he would have liked to if it weren't for the fact that there was binding on authority on him, as a member of the House of Lords, to contrary effect.

It follows, we submit, that if we are right in the argument that the Article 2 investigative obligation is not engaged here in respect of the role of the Security Service, the scope of this inquest cannot properly extend to cover those issues.

On Lord Brown and Lord Bingham's analysis -- because it doesn't satisfy the families' understandable desire for detailed findings to be made upon the circumstances leading to the death of their loved ones and would be the worst of all worlds, and on Lord Rodger's analysis because it would be outside the lawful scope of the inquest.

So for all those reasons, the decision of Mr Justice Beatson, the analysis of the House of Lords in the case I've just taken you to, and upon the natural reading of Rule 36, we say it is not open to you, if you're with us on the submission on Article 2, to consider this material.

Madam, I'm conscious of the time.

LADY JUSTICE HALLETT: Just before -- we will break in a second. So the effect of what the Secretary of State is saying -- because you are acting for him as well -- is that he's telling the families -- I just want to make sure we understand the practical effect of what you're saying -- whatever their concerns, there's going to be no public inquiry, and there will be no exploration by this inquest, if resumed, and, therefore, they have to be satisfied with the report of the ISC?

MR GARNHAM: Not entirely, madam. First of all, I'm not in a position to make any submissions one way or the other

about public inquiries. I know nothing.
LADY JUSTICE HALLETT: They've been refused. That's why some of the families took judicial review.
MR GARNHAM: I think that's right -- I will be corrected if I'm wrong, because I simply don't know the details of this -- that that application has been stayed pending the outcome of the inquest. I don't have instructions to be able to answer your question precisely, but I do say that this inquest cannot perform that function on any proper interpretation of the law, and I do say that it is not even a matter for your discretion.
LADY JUSTICE HALLETT: We'll break for -- I'll return at 11.40 am, ten minutes, just over.
(11.27 am)
(A short break)
(11.40 am)
LADY JUSTICE HALLETT: Yes, Mr Garnham?
MR GARNHAM: Madam, before I leave the submissions that I was just making and move on to my next topic, which is remoteness, I'm reminded of a point I ought to have made in relation to Van Colle and omitted to make. May I make it quickly now? It might be worth just having Van Colle open while this short point is made. It's at 37 in C3.
Madam, you will recollect that Van Colle is

a decision on two cases, not just one. The decision on the first case was the one in which Osman was applied and one which we've already looked at in some depth. The decision in the second case is neatly summarised I would submit in the headnote in the Appeal case reports, if you still have that, madam.

"Allowing the appeal in the second case (Lord Bingham dissenting) that it was a core principle of public policy that in the absence of special circumstance the police owed no common law duty of care to protect individuals from harm caused by criminals, since such a duty will encourage defensive policing and divert manpower and resources from their primary function of suppressing crime and apprehending criminals in the interest of the community as a whole, and the public interest was best served by maintaining the full width of the core principle and an exception which imposed a duty of care in circumstances such as arose in the claimant's case where the police were discharging their general public duty ..."

LADY JUSTICE HALLETT: Sorry, pause, Mr Garnham. You said if I still had the Appeal cases for Van Colle. You have given me the Appeal cases for L. I haven't got the Appeal cases for Van Colle.

Mr Saunders looks hesitant at handing over his copy.

MR GARNHAM: We have just noticed the marks he has made down the side.

MR KEITH: We have an unmarked copy. No, I'm told by Mr O'Connor that he's highlighted the bit that Mr Garnham has read out already. (Handed).

LADY JUSTICE HALLETT: Thank you.

MR GARNHAM: I'm very grateful to Mr Keith.

Headnote, holding 2:

"Allowing the appeal in the second case ... a core principle of public policy that in the absence of special circumstance the police owed no common law duty of care to protect individuals from harm caused by criminals, since such a duty will encourage defensive policing and divert manpower and resources from their primary function of suppressing crime and apprehending criminals in the interest of the community as a whole, and the public interest was best served by maintaining the full width of the core principle and an exception which imposed a duty of care in circumstances such as arose in the claimant's case where the police were discharging their general public duty of law enforcement could not be accommodated within it. Accordingly, the judge has been correct to strike out the claimant's action."

But the point I make here madam -- I'll show you

a couple of passages in the speech in a moment -- is a short one, that it's been suggested by Mr O'Connor that the common law is a flexible tool, that the common law will adapt and qualify previous approaches so as to reflect modern conditions, I'm paraphrasing rather badly, but in essence, I think that was the point he was making. Because he says, even if we are right about Article 2, the common law is adaptable enough to mean that you could deal with the matters he invites you to deal with within a Jamieson inquest.

But the public policy considerations which led the House of Lords in Van Colle to reject development of the common law in that -- in a damages context apply with equal force, we submit, in this context.

Can I, if I may, just show you a couple of passages in support of that submission? First of all, 82 in Lord Hope's speech:

"In cases brought under sections 6 and 7 of the Human Rights Act ... where Article 2 positive obligation is said to have been breached by a public authority, the relevant principle is that described by the Strasbourg court in Osman. But in my opinion, the common law, with its own system of limitation periods and remedies, should be allowed to stand on its own feet side by side with the alternative remedy. Indeed, the case for

preserving it may be thought to be supported by the fact that any perceived shortfall in the way that it deals with cases that fall within the threshold for the application of the Osman [case] can now be dealt with in domestic law under the 1998 Act."

Two points. One is, again, that Van Colle, despite referring to the Mastramatteo case, still says Osman governs.

But for my present purposes, it makes the point that in my submission echoes the submission I made earlier, that you can't let in by the back door the common law what is kept out of the front door by a decision that the Human Rights Act doesn't apply. I accept of course the context is different, we're here considering a damages case. Nonetheless, the principle applies.

Can I take you finally to Lord Brown's speech at paragraph 133:

"The second public policy consideration which I would emphasise ... is the desirability of safeguarding the police from legal proceedings, which, meritorious or otherwise, would involve them in a great deal of time, trouble and expense more usefully devoted to their principal function of combating crime. This was a point made by Lord Keith in Hill and is of a rather different character from that made by

Lord Steyn in Brookes ... In respectful disagreement with my Lord [that's Lord Bingham] I would indeed regard actions pursuant to the liability principle as diverting police resources away from their primary function. Not perhaps in every case, but sometimes certainly the contesting of these actions would require lengthy consideration to be given to the deployment of resources and to the nature and extent of competing tasks and priorities."

I make one simple point on the basis of that. Just as that was true for the police in that case, so it would be true of the Security Service were they now to have to do the equivalent of an Article 2 -- to respond to the equivalent to an Article 2 inquest in circumstances where Article 2 doesn't apply.

LADY JUSTICE HALLETT: Isn't the point about paragraph 133 that there Lord Brown is considering that if this duty is imposed upon police forces all over the country, there could be, time and again, actions brought against them which would divert them, whereas the argument here, as I understand it, is that this is an exceptional situation rather than something that might occur in every police force in the country on a daily basis?

MR GARNHAM: That goes to the weight to be accorded to the principle of public policy. It doesn't go to the

existence of the principle, in my submission.
So my Lady, with that said, I now turn to remoteness and make these submissions.
Even if you were to reject our submissions made thus far and hold either that Article 2 was engaged and this is to be a Middleton-type inquest or, despite being limited to a Jamieson verdict, you ought to consider evidence going wider than that necessary to answer the questions in the rules, nonetheless we submit that investigating the involvement of the Security Service would be too remote.
Madam, this is not a case like Hurst where the state was alerted to the fact that the murderer was threatening the deceased. This is not, therefore, a case where the state failed to act on information it had received naming the potential assailant.
Instead, the highest I submit the case can possibly be put -- and I make it clear that this is not a factual analysis, I accept -- is that, one, there was information available. Two, which, had it been identified as of a significance sufficient to mandate investigation -- after considering all the competing demands on the Security Service's resources -- might have led to surveillance or investigation which might have led to intelligence, which might have enabled the

plans for the bombing to be interrupted.
That is a chain of reasoning which, in our submission, could never found a conclusion that there was more, at its highest, than some form of missed opportunity.
As Counsel to the Inquests correctly say at paragraph 118 of their submissions, missed opportunity will not suffice.
I turn, madam, finally, to address the question: what if Article 2 is engaged, what then should be the scope of the inquest and, madam, you will understand that I do that on the basis that I maintain the submission that any involvement of the Security Service is too remote and ought to fall outside the scope of the Article 2 investigation.
But if, in principle, you were against me on that submission too, then we would submit it's still not either necessary or appropriate for this inquest to consider that issue.
We say that for three reasons. First, because the particular circumstances of this case demand that one aspect of the investigative process be conducted in an unusual form.
Second, because the ISC report, when taken with the other strands of the investigation process in its wider

sense in this case, has discharged the investigative obligation.

Thirdly, and perhaps most importantly, because the Article 2 obligation of investigation is an obligation of means, not of results. I'll deal with those in turn.

First, it's clear from the House of Lords decision in L that, although there are certain minimum requirements, there is no prescribed form for investigation which meets the requirements of Article 2, and that objective may be achieved by a combination of processes.

Madam, I don't understand that to be in dispute, so rather than showing you the passage, can I just give you the reference for that? Lord Phillips at paragraphs 17 and 43 to 45.

The core requirements are that, viewed as a whole -- I underline those words -- the investigation or the investigative strands in combination must have been independent and effective. There must be sufficient involvement of the families and the investigation must have been sufficiently public. But the way those requirements are to have effect will we submit depend upon the facts of the case.

Again, I hope not to trouble you, madam, to take you yet again to L, but just to refer to Lord Phillips'

speech at paragraph 31 where he says this:
"Different circumstances will trigger the need for different types of investigation with different characteristics."
We submit that the relevant features of the present case is that the investigation thus far has had to consider highly-sensitive material. The content and form of the investigations required by Article 2 are both context- and fact-specific. There is considerable flexibility to react to a particular context and to particular circumstances of an individual case. The feature emphasised in L is that, even if the Article 2 obligation is triggered, there is not a one-size-fits-all context to the required investigation.
Again, I don't understand that to be in dispute, and I'll just give you, madam, the references. It's in L, Lord Walker at 96 and Lord Mance at 114.
One of the features of that analysis is that the involvement for the victims' families may well be limited, for example, to suggesting lines of enquiry.
I will, if I may, take you to the authority in support of that. It's Lord Rodger in L at paragraph 76.
Tab 38 in C3, paragraph 76.
LADY JUSTICE HALLETT: Yes, I have it.

MR GARNHAM: It begins:

"Once the independent investigation has been established [I'll come back to what "independent" means for this context] with the powers and resources it needs, it is very much up to the investigator to decide how to proceed in order to achieve the objectives for which it was set up. But, presumably, the first steps will involve assembling [the] material, in the form of records and reports, and taking statements ... All this can done in private [I underline those words], but it is essential that the prisoner's relatives and his representative, if there is one, should be told that the investigation is underway. They should also be given an opportunity to participate. In due course, they [may] be informed of the investigator's conclusions. It is not, however, necessary for the relatives to be granted access to all aspects of a current investigation if this might prejudice private individuals or other investigations ..."

The authority is Ramsahai in the European Court.

"Sometimes relatives will be in a position to contribute information about the prisoner's state of mind in the period before the incident."

This, of course, is in the context of a suicide case.

"They may be able to suggest lines of enquiry. Being independent, the investigator is free to reject the suggestions if he considers that the enquiries would not be useful. Where the relatives have had little contact with the prisoner and so have no relevant knowledge of the circumstances, the investigator's main duty will be to keep them informed of the progress of the investigation and to tell them his conclusions."

As to the other elements of the investigation, can we stay with Lord Rodger and go to 78:

"The principal hallmark of an Article 2-compliant enquiry is that it is 'effective'. The Grand Chamber explained what that means in Ramsahai v The Netherlands, a case where the police had shot someone suspected of stealing a scooter. The court said:

"'In order to be "effective" as this expression is to be understood in the context of Article 2 of the Convention, an investigation into a death that engages the responsibility of a Contracting Party under that Article must firstly be adequate. That is, it must be capable of leading to the identification and punishment of those responsible. This is not an obligation of result, but one of means."

I underline that.

"'The authorities must have taken the reasonable

steps available to them to secure the evidence concerning the incident. Any deficiency in the investigation which undermines its ability to identify the perpetrator ... will risk falling foul of this standard.

"'Secondly ... to be "effective" ... it may generally be regarded as necessary for the persons responsible for it and carrying it out to be independent from those implicated in the events'."

Again, I underline those words, that's the nature of the independence that's required.

"This means not only a lack of hierarchical or institutional connection, but also a practical independence.'".

LADY JUSTICE HALLETT: Which seems to go further from independent of those implicated in the events.

MR GARNHAM: I agree. It does, on the face of it:

"The Grand Chamber stresses that those carrying out the investigation [Lord Rodger goes on] should be entirely independent of those who may have been implicated in the events. So, in a case like the present, the independent investigator could not use prison service officials to carry out enquiries on his behalf. But, beyond that, what matters is that the investigator should take all reasonable steps to secure

the evidence concerning the incident and to find out, if possible, what happened and what, if anything, went wrong. The steps which the investigator needs to take to fulfil these requirements will inevitably depend on the circumstances of the particular case. There neither is, nor can be, any single off-the-peg model that is suitable for use in all cases."

I should also take you to 80 onwards:

"Similarly, because the investigator is independent, his investigation may well be effective, and so fulfil the requirements of Article 2, even though no part of it [I underline those words] is conducted in public. Again, it depends on the particular case."

There's a reference to Anguelova v Bulgaria, where the Grand Chamber, you will see, adopted the approach in Ramsahai.

Then over to 81:

"Indeed, applying that approach, the Grand Chamber held ... that in the circumstances ... there was no need for the Dutch Court of Appeal to carry out its review of the decision ... in public -- or even to publish its findings. It was enough that the deceased relatives had had access to the investigation and had been provided with the Court of Appeal's reasoned decision ..."

Paragraph 82:

"Rightly, the Grand Chamber has made no attempt to specify types of cases in which a public hearing will be needed. The House should follow that example. But it is worth stressing that, whatever the steps the investigator takes from the time of his appointment until he finishes, they are all part of a single independent investigation which is required by Article 2."

The detail of that part of the speech is important, but so is the general thrust, which is that what is required for an Article 2 investigation is dependent on the circumstances of the case and is not readily to be prescribed.

The context in the present case is critical, we submit, to a proper analysis of this issue.

We submit in essence that, consistent with safeguarding national security, no other "independent" body could have had access to information which the ISC received, or could have produced a report like this.

As, madam, you know, the ISC is a statutory body, established by the 1994 Act. It's made up of members of Parliament from all three major political parties. Members have access to highly classified material, take evidence from government ministers and senior officials, have access to written evidence either specifically

written for them or drawn from original documents. The ISC reports to the Prime Minister, who publishes the report, subject only to redactions in the interests of national security. Such redactions, in practice, always being agreed with the ISC.

We say, on independence, madam, that although it's right to say that the ISC might not be independent in the sense required for a court by Article 6 of the Convention, there is not -- and that might be said because there isn't, we accept, the sort of security of tenure that would be required of a judge -- it is operationally independent from both the Home Office and the agencies, and in a real and practical sense it is independent from the Security Service, Secret Intelligence Service and GCHQ and that is what matters here.

I've shown you what Lord Rodger said in L about the relevant case law, and in our submission what is critical is whether or not there was in Lord Rodger's words independence of those who may have been implicated in the events.

The ISC contains no ministers of the state. It contains no past or present members of any of the agencies. It is in a real, practical sense, independent of those whose conduct it was examining.

LADY JUSTICE HALLETT: Is it institutionally independent?
MR GARNHAM: Probably not, madam, because I would have to accept that it's appointed by the Prime Minister and it reports to the Prime Minister. The fact that it's appointed by the Grand Chamber is, in fact, a matter that goes to support my case that it's Article 2-compliant, because Article 2 requires that the investigation is initiated by the State and, therefore, the fact that the Prime Minister sets it up and gives it its task in fact assists my argument rather than detracting from it.
I accept, however, that there is an argument that institutionally it reports to the Prime Minister, but, madam, the submission I make is that you need to look, in the context of this case, at the practicalities and the realities of how this sort of material could be examined and by whom it could be examined and that, in that context, this achieves the necessary requirements for Article 2.
Not on its own, which is why I qualify what's said about institutional independence.
If this was the only strand to the investigation in this case, I might have a harder row to hoe, but it most certainly isn't.
I'll come back to that in a moment.

Before I do so, however, can I make some submissions about the nature of this investigation by the ISC and its report?

In our submission, the ISC was uniquely well-placed to conduct the investigation into the Security Service's conduct. The members of the Committee are security cleared to the relevant levels and they have, as a result, access to the totality of the relevant material documents and oral testimony.

The subject matter of the ISC report, in our submission, is really quite extraordinary.

It considers what the Security Service, the SIS, GCHQ, the Met Police, the West Yorkshire Police, knew, and when they knew it and what they did at the time.

The ISC looked at the raw evidence, the operational documents, surveillance photographs, transcripts of conversations, police logs, covert recordings.

All of this is material which, for the soundest of reasons, we submit, is ordinarily treated not just as confidential, but as secret.

The ISC then released in its report the most that could conceivably be made public without seriously compromising national security.

Madam, the essential nature of the work of the Security Service in this country, as in many other

member states of the Council of Europe who are signatories to the Convention, requires secrecy, if it's to be effective.

As you know, madam, the primary function of the Security Service is the protection of national security, including its protection from threats from terrorism and espionage, and there is an obvious and, we would submit, widely-recognised need to preserve that effectiveness and the secrecy that goes with it.

Madam, the courts, in a wide range of legal proceedings, have repeatedly recognised the need to protect the effectiveness of the Service's work and to protect from disclosure the material which would be contrary to the public interest.

The criminal and civil courts have upheld applications to withhold material on the ground that disclosure would be contrary to the public interest in a whole range of cases as, madam, you're aware.

A further example of the amendment of ordinary procedures to accommodate this need for secrecy is found in Rule 76(2) and 79(2) of the Civil Procedure Rules which amend the overriding objective so that the court has a duty not to disclose information which is contrary to the public interest in cases like control order and financial restriction order cases.

Madam, as you will know as well, similar rules apply to the work of the Special Immigration Appeal Commission and to control order cases.

The purpose of withholding sensitive information is for the protection of the integrity of intelligence operations, the protection of the safety and usefulness of those who work for the Security Service or provide information to it, and we would submit that it's almost self-evident that a failure to provide the protection sought has the potential to create risk to those who provide information in confidence to the Security Service, and will lead to a reduced ability to counter future threats from terrorism.

Sensitive information, madam, must be disseminated no wider than is strictly necessary for the efficient conduct of the Security Service's business. That dissemination is limited to those individuals who have appropriate authorisation of access to it, and it's against that background, we submit, that the adequacy of the ISC report falls to be considered. There has never been so detailed and comprehensive report of the work of the Security Service ever made public.

The Committee required the agencies and the police to search back through their records, to re-examine all the information they held on these matters, which, in

some cases, revealed further evidence and led to further detailed questioning.

As we explain, madam, in paragraph 47 of our skeleton, the published report included a quite exceptional level of operational information because the ISC considered it important that as much as possible was known about the events leading up to 7/7, subject to not damaging national security.

You will have seen, madam, that the report refers in great detail to surveillance, detainee reporting, phone contact, overseas intelligence, transcription of audio devices, tracking devices, and other actual or potential sources of intelligence.

The Committee listened to audio recordings in order to understand whether the Security Service or the police should have drawn greater significance from recorded conversations, and in order to consider the Security Service's conduct at the time, the Committee also considered a number of other major operations that were happening prior to the July bombings.

We set out at paragraph 53 of our skeleton five points of particular importance in considering the ISC's investigation.

First, it was initiated by the state.

Secondly, it was conducted with reasonable

promptness at a time when memories were fresher than they would be now.

It was independent in the practical sense I've described, although not in the sense a court is.

The Security Service and other government department and agencies cooperated fully with the ISC. There was no need for powers of compulsion, and the investigations were rigorous.

I would add, in addition, that the ISC report addressed the questions of lessons that needed to be learned, precisely the sort of topic which it was suggested yesterday a Rule 43 report might be addressed to.

For your note, madam, it's the second report, paragraph 158 onwards.

The stark reality, madam, is that no more information could be revealed of that which was shown to the Intelligence and Security Committee without seriously compromising national security and, in particular, the Security Service's ability to counter the threats of further terrorist outrages.

LADY JUSTICE HALLETT: Can I press you on that, Mr Garnham? If, for example, one of your colleagues arguing to the contrary suggested that, if nothing else, they would like to know, on behalf of their lay clients, how many

people Omar Khyam met during the two-day period when the bomb expert was in England, would that -- giving them that information which might enable them to assess the nature of assessing the threat posed and the leads that would need to be followed, would that have compromised -- would that now compromise national security?

MR GARNHAM: I can't pretend, madam, that I can give you an answer to that, because I don't have the background knowledge to enable me to do so. What I do say on instructions is that the Security Service and the other agencies gave to the Committee -- sorry, of all the material that they gave to the Committee, they permitted there to be made open in that report everything, everything, that would not compromise national security.

LADY JUSTICE HALLETT: For my part, at the moment I'm just not following why revealing some information -- for example, the number of people Omar Khyam and the bomb expert met with, so that one can see how significant or insignificant the fact they met with Khan and Tanweer -- Khan and Hussain. Just the numbers might give us some idea as to the problems --

MR GARNHAM: I can't answer that, madam, without taking instructions, but I will do so during the luncheon break and come back to you.

LADY JUSTICE HALLETT: The other questions I have for you -- and I don't know if you can answer these immediately -- looking at L, for an inquiry to meet Article 2 requirements you point out that Lord Rodger says it can be done in private and it's the nature of the proceedings up to the investigator. But he also points out, as you, yourself, have mentioned, that the families of the deceased -- or the severely injured -- need to be told that the inquiry is underway, told they had the opportunity to participate, and given the opportunity to suggest lines of enquiry.

Now, as I understand it, the families and survivors whom Mr O'Connor represented, as it were, made themselves be given the opportunity by sticking their heads above the parapet and saying, "We want a public inquiry".

To what extent were the other families or survivors told the proceedings were underway and given the opportunity to participate and suggest lines of enquiry?

MR GARNHAM: The answer to the first of those two questions is the holding of the ISC report -- investigation was announced publicly, so everybody knew.

LADY JUSTICE HALLETT: Right.

MR GARNHAM: As to the latter, I would have to take instructions, but I think the position is that it was

only those represented by Mr O'Connor who, as you, madam, put it, put their head above the parapet and asked to be seen and were then accommodated. I think that's right, but I will get instructions on that.

LADY JUSTICE HALLETT: I'm not criticising the ISC in this respect, because their statutory duties and objectives are not the same as a public inquiry would be --

MR GARNHAM: No.

LADY JUSTICE HALLETT: -- and they are not the same as an inquest might be. So they would not necessarily have thought it incumbent upon them to notify every family of the deceased and every survivor. So it's only those who basically put their hands up and said, "We want to come and talk to you" --

MR GARNHAM: Madam, I think that's right.

LADY JUSTICE HALLETT: -- who were given the opportunity?

MR GARNHAM: I think that's right, and of course it's the case that the point can be made that others didn't do that, but I repeat again that --

LADY JUSTICE HALLETT: Is it incumbent on the families and the survivors to notify the ISC?

MR GARNHAM: No, of course it's not. The point I make is that the requirements of Article 2 -- which is what we're looking at -- are flexible, depending on the circumstances of the case. They are not prescribed.

What you have to consider is to look at all the strands of investigation and to see whether that meets the test. The fact that there is an element of the investigation which doesn't meet all the elements of the test doesn't mean that the thing as a whole is unsatisfactory, which is why I was going to develop next the strands point.

LADY JUSTICE HALLETT: I totally understand your point that I have to look at the whole package, as it were, to see whether or not this is an effective, independent investigation, but it was set up for a different purpose. It was not set up to meet any potential Article 2 obligation.

MR GARNHAM: I think that's right.

Madam, you'll recollect the passage in Lord Rodger's speech where he talks about the circumstances in which it may be incumbent upon an investigator to invite questions or involvement of the family of the deceased or the injured, and he makes the point that the reason why it's necessary is because, in the case of a prison suicide, the family may be able to have -- may be able to say something which is directly material to the investigation that's taking place.

In other words, not take the role of assistant investigator, but say something positive by way of evidence that is relevant to the investigator's

enquiries.
LADY JUSTICE HALLETT: That's not right, because suggesting lines of enquiry goes further than providing evidence.
MR GARNHAM: I may need to go back to what Lord Rodger says about it. Perhaps I should.
LADY JUSTICE HALLETT: It must surely be relevant for a bereaved family member to suggest a line of enquiry, even if they have no direct knowledge themselves.
MR GARNHAM: Well, not according to Lord Rodger. Can I ask you to look at 76 again, madam?
The last sentence of 76:
"Where the relatives have had little contact with the prisoner and so have no relevant knowledge of the circumstances [of the death] the investigator's main duty will be to keep them informed of the progress of the investigation and to tell them his conclusions."
Lord Rodger is looking at this through the lens of effectiveness. He's looking to see what it is that it is necessary in the investigator's enquiries to enable him to produce an effective report, and it's not submitted by those who were not asked to make suggestions to the ISC that there is, as a result of that absence, something critical that the ISC didn't know, that, had they been asked, they would have done.
So, on the question of effectiveness, there isn't

a requirement. As Lord Rodger recognised, there isn't a requirement to involve the families for the purposes of inviting them to suggest lines of enquiry.

LADY JUSTICE HALLETT: If that's right, Mr O'Connor wasn't entitled, and Mr Coltart and Mr Saunders, none of them, Ms Sheff, were not entitled to suggest to me that a line of inquiry might be: why weren't those who met with the bomber followed?

MR GARNHAM: Yes.

LADY JUSTICE HALLETT: Because you're saying that the relatives are not in a position to contribute information.

MR GARNHAM: That's exactly what I'm saying, madam, yes.

LADY JUSTICE HALLETT: I didn't realise you were going that far, Mr Garnham.

MR GARNHAM: Well, then it's my fault for not putting it clearly. I say that that is not an essential element of an Article 2-compliant investigation, and I say that on the strength of Lord Rodger.

LADY JUSTICE HALLETT: Even though -- what, just Lord Rodger, is that your only support for that proposition? Because Lord Rodger says in that paragraph:

"Sometimes relatives will be in a position to contribute information", in that case about the

prisoner's state of mind.
Next sentence:
"They may be able to suggest lines of inquiry."
So you're saying that that sentence is qualified by
"if they are in a position to offer information"?
MR GARNHAM: Yes. Because this is going to the
effectiveness of the investigation.
LADY JUSTICE HALLETT: I thought that a number of cases
talked about how -- it's the importance of the feelings
of the bereaved and making sure they are satisfied the
inquiry has been full and effective. How can you do
that if the family aren't entitled to raise lines of
enquiry about which they have no direct information?
MR GARNHAM: Because this is but one strand of the
investigative whole.
LADY JUSTICE HALLETT: Who does ask the question?
MR GARNHAM: Those questions -- given the nature of the
issues at stake, they have to be done in the way they
were done, in our submission, in this case.
LADY JUSTICE HALLETT: No, if the family aren't entitled --
if Mr Coltart, Mr O'Connor, Mr Saunders, everybody else,
are not entitled -- Mr Patterson -- are not entitled to
say to me, "Look at what happened in that two-day
period. We want to know how many people the bombing
expert and Omar Khyam met, and which, if any of them,

were followed and, when they weren't followed, why not",
you say they're not entitled to do that.
MR GARNHAM: Yes.
LADY JUSTICE HALLETT: Who is entitled to put that point
before me?
MR GARNHAM: The investigator.
LADY JUSTICE HALLETT: Who's that?
MR GARNHAM: The ISC in this case.
LADY JUSTICE HALLETT: And if there's no ISC?
MR GARNHAM: If there had been no ISC report, then I might
have difficulties on Article 2, but there was.
LADY JUSTICE HALLETT: I thought you were putting forward
a general proposition that in an Article 2 inquiry the
families wouldn't be in a position to put forward lines
of enquiry.
MR GARNHAM: I'm submitting that, if there has been an
effective investigation, as was done in this case,
I submit, by the ISC, then there is not an additional
obligation to accommodate questions from the families --
LADY JUSTICE HALLETT: That's with the benefit of hindsight.
What I'm asking about is when the inquiry is going on.
Are you going so far as to say that during the inquiry
the families aren't entitled to suggest lines of enquiry
about which they have no direct information?
MR GARNHAM: If you're referring to the ISC, yes, I am.

LADY JUSTICE HALLETT: Your support for that is Lord Rodger?
MR GARNHAM: Yes. I say the reason for that, in addition to what Lord Rodger says, is that the particular circumstances of the case, like this, which involve analysing particularly sensitive information preclude, or may preclude, the involvement of members of the family in the investigative process. It has to be done by a closed form of investigation of the sort that happened here.
LADY JUSTICE HALLETT: So had I been set up to conduct a public inquiry, because there hadn't been an ISC inquiry, and had that been because it was accepted that Article 2 -- there was an arguable breach of Article 2, the families wouldn't have been able to suggest to me lines of enquiry?
MR GARNHAM: Of course they would have been able to and it may well be that you would have accommodated them. But when you were considering the secret material, the failure to give them that opportunity wouldn't have been fatal to the validity of the investigation.
LADY JUSTICE HALLETT: Right.
Now, you were about to move on?
MR GARNHAM: To strands.
LADY JUSTICE HALLETT: This is now criminal proceedings, is it?

MR GARNHAM: Yes, amongst other things, but, yes.
The question is -- and this comes from Takoushis at paragraph 105 -- has the system as a whole, including both any investigation initiated by the state and the possibility of civil and criminal proceedings, and of a disciplinary process, rendered a practical and effective investigation?
So again assuming that Article 2's investigative obligation is triggered, in addressing its scope we submit you have to take account of all the other strands of investigational process either underway or available. The ISC report, so far as could be done consistent with national security provides one strand of that investigation.
There are three other potentially relevant strands. First, the extensive police investigation. As you know, madam, Operation Theseus resulted in two trials of alleged co-conspirators, that in fact led eventually to their acquittal on some of the charges.
LADY JUSTICE HALLETT: Convicted of attending terrorist training camps.
MR GARNHAM: That's right. There's been no suggestion that the criminal investigation had not been sufficiently effective. So it met the Menson requirements of Article 2, for example.

I just interpose at this stage there's no suggestion that there's an Article 2 obligation to permit families of the deceased to -- requiring families of the deceased to be allowed to suggest to the police how they go about their task. That's not an Article -- they may do it, but that's not an Article 2 necessary ingredient of an effective police investigation, and nor is it, I submit, for the same reasons, a necessary ingredient of an effective investigation of the Security Service background.

Secondly, availability of civil proceedings.

In that regard, the prospects of success are immaterial. What is relevant is that English law provides remedies for those adversely affected by actions of the state, and they provide -- that provides an important part of the framework of law and processes that surround and serve to protect the right to life, the right to protection of life by law, because that's a part of the framework of doing that.

Third, this inquest, if it's reconvened, will form an important part of the state's satisfaction of its investigative obligation.

I say in that regard that, whether or not this is a Middleton or a Jamieson inquest, and whether or not it seeks to reinvestigate the issues already considered by

the ISC, this inquest will make a valuable contribution to meeting the requirements of Article 2. It will be a public investigation by an independent judicial body, in which the families will be able to play a full part.

LADY JUSTICE HALLETT: But only on certain topics?

MR GARNHAM: Only on certain topics, absolutely. My Lady, that is not -- madam, that is not in the least bit surprising, in my submission, because the fact that they aren't permitted to play a part in reviewing highly-confidential, highly-sensitive material, the disclosure of which would be damaging to national security, does not make this noncompliant with Article 2.

LADY JUSTICE HALLETT: That's your extreme scenario again, Mr Garnham. It's why I put to you earlier on today, is it all or nothing? For example, I think Mr Saunders was suggesting there might be a middle way which could protect national security but also possibly provide some of the bereaved and survivors with answers.

MR GARNHAM: I will come on to address the practicalities at the end of these submissions, but just by way of immediate response to that, the trouble with that is it begins a process of a death by a thousand cuts. As soon as you begin a process which opens up what has already been held to be sensitive, because it's not been

disclosed in the ISC report, it's bound to invite further questions. It's bound to invite a continued process of further questioning that goes deeper and deeper into the territory of the confidential and the sensitive and the national security concerns.

I'll come on later to why that is objectionable, but that's the immediate response to your question.

The point of the last few submissions is simply to submit that, if Article 2 is engaged, the various strands I've referred to meet the Article 2 obligation.

Next, and, we submit, importantly in this context, the obligation implied into Article 2 to investigate is one of means, not of results.

My learned friends for the family make numerous criticisms of the ISC reports.

Those criticisms are, in an Article 2 context, misconceived for three reasons.

First, with respect, all of those submissions are founded on the benefit that hindsight gives. When you know what happens, when you know that MSK was a suicidal Jihadist, all of it becomes perfectly obvious. But there is no sensible way of criticising either the Security Service or the way the Committee approached its business on that basis, and I've taken -- shown you, madam, during the course of my submissions,

observations by Lord Bingham amongst others about how important it is that hindsight plays no part in this. That's the first point.

The second, linked one, is that the criticisms are directed towards a failure to appreciate the significance of intelligence relating to two men, but, with respect, it entirely disregards the fact that there was intelligence relating to hundreds or thousands of others, all or much of which was deserving of the same or greater attention.

The only sensible criticism -- let me start that again.

The only way that sensible criticism could be attempted on that basis is if all that other intelligence in respect of all those other individuals was considered as well.

In making any criticism of the Security Service about what they did or didn't do in relation to MSK and the other terrorist who was -- who came across their radar, you have to put out of your minds, we submit, the fact that you know what happened in the end, and you have to compare their significance with that of the other -- was it 4,020 contacts with the Crevice group?

LADY JUSTICE HALLETT: That's telephone calls over a period of three months?

MR GARNHAM: Yes.
LADY JUSTICE HALLETT: That's why I asked you questions like: do we know how many people Omar Khyam and the bomber met when the bomber was here?
MR GARNHAM: No, but we know that there were 4,020 telephone contacts.
LADY JUSTICE HALLETT: That's not the point I think that's necessarily been put against you. One of the major points being made is that the families and the survivors want to know why, given there was a known bomb expert in the UK for two days, those with whom he met weren't then targeted.
Now, you may have a very simple answer to that. "He met lots of people in the time he was here" or "There were other avenues we were pursuing at the time". But I think one of the simple questions the families and the survivors want to know the answer to is: could somebody help us as to why they weren't targeted, having met an acknowledged bomb expert, having met Omar Khyam in suspicious circumstances before?
MR GARNHAM: I ask rhetorically, why is the fact of meeting any more significant than the fact of a phone call? How can the Security Service judge which of these contacts was the one that said "I want you to be part of my bomb-making team". How can the Security Service,

without assessing and exploring all the other contacts, say whether this contact, that happened to be face-to-face, was greater or less significant than the phone calls, or all the other contacts that happened?
LADY JUSTICE HALLETT: That may or may not be a line of argument, Mr Garnham, but I think the argument against you is, why can't we just explore that? Why can't we have somebody from the Intelligence Service who will explain to us, so that we can understand the pressures and why these decisions were made? That's really all they're asking.
MR GARNHAM: Madam, I appreciate that, but the burden of all the submissions I've been making for the last day are directed to why the answer to that question should be "no". I was addressing here what is, in my respectful submission, the errors of analysis in the criticisms of the report. Your Ladyship makes a perfectly fair observation, but the answer to it is not in this part of the submission. It's in the totality of the submissions. That there is no lawful basis upon which those enquiries can be pursued in these inquests.
LADY JUSTICE HALLETT: This all raised its head again when you went back to your argument that we're talking of hundreds and thousands of other contacts that had to be investigated.

MR GARNHAM: Yes.
LADY JUSTICE HALLETT: I think the point I've been trying to make is that the argument against you is you don't necessarily have to go as far as you're saying.
MR GARNHAM: No, but my answer, madam, to your question is that there is an illegitimacy in the criticism that focuses simply on two contacts. I'm not saying -- I am saying for different reasons that you can't investigate that, but in this point of the submission I am saying that it is illegitimate to criticise the report on that basis because the report was right to observe that, given the state of knowledge that existed at the time, there was nothing to alert the Security Service to the particular significance of these amongst many others.
LADY JUSTICE HALLETT: Can I ask you this, Mr Garnham -- this is a point that's been troubling me for the last couple of days -- supposing I thought or came to the conclusion there might be an arguable avenue of enquiry as to why weren't those who had met Omar Khyam in suspicious circumstances, who then met the bomber, targeted, supposing I was satisfied of that.
Do I know enough for my purposes to decide that point now, and do my team know enough? Or is there any scope for my satisfying myself that what you're saying is right?

MR GARNHAM: Am I to suppose, in answering that question, that Article 2 applies, or is that just a question -- if I may ask -- is that a question --

LADY JUSTICE HALLETT: It's a question to inform all my rulings, because at the moment there's this -- we're dealing with this -- I mean, you were all forced to keep to a strict timetable and, therefore, we have so far very limited disclosure.

MR GARNHAM: Yes.

LADY JUSTICE HALLETT: I'm just wondering the extent to which I am truly in a position -- apart from your points of law that I have no discretion, and if I were not -- if I didn't accept that argument, would I then, if I were going to be in a position of exercising my discretion, be in a position to make decisions?

MR GARNHAM: I'm not sure that I can answer that, because I don't know what it is you know and what it is you don't know.

LADY JUSTICE HALLETT: I don't know anything more than is in these lever arch files. Even then, I don't know all of that because I haven't had a chance to go through them all.

MR GARNHAM: My Lady, I don't think I can give you a sensible answer on my feet to that.

LADY JUSTICE HALLETT: I have been on the internet and seen

some of the conspiracy theories, but apart from that, I know nothing more.

MR GARNHAM: I don't think I can sensibly answer that standing on my feet. I'm probably not going to quite finish by lunchtime. It may be that you'll allow me to reflect and get instructions on that question.

LADY JUSTICE HALLETT: I am, by nature, a pragmatist, Mr Garnham, and of course, if the law dictates I have to take a certain course, I will take it, but if the law doesn't dictate that course and if there's a way that we can satisfy reasonable or legitimate concerns and satisfy the interests of national security and the interests of the Security Services, I would like to take it.

MR GARNHAM: Yes.

LADY JUSTICE HALLETT: So I would be grateful if you could consider with those with whom you act whether, subject obviously to your overriding "You have no part in this Article 2", there is any possible way through this.

MR GARNHAM: I understand the point. I would prefer not to give an answer on the hoof.

LADY JUSTICE HALLETT: Of course. Absolutely. So we were -- I am sorry, I keep interrupting you.

MR GARNHAM: My third point in response to the criticisms of the report is that all of them ignore the fact that the

Article 2 investigative obligation is one of means, not results.

Article 2 doesn't impose quality control standards.

The Strasbourg court does not monitor the quality of investigations, whether police, inquests or any other.

It does not in particular concern itself with whether the outcome was right or wrong. Instead, it looks to see if the process was adequate.

Support for that proposition comes from numerous Convention decisions. Can I just give you the references?

LADY JUSTICE HALLETT: Of course.

MR GARNHAM: Jordan v The UK at 107. Edwards v The UK at 71. McKerr v The UK at 113, and Makaratzis v Greece, 74.

But the most convenient way to find authority for my proposition is Ramsahai v The Netherlands, which was cited by Lord Rodger in the passage I read to you, madam, at paragraph 78 in L.

That then is my response to the criticisms.

Finally, I end where I began with public interest and turn to the ways of handling sensitive material.

If the inquest were to need to consider sensitive material because you are against me on the submissions I've made thus far, in our submission the public

interest would not be served by an attempt to reinvestigate the matters before the ISC.

In particular, I say, firstly, that any proper analysis of the response of the Security Service to the threat from those concerned in this incidence necessitates consideration not just of the evidence relevant to this threat, but also of evidence relating to all threats current at the material time.

Secondly, such exercise would, in those circumstances, require you and, if you sit with a jury, the jury, to have access to the most sensitive material. The material that would have to be considered would be vast, covering much of the work of the Security Service over a period of more than a year, because I submit -- and in a sense this is an answer to the question you asked me only a few moments ago -- the failure to conduct that sort of exercise would create the obvious risk of inaccurate and unfair conclusions which would be in the interests of nobody.

It is incidentally also the case that such an exercise would be impossibly cumbersome and costly and that it would distract the Security Service from its work of protecting national security. Mr O'Connor generously referred to the brilliant work -- I think that was his word -- "brilliant" work of the police and

the Security Service in respect of Operation Crevice. That was work that prevented the bombing of a nightclub or a shopping centre that might well have left hundreds dead. It's worth also noting the success of Operation Rhyme, the one that followed, where there was a plan for gas canisters to be driven underneath buildings and detonated, which also would have resulted in the death of dozens, if not hundreds. It's of significance that, in that case, the plotter was tried and convicted and sentenced to life for the minimum of 40 years. Again, the work of the Security Service and the police.

Some of my friends floated the idea of your postponing the question whether this should be a Jamieson or a Middleton inquest until shortly before the verdicts were sought. In our submission, that would be a thoroughly undesirable outcome.

First, in substance, it amounts to a fishing expedition. It proceeds on the basis: let's assume there's not enough to show Article 2 is engaged for now, then let's assume that there may be something in the Security Service's files, if they give comprehensive disclosure. It then requires us to give disclosure before you've reached a decision on scope with a view to seeing if anything turns up.

The Micawber approach to inquests is, in our submission, inappropriate.

Second, it risks creating all the disadvantages in public interest terms that I've just sought to outline for what would turn out to be, or might turn out to be, an inquiry of much narrower scope.

Third, it risks having the effect that the jury listens to months of evidence on which ultimately they are not entitled to give a verdict.

Fourthly, it would be flat contrary to authority. Dallaglio, C1, divider 6, page 15, says: decide scope at the beginning.

It's also suggested by my learned friends that the difficulty of dealing with sensitive material could be readily addressed. With respect, it could not. The premise for these suggested arrangements appears to be that, in addition to you and your team, the interested parties and, if empanelled, the jury, should have access to that material.

I make this next submission with a degree of hesitation and deference. Identifying and addressing the difficulties in advance, in advance of knowing your decision on Article 2, scope and the empanelling of a jury, is extremely difficult, and I make it clear, in case there's any in this room that doubt it, that if, at

the end of the process of deciding on scope, the Security Service are required to provide material, they will do all they can to cooperate. But it may nonetheless be worthwhile now identifying some of the potential difficulties that would lay in the way of that course.

If one begins by assuming you decide it is necessary to investigate, to one extent or another, the preventability issue, you might consider a range of questions relevant to the scope of your enquiry.

You might think -- again, this is why I say I quote this with some deference -- but you might think that the following questions become relevant: was the Service right to assess that unidentified males C, D and E were on the periphery of the Crevice investigation, or should they have been considered a more significant threat?

Was the Service's failure to identify MSK as a threat reasonable or not? Was the Service's subsequent failure to return to unidentified males C, D and E between March 2004 and July 2005 reasonable or not?

In considering whether there's a risk of recurrence from the point of a Rule 43 report, you might want to look at how the Service does these things now.

If you are to consider Rule 43 issues, the purpose of Rule 43, we submit, is to look at whether there's

a risk of recurrence, and it will necessitate considering what those risks are now, today, or the day of your inquest, rather than what they were in the immediate aftermath of the death.

Now, I just say those are the sorts of questions that you might be contemplating.

What information you would need in order to answer those questions is, we would submit, at present difficult in the extreme to determine.

For example, in relation to my first possible question, you may want to consider who else featured in the Crevice investigation, and that's something you've just mentioned.

In relation to my third question -- that's the failure to return to the unidentified males in the 15-month period -- you may also want to consider whether the investigative work between 2004 and 2005 was so pressing that it was reasonable not to return to those three individuals.

In addressing those questions, you might decide to rely upon the information provided to and the evidence given to the ISC or, the opposite end of the spectrum, you might think it necessary to look at all the information available to the Service when making its judgments on what to investigate from the beginning of

Crevice in 2003 until July 2005.
The point of all that is that it follows that the issue of sensitive material is very much dependent on the question of scope.
If, as must be possible, you took the view that you need to put yourselves in the shoes of the Security Service, to consider whether its actions were reasonable, then it's likely that you will have to consider material of the greatest sensitivity.
The material that was available to the Security Service at the time from investigating Crevice until 7 July, was sensitive for national security reasons and in many cases it remains so.
The question then arises as to how such sensitive information might be handled within these inquests.
First, if you're sitting with a jury, it would be the Security Service's position that disclosure of sensitive material to a jury is simply not possible.
Before that could even be contemplated, every juror would need to be subjected to developed vetting, which is the means by which the government seeks to ensure that there's no risk of accidental or deliberate onward disclosure by those to whom secret material is disclosed in circumstances likely to compromise national security.
The developed vetting process is very intrusive and

very time-consuming, but even if a jury could be put through the DV process, they could still not be subject to the same legal obligations that safeguard against leakage that, for example, officials handling this sort of material or lawyers instructed by the Security Service have when handling this sort of material, in that they are bound by the Official Secrets Act and their contracts of employment as to how -- none of that would apply to a jury.

There would be serious difficulties, we would submit, with disclosing just to you and to your counsel team. When sitting with a jury, you are not the decision-maker. It would not, in our submission, be possible to split the functions of coroner and jury with you considering sensitive material and the jury not. Even if it were done on the basis of you presenting the jury with a finding of fact on the sensitive material so that that could feed into the jury's conclusion, because it would be impossible for the jury, as decision-makers, to be presented with a potentially critical piece of the jigsaw as a fact that they could not look behind.

LADY JUSTICE HALLETT: I don't think that's a suggestion, Mr Garnham. I think the suggestion is that one would do what we do on a regular basis in criminal trials, which

is that the judge hears a PII application, and then decides the extent to which any information must be disclosed to the jury, and then it goes to the jury in a redacted form.

So, for example, if there's an eyewitness who lives at number 33 Railway Cuttings, the jury and the defence -- and no-one is told their address.

MR GARNHAM: As you madam, know, much better than me, there's a huge difference between a criminal trial and the use of PII and these proceedings and the use of PII.

LADY JUSTICE HALLETT: I do understand that.

MR GARNHAM: The most fundamental point is, in a criminal trial, if the Crown take the view that the material is so sensitive that it simply cannot be disclosed even in redacted form, they pull the trial. That is not going to be an option if you go down this course. There will be material that is of a sensitivity that, were it in a criminal trial, might prompt that consideration. The Security Service would be deprived of the opportunity to do what, in a last resort, it does to protect national security. It can't pull this inquest.

Once it goes to you, it's out there.

Although, of course, we would have great confidence in the way you deal with it, there are occasions when the Security Service's judgment of the threats of

national security are not the same as a judge's, and there is good reason for the practice in criminal cases that entitles the Crown to say, "Sorry, this is just so sensitive we would rather see a guilty man go free". PII won't do here, and it's also worth saying that PII is working in the wrong direction here. PII in a criminal case is used to keep out of a trial potentially exculpatory material which is not so relevant that fairness dictates it must go in.

I'm sorry, that's a rather inelegant way of putting it, but it's been a long morning and I'm starting to struggle with elegance.

Madam, you have my point as to the significance of PII. It doesn't provide a route in; it provides a route out, and it doesn't enable the national security concerns to be dealt with in the same way.

The same applies in many other contexts. Madam, you'll be familiar with control order cases and Special Immigration Appeal Commission cases, where, even with the use of special advocates, there are occasions when, faced with a judge's decision, the Secretary of State is put to his election: either you abandon the attempt to remove this person, to impose a control order, or you allow us to gist and disclose this piece of material. Sometimes the Secretary of State has to say: well,

if that's the court's ruling, we pull it. We cannot risk disclosing this critical piece of information to a jury, or even to a Special Advocate. It sometimes becomes that sensitive, and that's what we fear in this case; that there is no convenient way to handle this. My friends talk, with the greatest of respect, blithely about PII and about redactions and gistings and confidentiality rings. None of it deals with this critical problem.

If you were sitting alone -- can I address that? Because the question of whether or not you empanel a jury is still one for you to decide.

Subject to satisfactory secure storage arrangements, there would of course be no objection from the Security Service in principle to disclosure of sensitive material to you, nor to Counsel to the Inquest who are DV cleared. However, beyond that, there would be real difficulties.

You will be familiar, madam, with the statutory duty on the Security Service under section 2 of the Security Services Act 1989. Consistent with that duty, we, the Security Service, could not countenance disclosure to non-DV'd counsel. Nor could there be disclosure to counsel who owe duties to their clients to share information with them, which would come to the

same things. That's why the ring of confidence doesn't work.

The need to appoint special counsel who don't have duties to clients, in order to consider sensitive material, is precisely why Special Advocates or Special Counsel are used.

To them, there apply special rules to safeguard against inadvertent disclosure, principally that, once they receive the closed material, they can have no further contact with those open advocates acting for the people concerned or with their clients.

It might, we concede, be possible to appoint Special Advocates to represent the other interested parties in this inquest if it was considered that Counsel to the Inquest could not adequately protect those interests, although, frankly, we suspect Counsel to the Inquest could indeed protect those other interests. But, for the same reason as for juries, disclosure to the families would be impossible.

Given that disclosure would, for those reasons, have to be limited to disclosure to you and to your DV'd counsel team, and possibly to Special Advocates if they were thought necessary, it has to be open to doubt, we would respectfully suggest, whether either you would agree to receive it on that basis, particularly before

you've seen it and assessed its importance and, second, whether the families could possibly agree, and if I was acting for them, the submissions would be fairly obvious.

All of the submissions so far have been that the families want to know and want to see the material for themselves in order to answer their questions.

It's never been suggested, thus far at least, that they would be content never to know what the secret material reveals.

There was one suggestion -- and I confess I forget by which advocate the suggestion was advanced -- that he had one family client who would be happy for only you to see the material.

LADY JUSTICE HALLETT: Mr Saunders.

MR GARNHAM: I'm grateful. But even that, as I understood that submission, was caveated as being for the purpose of your assessing its relevance. It wasn't, I don't think, said that you could make -- you could be the only person to see it. It was always understood that, ultimately, if you decided it was relevant, it would come to the families.

So in summary, there's no objection in principle to sensitive material being disclosed to you and to your counsel, but for practical reasons it's hard to see how

you or the families could agree to disclosure in that way.

If Article 2 applies, in addition, there would be additional consideration whether it would be consistent with Article 2 for material to be withheld from the families and you'd have to consider whether their interests could adequately be protected by Counsel to the Inquest.

I promised that I would -- I indicated that I would finish by lunchtime. I had hoped that I would drag it to exactly 1 o'clock, so that I could have an opportunity to take instructions on the points you raised before I finally closed.

LADY JUSTICE HALLETT: You've had a very busy morning, Mr Garnham. If you'd rather just reserve your position now as to --

MR GARNHAM: May I?

LADY JUSTICE HALLETT: Yes, of course.

2.05 pm.

(1.00 pm)

(The short adjournment)