Thursday, 29 April 2010

(10.15 am)

Discussion re fingerprint letter

MR KEITH: Madam, before Mr Hill resumes, may I raise one matter, which has come to light overnight, and it concerns the matter of the West Yorkshire Police letter dated 22 April to Mr Smith concerning the issue of fingerprints and the coming to light of the fact that in fact West Yorkshire Police held two sets of Khan's fingerprints.

The letter was received by Mr Smith shortly after 22 April and, after we discussed the issue, Mr Smith made plain that a letter to him and through him to you, was, of course, a matter that would then have to be drawn to the attention of all the parties, and indeed, subsequent to that, Mr Smith sent a copy of the letter out to all the potentially properly interested persons including Messrs Imran Khan.

Concern has been expressed overnight following enquiries from the press as to whether or not that letter, having been revealed in the public domain, may be published, as to whether or not confidentiality, if it exists at all in that letter, has been fully waived by the sending out of the letter, firstly, to Mr Smith and then through him to all the parties.

LADY JUSTICE HALLETT: Sorry, just before you go on, I'm not sure that the letter is yet in the public domain, is it? Reference to it has been made.
MR KEITH: Yes, indeed.
LADY JUSTICE HALLETT: But the contents haven't been read out.
MR KEITH: In the civil jurisdiction there has been a debate for many years as to how much of a skeleton argument and how much of evidence referred to in open court thereby becomes publicly disclosable in its entirety. I don't want to trespass into that difficult debate.
May I propose this for your consideration: if either West Yorkshire Police or any of the other agencies have a real issue as to whether or not the letter can be published, because the press are asking now, could I invite counsel to indicate to their instructing solicitors that you might wish to consider any written application as to why it shouldn't be published and perhaps some part of today could be taken by them in preparing some written submissions as they see fit to you and we might then be able to consider that at the end of the day.
LADY JUSTICE HALLETT: Mr Skelt, any problem with that?
MR SKELT: That can be done. I have not had the opportunity of discussing it with Mr Keith this morning,

regrettably, but there it is. It seems a sensible course.

LADY JUSTICE HALLETT: Perhaps if you took the opportunity of the mid-morning break, if that's possible, if Mr Keith is not doing other things. At the moment, you have not read the contents to me in open court.

MR SKELT: Yes.

LADY JUSTICE HALLETT: You have referred to it, but I can understand that you've referred to it in terms that may leave people confused as to what it contains.

MR SKELT: Yes, it will be understood, I hope, that that was done intentionally, not to cause confusion, but to limit the degree of reference. But rather than spend any more time on it, there are other matters to be dealt with this morning.

LADY JUSTICE HALLETT: Indeed. I will leave it to you to discuss further with Mr Keith, Mr O'Connor and Mr Hay and we'll see where we go later.

MR SKELT: Thank you.

LADY JUSTICE HALLETT: I'm sorry we can't answer the press's question moment, but we will try to return to it before the end of the day. Yes, Mr Hill?

Submissions by MR HILL (continued)

MR HILL: Madam, on that issue, you will recall, of course, that I did make some observations yesterday about the

letter. We, of course, can reduce those by repetition into writing. For the avoidance of doubt, our position is and will be that the letter written by West Yorkshire Police is entirely factually accurate, and we don't take issue with the contents.

LADY JUSTICE HALLETT: But you say it's not the full story.

MR HILL: We say don't take it out of context. Page 66 of the ISC report published in 2009 is the reference that must be made, madam.

LADY JUSTICE HALLETT: Your concern is, at the beginning of the letter there's a reference to date when a request was made for fingerprints, you say, "Ah, but that's not the first time".

MR HILL: Yes, that's the simple point.

Can I just take the opportunity, if I may to return to what is becoming known as the halfway house scenario, although, if I may, we would prefer, not the term "halfway house", but we would propose instead the term "the necessary exploration of evidence prior to 7 July 2005", under the auspices of a Jamieson inquest but as necessary to enable the obvious verdict to which many interested persons will be drawing attention.

Given the very helpful observations made by you and questions asked by you yesterday, I took the opportunity overnight to review documents created in the course of

Operation Theseus and I'm going to take just a few minutes of time, if I may, to try to assist under the heading of "halfway house", or "evidential exploration", because you will remember, madam, that Operation Theseus, the Metropolitan Police Service operation, did not commence until after the bombings. It commenced on 7 July itself. That operation became, as I would submit, an exhaustive investigation which resulted, some 20 months later, in March 2007, in the arrest of three individuals, two of whom were arrested at Manchester Airport as they were about to board flights out of the country. The reason I mention that last fact is because it's necessary so that we can understand the indictment as it was then framed in the Operation Theseus trial. For the avoidance of doubt, there were two trials, one commencing April 2008, the other commencing January 2009. At the first -- the defendants were the same. They were Waheed Ali -- also known as Shipon Ullah, a name that we've heard this week -- Sadeer Saleem and Mohammed Shakeel. It's the first and third of those individuals who were arrested at Manchester Airport. At the first trial, the single count indictment

alleged conspiracy to cause an explosion. The jury failed to agree and were discharged in accordance with normal criminal principles, criminal jurisdiction principles, and at the second trial, the jury were empanelled in respect of a two-count indictment, count 1 being the conspiracy to cause an explosion and count 2, in respect of the first and third defendants, Ali and Shakeel, being one of conspiracy to attend terrorist training.

That second count was specified in the particulars of the offence alleged as to March 2007, so one can see that what the prosecution were directing the court's attention to was the intention of those defendants, as it were, when they were arrested at Manchester Airport in March 2007.

The point of this, though, is to indicate, in the hope that it's of some assistance to you in shaping the necessary evidence for this inquest, what the scope of the first conspiracy was, and what I'm going to do, if I may, is read two or three short extracts from the prosecution opening speech made to the jury, therefore in public, at Kingston Crown Court in January of last year.

I'm going to read it out. I've extracted overnight a single page which I've typed. I'll read it out in

full, if I may, but if it would save your pen, madam, can I pass a copy and I'll read the contents as they are.

LADY JUSTICE HALLETT: These were the trials in front of Mr Justice Gross?

MR HILL: Correct. I'm afraid I have limited copies, but I should at least provide one for the inquest team. Can I do that as well, so they see what I'm reading out? (Handed).

I shall read it all.

The first point to note is that the indictment at count 1, as it ultimately became -- that means in the two-count indictment for the purpose of the second trial -- conspiracy to cause an explosion between 17 November 2004 and 8 July 2005, conspired together with -- I haven't written out all of the particulars of the offence -- conspired together with the four bombers to cause by an explosive substance an explosion or explosions of a nature likely to endanger life or cause serious injury to property in the United Kingdom.

Now, madam, you will be entirely familiar with that, because that is the statutory wording of the ingredients, the legal elements, of the offence under the Explosive Substances Act 1883 which were used by the prosecution in this case.

What obviously I invite you to note is that the framing of that conspiracy, using the normal principles for framing a criminal indictment, is that it's expressed on between dates and that means that the operative dates of the conspiracy as alleged by the prosecution at Kingston Crown Court were 18 November 2004 to 7 July 2005, and, madam, you understand of course the ordinary drafting principles which require, on a continuing conspiracy, that the date as to a bracket of time is so identified.

Count 2 I needn't repeat in any detail. That was a conspiracy to attend terrorist training prior to the arrest date, 23 March 2007.

Can I read the first sentence from the opening speech:

"It is not the prosecution case that there was, in early 2004, any plan to carry out the London bombings. On the contrary, the evidence suggests that at that time Mohammed Sidique Khan and his friends were more interested in fighting Jihad in Afghanistan. Although, as we shall see in due course, their attention moved closer to home and became focused on planning the London bombings, that change of plan almost certainly did not take place until towards the end of 2004."

If, as it were, one asks, "Why was that assertion

made?", that is because, looking at the last paragraph on the page -- sorry to take it out of order, but it would make more sense of the analysis -- I'm again quoting from the prosecution's opening speech:

"It is the prosecution case that whilst Mohammed Sidique Khan and Shehzad Tanweer were in Pakistan, something happened to cause them to change their plans (ie [my parentheses] to die abroad, in Jihad) and to turn their attention to an attack on the United Kingdom."

Next, to put matters in sequence, going two paragraphs up on my sheet, the fact is, as the criminal investigation later discovered, on 18 November 2004, Khan and Tanweer travelled to Pakistan. They returned to the United Kingdom on 8 February 2005.

So that is the sequence of events as subsequently unearthed by Operation Theseus: travelled out of Pakistan in November. Something changed plans. They didn't return, Khan and Tanweer, until February 2005, but see what happened in the intervening period and go, if I may, to the largest of the paragraphs on that page, again a direct quotation from the prosecution opening speech:

"'On 16 December 2004, the defendants [that is Ali, AKA Ullah, Saleem and Shakeel] travelled from Leeds with

one of the London bombers, Hasib Hussain, to London, where, over a period of two days, they conducted a reconnaissance of potential targets. Whilst they were in London, they met and spent time with another of the London bombers, Jermaine Lindsay. It is not the prosecution case that at the time of the trip to London on 16 to 17 December 2004, the conspirators had made a final decision about the method of attack, ie suicide bombing or some other method of causing explosions, the targets to be attacked or even the date for the attack. However, it is the prosecution case that the London visit was an important first step in what was by then a settled plan to cause explosions in the United Kingdom'."

That is, therefore, the way in which the conspiracy was framed. It is to be borne in mind, as you already know, madam, that all three of those Operation Theseus defendants were acquitted on the bomb conspiracy count, and it follows that the jury, we must interpolate, did not accept to the requisite criminal standard what was asserted as to the 16 to 17 December 2004 visit. They were, those two Theseus defendants who were charged with it, ultimately convicted of the terrorist training conspiracy, that being framed of course in March 2007.

Returning to the sheet, there is one paragraph I haven't read out. It's the penultimate one:

"The purchasing of hydrogen peroxide ..."

This is not a direct quotation from the prosecution opening note, but is factually accurate, I'm confident.

"... the key component in both the main charge and the initiators for the 7/7 bombs commenced after the return of Khan and Tanweer, therefore February 2005 or later."

Madam, I have, I submit, faithfully represented what the prosecution case was as a result of Operation Theseus, and it remains the analysis of the Metropolitan Police, as presented through that prosecution. It means that insofar as the criminal cases and Operation Theseus are concerned, we would contend, as we always have, that the conspiracy in a real sense was not afoot until November 2004 at the earliest. Alternatively, December 2004, or in the further alternative, bearing in mind the acquittals on count 1 in the Theseus trial, February 2005.

LADY JUSTICE HALLETT: I don't think the acquittals get you there, Mr Hill.

MR HILL: Madam, I don't say that follows, because the prosecution case is the prosecution case, and whilst, as you will be familiar with from your own experience in

the criminal jurisdiction, we abide by any verdict of a jury --

LADY JUSTICE HALLETT: Yes, all the verdicts mean is that, even if the jury was satisfied it was a reconnaissance trip in December 2004, they weren't satisfied that those they acquitted were a party to it. They might have been visiting for other purposes.

MR HILL: Quite. Equally, it is open to interpretation that a jury might have been satisfied as to that trip in respect of the third and fourth bombers --

LADY JUSTICE HALLETT: Indeed.

MR HILL: -- but simply not in respect of those at the trial.

LADY JUSTICE HALLETT: I think it's a better way to put it that it wasn't your case that in any real sense the plot was afoot until 11 December 2004. I think the acquittals takes us into unknown territory and speculation.

MR HILL: Madam, I'm more than content to abide by that. It is a byproduct, however, of the Operation Theseus analysis, if I can put it that way, that we would contend that Article 2 engagement simply cannot be right, as has been contended here this week, so early as February and March 2004.

For the sake of completeness, in terms of

references, it might just be worth going once more to the ISC report at E2/10 because what the prosecution asserted at the trial was that, if there was an intention in early 2004, it was "more of an interest in fighting Jihad in Afghanistan", and one might question why that assertion was made.

So to try to deal with that, if we go to ISC2 as I've called it, at page 32, what the ISC reported at paragraph 107, was:

"It was only after 7/7 that MI5 knew that Khyam had described going over the Pakistan border to carry out an operation in a conversation with Mohammed Sidique Khan."

That is in reference to the monitored conversation in a vehicle on 21 February 2004, and to explain that the ISC then went on, in the box at the bottom of page 32 headed "What was known at the time", to give an account of MI5's surveillance operation summary for that evening. That's, as it were, the contemporaneous summary, in February 2004. But we need to go two pages on to page 34 in the box in the middle of that page headed "What was discovered about this conversation after 7/7" to see the following:

"It was in August 2005, as a result of further analysis of surveillance and eavesdropping material from Crevice, the police were able to identify Mohammed

Sidique Khan's voice in the recording from 21 February 2004."

So it was only during, as it were, the Operation Theseus timeframe that further analysis of 21 February 2004 arrived at that conclusion allowing the prosecution in Operation Theseus to make the assertion as to MSK and Tanweer's intention in 2004.

I haven't retyped it, but, for completeness, can I say that it was part of the prosecution's opening in that same trial to put into evidence the transcript of that conversation, and what was said by the prosecution about 21 February 2004 was, during their time together, Omar Khyam can be heard telling Mohammed Sidique Khan about the problems associated with travelling to Pakistan.

Can I just pause there and say for any who may -- because this is a public document, in effect -- be following, it will be understood that the name "Khyam" wasn't referred to in Operation Theseus. A pseudonym agreed, on my understanding, by the learned judge and all the parties for "Khyam" was "Ausman", and he was referred to as "Ausman". The reason for that, on my understanding, is that there was legal argument before Mr Justice Gross, given the Operation Crevice trial, by then complete, as to the nature of prejudice that may

fall against the Theseus defendants if they were identified evidentially in that trial, Khyam by then convicted under Operation Crevice.

That submission was acceded to and, therefore, a pseudonym was used, but Ausman is Omar Khyam.

Moving back to what was opened and was placed in evidence in the Operation Theseus trial, he -- that is Khyam -- explains that people are watched travelling into and out of Pakistan and so run the risk of drawing attention to themselves and their associates on their return to the UK.

The prosecution then went on just two further references, if I may:

"Another topic discussed at length by Khyam and MSK was the means by which they could raise funds for their activities ..."

I think this was touched on by Mr O'Connor in his submissions, certainly in his writing, that there was discussion about fraudulent fund-raising schemes, some of which, it was said by the prosecution, Khan and perhaps others of the 7/7 bombers went on to try to put into effect during 2004.

But finally, at one point during their conversation, the prosecution told the jury, MSK asked Khyam for an extension. His wife was pregnant at the time and one

interpretation of that request is that he was asking to defer something expected of him until after the baby was born. He mentioned that the baby was due on 25 May -- that would be 2004 of course -- and asked for "two, maybe three weeks after that, to make sure that the child was all right". It is clear, said the prosecution, from what MSK was saying that he was intending to go abroad to fight Jihad and that he didn't expect to return.

So that was the full interpretation by Operation Theseus of the content of the February 2004 overheard conversations, if I can put it that way.

Madam, that's all I wish to say by way of intended assistance to you in the evidential shaping, contours evidentially, of what you may find to be necessary to underpin and explain the tragic events of 7 July. It is not for me, of course, to say, but we are acutely conscious that there is a heartfelt need for answers by the bereaved in this case and one in which you are only too keenly engaged to see whether answers can be provided.

We do maintain our position of support for Mr Garnham's submissions as to the non-engagement of Article 2, but we do say that the position is not stark. We do say that, by the sort of evidential analysis that

I've outlined, it is not only possible, but proper, and you may rule necessary, to look at this conspiracy from its inception, and of course I mean by that November 2004.

It leads me to a final observation --

LADY JUSTICE HALLETT: Wait a minute, pausing there, just because the prosecution of the trial of Operation Theseus said that was the inception of the plot re the Theseus accused does not mean the plot started in November 2004. It means that you could have an ongoing conspiracy. I'm sure both of us have said it to juries many times, Mr Hill, people can come and join a conspiracy, people can leave. The fact that the Operation Theseus accused are first put in the plot, you would say, in November, doesn't mean that's when the plot started.

MR HILL: Forgive me, I'd say that's not right. The count on the indictment which expresses the conspiracy names the four bombers. It is framed in open -- a term I know you'll understand -- it's said to be an open conspiracy, so the particulars of the event include the words "together with others unknown", but the total conspiracy timeframe, including the bombers -- so not just the Theseus defendants -- is expressed as between 17 November 2004 and 8 July 2005.

The reason I say that that is a comprehensive timeframe for the conspiracy is because, in the Theseus trial, there was nothing in respect of the Theseus defendants to place their role in the conspiracy as early as November. The first evidence alleged by the crown against the Theseus defendants was 16 December. So it does follow from an analysis of the indictment that the conspiracy had been afoot for up to a month before the involvement of the Theseus defendants. It doesn't follow that the conspiracy was afoot for any period before that.

LADY JUSTICE HALLETT: How do you say this material, be it November 2004, be it February 2004, is placed before any inquest?

MR HILL: Insofar as you ruled it to be necessary, the Metropolitan Police, in as much as they are the holders of the material, will abide by any order that you make by further report or access to material by your inquest team, disclosure generally, of any of the evidence that was either used or disclosed in the Operation Theseus trials, because, plainly, that evidence is still available, and with the assistance of your inquest team, you may see fit to make orders as to what aspects evidentially are necessary.

We would venture to suggest that it would not be

necessary on any resumed inquest to, as it were, simply review all of the Theseus evidence. The reason I say that is that there was plainly a very significant element evidentially in Operation Theseus which concentrated only on the acquitted defendants in Theseus.

So one would need to take a line through that, but we are -- I can put it in no simpler terms -- open to order to provide, to package, to create reports about any of that material that is necessary.

LADY JUSTICE HALLETT: But is the Operation Theseus material going to take us back, should I consider it appropriate, to the dates in February 2004 and March 2004 to which I have been referred and upon which very heavy reliance has been placed?

MR HILL: The simple answer to that has to be "yes". The reason the answer has to be "yes" is because, as is clear from the opening note in Theseus, evidence dating as early as February 2004 was before the jury. So if ordered, of course, albeit held, as it were, under Operation Theseus, that material first generated under Crevice could be provided.

As to the necessity for that, of course we await your order. We would say that because the proper analysis of the commencement of the bombers' conspiracy

could not predate November 2004, we would submit, in agreement with Mr Garnham, that it would only be if you made a positive ruling as to the engagement of Article 2 or, in the alternative, a ruling notwithstanding the non-engagement of Article 2 that there should be such breadth under a non-Article 2 Jamieson resumed inquest that that material is relevant.

We, for our part, submit that it's not relevant on any basis.

LADY JUSTICE HALLETT: Why, if it's relevant to pursue the background of the bombers in the way you suggest, isn't it relevant to go, not just to November 2004, but to February and March 2004 when said bombers are meeting a bomb expert, for example?

MR HILL: The answer that I give to that, from Operation Theseus, is a clear one, and it emerges from the full scope of the opening before the jury.

The evidence of February 2004 was relied upon by the prosecution not as evidence of guilt in the conspiracy alleged. It was evidence of association; for example, to show association between Shipon Ullah and Khan and Tanweer, as co-occupants of a car being driven north in February 2004. But, as a very careful direction given to the jury by counsel, and no doubt repeated by his Lordship in that trial, made clear, evidence of

association is not evidence of guilt. So it was background evidence that predated the alleged conspiracy. Admissible in the criminal trial, we would submit, though, unless you, as it were, rule on an Article 2 premise, not relevant in the context of these proceedings.

LADY JUSTICE HALLETT: If it's not relevant for me to ask what is the background of the bombers meeting a bomb expert, how is it relevant for me to ask what were the bombers doing in London on December 16? I'm not following why there's a cutoff. If I'm entitled to look at the background of the bombers leading up to the bombs, surely meetings with bomb experts are arguably just as relevant as a recognizance mission.

MR HILL: We'd submit no, there's a very real evidential distinction to be made between any meetings that MSK and ST undoubtedly had with Khawaja or others and their concerted activity in deployment of the conspiracy to detonate bombs in London.

In other words, the inquest will properly look at all of the evidence, which we concede is broad, to enable a jury, if so directed, as it were, as part of the inquisition to return a verdict of unlawful killing, the method of that unlawful killing be a coordinated terrorist suicide attack by bombing.

But that coordinated terrorist suicide attack was not, on our analysis, on foot at all in February 2004. If anything was on foot, it was as indicated to the jury in Theseus: an intention to fight Jihad abroad. So the attack with which we are all concerned in these proceedings was beyond any contemplation at the time that you're being invited to take interest, February 2004.

LADY JUSTICE HALLETT: That is the prosecution case, but the fact that the prosecution have put their case in that way doesn't bind me.

MR HILL: Madam, of course I have to accept that, but what the prosecution case was working from is the transcripts themselves of the conversations recorded in February 2004, and there is nothing --

LADY JUSTICE HALLETT: Which I haven't yet seen.

MR HILL: Well, they are reported in the ISC document, and that is why I took you to it at pages 32 and 34.

LADY JUSTICE HALLETT: The amount that is disclosed in the ISC report I confess didn't really lead me down the specific path that you said I should have gone down, given the limited amount we're told.

MR HILL: I can't help, as it were, as to the limitations the ISC on advice put within their report. I can identify that in paragraph 107 on page 32 there is

a clear reference to going over the Pakistan border to carry out an operation. There is no reference to carrying out an operation in this country.

Now, having said that, if there is a Gordian knot to be cut here, clearly the position the Metropolitan Police have to take is that the transcripts, albeit transcribed fully after 7/7, were evidenced, publicly, in the Theseus trials. So they are available, and as a matter of simple availability of material, we would not have any objection to you seeing that.

Of course we wouldn't, because it's, on my understanding, in no way redacted. It's a transcript referred to by prosecution counsel to a jury and it's part of the evidence in the Theseus trial.

So we don't object. What we say -- and I'm sorry for repeating myself -- it's not our dispute. What we say as to the dispute between Mr Garnham and Mr O'Connor is that, if pushed, we say that Mr Garnham is right when he submits to you that there cannot be any relevance to that material, there being no engagement of Article 2, and in support for that contention we say, for what it is worth, that the Operation Theseus analysis agrees, entirely agrees, with that and although Mr Garnham in his submissions didn't himself frame the 7/7 conspiracy,

the Metropolitan Police in conjunction with the Crown Prosecution Service did, and I've simply set before you that framework.

Perhaps one other way of looking at it, without delving further into authority, you asked a number of pertinent questions yesterday on a hypothetical basis as to what would be enough to engage the principle -- to engage the duty, rather, under Article 2.

One of the questions you posed -- forgive me if I paraphrase it -- is, if it is known that an individual is ready to detonate a bomb, even though his target is not identified, could I or anybody else say that the duty is not engaged?

The answer on reflection that I make -- repeating that it's not my dispute -- is, of course I wouldn't submit, I would not submit that, if it were known that there were an individual in this country ready to detonate a bomb, then the authorities could justifiably do nothing. They clearly couldn't.

But the submission I make, if it is sought hereafter to somehow, by extension or undermining of Osman, say that Article 2 is engaged on the basis of immediate threat, even without identification as to target beyond the populous as a whole, if that's what's attempted hereafter, it would be our submission that that's not

this case, and our analysis, as I've set out, is that that could not be this case because the analysis of what was happening in February 2004 did not demonstrate on the part of MSK, Tanweer or any of the 7/7 bombers that they posed any real or immediate threat within this jurisdiction at all.

LADY JUSTICE HALLETT: Would you question an assertion that the potential victims have to be sufficiently identified for the state to do something?

MR HILL: There has to be identification to the extent that it is susceptible to a reasonable, proportionate response by the authorities. That is why I say that if it were known that an individual posed an immediate threat -- albeit not precisely to whom -- one could easily conclude that it would be reasonable and proportionate to arrest him and, frankly, that's what the police would do if they were in that position.

But that's not this case, I repeat, and our evidential analysis is that could not be this case, and it was painstaking investigation and enquiry after 7/7 that ultimately arrived at the position set out in Theseus.

LADY JUSTICE HALLETT: Just so others know the way I'm thinking -- I appreciate that you keep saying this isn't your dispute -- but as I've been reading Mastramatteo

overnight, that's how I take the court to have operated, that, in that case, because it was the release of a specified, dangerous prisoner, there was a reasonable, proportionate response which was to detain him or get him back into custody, and, therefore, albeit they there say the risk is to the public at large, you can identify the potential killer and, therefore, you don't have to have the identified individuals because it's anybody he comes into contact with.

MR HILL: Yes, well, madam, he can speak for himself, but it does seem to us that that probably is where Mr Keith is going in citing, as he does now, Mastramatteo. I do defer to Mr Garnham as to whether that is right and he's addressed you at length upon it.

What I say is, even if that is, as it were, a correct reading down of Osman, it's not this case because this case, on analysis, shows nothing more in February 2004 than an association, in suspicious circumstances, with a bomb-maker. It doesn't show more than that, and indeed an analysis of the transcript of the recorded conversation would tend to demonstrate something very different, perhaps going so far as an intention to deploy in some fashion abroad, perhaps in conjunction with Omar Khyam.

But what then happened was that, even if there were

such a plan, it wasn't put into effect because Khyam was disrupted as a result of Operation Crevice. Any threat for the sake of argument that MSK proved or showed by association was therefore suspended, at the very least, by Khyam's arrest. We know that there was then a delay of some nine months, during which the evidence later gathered shows that there was nothing other than low-level, fraudulent activity being undertaken by MSK and he then travelled out of the country in November. It was only after that that there was any attack planning put into effect, at the earliest by calling into being a reconnaissance trip on 16 and 17 December, and then by making practical preparations not earlier than 8 February, until which date, of course, he and Tanweer were out of the country.

LADY JUSTICE HALLETT: So you say two hurdles and we don't need to get to the identified individual hurdle because the argument fails at the first hurdle, the real and imminent risk?

MR HILL: Yes, that's what I say.

LADY JUSTICE HALLETT: I have the argument, thank you.

MR HILL: So finally then, we do not contend, as a result of all of this, that preventability is to be absent from the resumed proceedings. We accept entirely that preventability as a concept may be something that you

find is, as it were, engaged after the detonations and we have no submissions to make as to limiting preventability in the context of aftermath, as you've called it, emergency response, the susceptibility to lives being saved, which are the submissions that you've heard.

We do say that preventability by the Security Service before the event would require either Article 2 engagement or a ruling to which the evidence simply is not susceptible. However --

LADY JUSTICE HALLETT: So we can look at the background, but what we can't do is ask anybody to explain why the decision was taken as it was. So we can air all the background material, subject to whether it's November 2004 or February, but subject to that, we can air the material relating to the bombers --

MR HILL: Yes.

LADY JUSTICE HALLETT: -- but no questions to be asked on the judgment call?

MR HILL: We say strictly not, because that's outside the realms of -- or that would require Article 2 engagement.

LADY JUSTICE HALLETT: I follow, thank you.

MR HILL: We have Mr Garnham's arguments on what the ISC report shows, in any event, as to decision-making.

So I have one final topic, but just to encapsulate

it, our submission is that there should be -- and we positively support a resumed inquest for all of the 52 deaths. We submit that it should be along Jamieson principles. We submit that it should be broad enough to cater for aftermath and emergency service response, and, of course, within Jamieson principles, how the deaths were caused in the sense of eliciting evidence to demonstrate unlawful killing in the way that we've tried to assist with today and, indeed, an inquest leading to and susceptible to a Rule 43 report that you may choose ultimately to make.

That leaves a final point, which is whether a jury is either necessary or practical in that context. We don't wish to repeat submissions earlier made. We've heard what Mr Gibbs has had to say about the impact upon jurors and the potential difficulties that a jury would face. The only matter of detail that we would just add for your consideration is the statutory considerations within the Coroners Act. If I may finally go to B2 and just to look at section 11 of the Act, we have an observation for to you consider.

Behind B2 we have the Coroners Act 1988. If you would kindly go to section 11.

It is just a point about, in effect, the development of coronial law and procedure since this Act came into

force. What the Act says -- and it is still in force -- is at 11(3)(a), that:

"The jury shall, after hearing evidence, give their verdict and certify it by an inquisition."

Over the page, under 11(5)(a):

"That inquisition shall be in writing under the hand of the coroner and, in the case of an inquest, held with a jury under the hands of the jurors who concur in the verdict."

Insofar as it could be within your contemplation that there be a narrative verdict here, we say that a case such as this is a good example of developments in practice and procedure at inquests hearings which have outstripped the normal procedure contemplated at the time the Act was passed.

Complex submissions on intelligence-gathering, handling and even resource-led decision-making, which, at one end of the spectrum, is what you are encouraged to permit a jury to consider, is not only difficult for a jury, for the reasons identified by Lord Justice Pill in the case of Scholes which I referred to yesterday, but also is proper material for you under Rule 43 by the making of a report.

Our point on the statutory drafting is that it does not appear from 11(3) and 11(5) that there's any room

for any variation in the degree to which a jury, if empanelled, concur on any aspects of the verdict. What I'm saying is, if these proceedings are susceptible to a narrative verdict, one imagines a number of questions, which, after hearing submissions and at the end of evidence, no doubt, you would rule upon and leave to a jury in a questionnaire, of the type it has been said was left by Sir Michael Wright in the Stockwell proceedings.

But on the submissions of Mr O'Connor and, to a lesser degree, Mr Coltart, that would be a complex document on which, applying the statute, all of the agreeing jurors would need to concur on all of those matters.

We do not think that the criminal jurisdiction model under which there may be different numbers of jurors agreeing, albeit in the requisite number, one way or the other on a particularised indictment reads across to coronial procedures.

So it does seem to us -- and we're not aware of any authority that defines this -- that there would need to be the same measure of agreement by the same jurors on all of the matters that go under their hand in the returning of what would be a single verdict -- unlawful killing for example -- but where there are a number of

factual matters for them to consider. It simply seems to us that that is setting an even more difficult task for a jury, whereas one that would not, we submit, be difficult for you, particularly given your power to deal with detailed recommendations under Rule 43.

Finally as to that, we would pray in aid the fact that, were there to be a narrative verdict and a questionnaire and a jury empanelled in this case, this is not a de Menezes-type case. I say that because Mr O'Connor put before you the de Menezes questionnaire approved by Sir Michael Wright as a means of demonstrating that, with intelligence and acumen, a jury can get through complex proceedings.

We agree with that as a general principle, but we would remind you, as you already know, that the de Menezes case, tragic though that was, involved a jury looking at events that unfolded over 24 hours and nothing more than that, because the operation, as a result of which the innocent Mr De Menezes tragically lost his life, commenced on 21 July and concluded on the 22nd.

This is not such a case on any basis.

So we simply put that into the mix for consideration in support of what Mr Gibbs has to say about, with all credit to juries for the essential work they do, what we

say may be a better procedure here, which is to proceed without one.

LADY JUSTICE HALLETT: If you are saying, following the reasoning of Lord Justice Pill it's better for a judge to be looking at resource-led policies, systemic failures, that I understand the argument, but I then am troubled by section 8(3)(c) and indeed (d) itself that, why -- what was the purpose in Parliament saying that a death that's caused by accident, poisoning or disease, that has to be notified being tried by a jury? That seems to be a very odd subject matter to put to a jury rather than a judicial officer, and "possible recurrence of which prejudicial to the health or safety" sounds to me like policy, resource-led systemic failings-type debate, again Parliament saying goes to a jury, not a judge.

MR HILL: I can't pretend to try to unravel it. It's been interpreted by the highest authority over a number of years, and I think the best that I can do is to say that in the recent and authoritative view of Lord Justice Pill, whatever the potential for empanelling a jury may be on a statutory basis, there are good reasons on a case-by-case basis for saying that that should not be so, and to that extent we say that you should view this as a section 8(4) case. You should

1 therefore view it as one over which you hold discretion,
2 and you might choose to exercise that discretion in
3 favour of no jury.
4 That is not necessarily the case. There would be
5 many in this room who we understand would wish the
6 imprimatur of a jury to stand over these proceedings and
7 it may be that shaping the proceedings in the way that
8 we submit is proper, with the date and evidential
9 parameters that we've suggested, might actually make it
10 more susceptible to jury treatment.
11 That said, I do submit that Mr Garnham got it right
12 generally when he submitted as to the difficulties of
13 public interest considerations in proceedings of this
14 sort and, really, the final point is that, even going
15 into Operation Theseus territory alone, as we encourage
16 you to do, you will know from your criminal experience
17 that in any major criminal trial there are bound to be
18 considerations of public interest and no doubt there
19 were in Operation Theseus. I wasn't engaged in that
20 case myself.
21 But to the extent that PII material, although
22 commonly handled and dealt with in the criminal
23 jurisdiction, can't be catered for in this jurisdiction.
24 Again, if it comes down to it, we say you might find
25 it more attractive to resume but do so without a jury.

Those are our observations.

LADY JUSTICE HALLETT: Thank you, Mr Hill.

Who's next, is it Ms Barton.

Submissions by MS BARTON

MS BARTON: I am, yes. I make submissions on behalf of the Commissioner of the City of London Police.

Madam, in view of all the submissions that have gone before, I can make them, I hope, quite shortly.

The summary is this: that on the question of resumption, the Commissioner is neutral, although, of course, we acknowledge the very powerful arguments advanced on behalf of the bereaved families as to resumption.

On the issue of joinder, the Commissioner is neutral, but put forward a suggestion at paragraph 3.2 of our written submissions at tab 3 in respect of the four bombers' inquests remaining adjourned.

You may of course find that the only practical way forward at the moment, in the light of the breach of your order thus far, which has resulted in no representations being made available upon which you could properly judge a sufficient cause issue.

Jury. I think in respect of our written submissions we were neutral on the question of the jury. Having had the advantage of hearing the submissions of Mr Gibbs,

the position is this: that we support and adopt the submission of Mr Gibbs, in that we would say that the summoning of a jury is not mandatory. If it is not mandatory, then we would strongly encourage the court to hear these inquests without a jury, for all the very compelling reasons that have been advanced by a number of the counsel in this case.

On scope, again the Commissioner is neutral and in particular we make no submissions either way on the issues of background and preventability so far as the preventability relates to the attack itself as opposed to preventability of emergency rescue issues.

The reason for that, madam, so that you and the court are clear, is that the City Police had no involvement in or knowledge of the background or preventability issues. Their involvement in this started with the detonation of the Aldgate bomb on 7 July.

Madam, in respect of properly interested person status, I do have a positive submission to make. The Commissioner seeks designation as a properly interested person, either under section 20(2)(g) or, alternatively, under section 20(2)(h).

Madam, I need develop those matters hardly at all except in respect of scope and the properly interested

person matters.
In respect of scope, may I say this: that the scope that the Commissioner considers ought properly to be covered by these inquests is set out at paragraph 4.3 of our submissions and relates essentially to the events on the day and the aftermath.
Now, it has become clear, madam, in the course of submissions that have been made, that there may be aftermath issues that are of significant concern to families, but, viewed properly, are too remote from the causes of death.
May I, on behalf of the Commissioner of the City of London Police, extend exactly the same invitation to bereaved families as has been extended by the Metropolitan Police that, in respect of the Aldgate scene, if City of London Police can assist with answering questions that are perhaps outside the scope which you, madam, determine for these inquests, then we would be only too happy to do so and invite families to put down those questions in writing and we'll do our very best to answer them.
Madam, that also follows because I've had a conversation with one counsel in particular who I won't identify but there is an issue that one family in particular wants to raise but probably does not want

to raise in public and we are more than happy to deal with that particular issue if we are able to.

Madam, turning then to the properly interested person status, there is a technical legal argument in respect of the Commissioner of City of London Police that might result in him being designated either under section 20(2)(g) or section 20(2)(h). It may not matter in practical terms.

LADY JUSTICE HALLETT: You, too, are going to relieve me of the technicalities.

MS BARTON: I hope so, madam. It doesn't matter to us which section we are designated under. It's simply a question that, so far as the City of London Commissioner is concerned, his officers were responsible for policing the Aldgate scene, and, therefore, however he is designated matters not in my submission, although my submission would be that because your jurisdiction has been extended to cover the Aldgate scene effectively, he ought to properly be designated under section 20(2)(g) as the Commissioner for that area, effectively the Chief Constable for the Aldgate scene.

Madam, unless I can assist on other specifics, those are my submissions.

LADY JUSTICE HALLETT: I take it, as far as properly interested person status is concerned, from your written

submissions, you are neutral to others being made.
MS BARTON: Certainly, yes.
LADY JUSTICE HALLETT: Thank you very much, Ms Barton.
Who's next, is it Ms Simcock?
Submission by MS SIMCOCK
MS SIMCOCK: Yes madam. I represent the London Ambulance Service. Our written submissions are at bundle A1, tab 7.
As you've asked and others have done, I will indicate a summary of our position on each of the issues and expand where necessary, although, in fact, I probably have very little to say in addition to what I have already put in writing, so the summary may suffice.
On the issues of resumption, joinder and jury, we adopt a neutral position, although, in common with Ms Barton, we also acknowledge the very powerful arguments advanced for resumption in connection with these requests by the families.
In relation to jury, we also, in common with Mr Gibbs and Mr Hill, can see certain practical benefits to these inquests being heard without a jury, should you decide in law that one is not mandatory.
You have our written submissions on those and I don't propose to repeat them.

Similarly, on joinder, we can see practical benefit to one resumed hearing, but of course we recognise and are wholly sympathetic with the families' views and feelings, and along with others can see merit in adjournment of the four, there being resumption of the 52 inquests.

On scope, we make no submissions about whether Article 2 is engaged here, and we also say nothing on the preventability issue in terms of the attacks themselves, as it doesn't concern the LAS.

On the emergency response issue, we can see that various questions under this heading may legitimately fall within the scope of an inquest, whether that be a Middleton inquest or a Jamieson-type inquest.

The LAS are intimately involved in those issues, both from an organisational point of view and from the point of view of individual LAS employees who clearly attended as first or emergency responders to the scenes on the day.

That brings me to the last issue, which is PIP, properly interested person status.

We would wish to be designated as a PIP under section 20(2)(h) and we consider that there are several very good reasons why the LAS should be a PIP and we set those out at paragraphs 12 to 18 of our written

submissions.
We're also very grateful to the submissions of Counsel to the Inquests at paragraphs 188 to 191, and what are clearly elucidated there are four cogent arguments for such designation and we respectfully adopt those submissions which essentially mirror our own.
Madam, unless you wish me to, I don't propose to go through each of them in turn. They're there clearly and concisely set out, probably better than I can do now, suffice to say, though, that where the adequacy of the emergency response on the day is to be scrutinised -- and, of course, we recognise that that is exactly one of the issues that the families quite properly suggest is appropriate to look into -- and that is both at an organisational planning systems, resources-type level and also an individual level, and we wholly understand both those issues. It's only proper, where the LAS played such a major role in that response, both at organisational level and at individual level, that they are designated a PIP in these inquests.
Madam, unless I can assist any further with particular issues, those are my submissions.
LADY JUSTICE HALLETT: Thank you very much, Ms Simcock.
Ms Boyd, are you next?

Submissions by MS BOYD

MS BOYD: Madam, I think I am.

Madam, I represent the London Fire Brigade. The only issue with which they're concerned is status. They are applying under Rule 20(2)(h) to be designated a properly interested person. They are neutral on all other issues, though they acknowledge the very powerful reasons for resumption.

Madam, the London Fire Brigade clearly played a significant role in the immediate aftermath of the explosions. It was anticipated that an inquest, if resumed, was likely to involve investigation into the emergency response, hence the authority's application. The scene reports have brought this aspect into sharper focus and those representing the bereaved families and survivors are, for understandable reasons, inviting you to determine that the scope of any inquest should indeed consider the adequacy and effectiveness of the response by the emergency services, and indeed there appears to be a common consensus on that issue, if nothing else.

Madam, I make it clear on behalf of the London Fire Brigade that, although an investigation has been undertaken by the London Assembly Committee and a number of issues raised and, indeed, subsequently addressed by

the authority, we do not seek to suggest that that means an inquest should be constrained or restricted in the ambit of its own investigation into the aftermath and any issues that may arise.

Madam, the authority will assist in every way it can, but I respectfully submit that they should therefore be in a position to put questions to deal with any issues or criticisms which may arise in relation to their management of operations or, indeed, individual responses, and of course there may well be wider procedural inter-agency issues on which they can also assist, hence we do ask for designation for status.

Madam, unless there's anything else?

LADY JUSTICE HALLETT: Thank you very much, Ms Boyd.

I think, is it Mr Morton left?

Submissions by MR MORTON

MR MORTON: Madam, yes.

Madam, I appear on behalf of Transport for London and you have our written submissions at bundle A2, tab 14.

I shall be extremely brief.

As you know, madam, on the issues of joinder, scope and jury, Transport for London are neutral.

In relation to resumption, Transport for London is also neutral, but, as with others, of course recognise

the force of the submissions made by others in support of resumption.

The only positive application we make is to be recognised as a properly interested person under Rule 20(2)(h) and the basis for that application is fully set out in our written submissions, and I don't propose to repeat it, save to say that it's clear on any view that the scope of the inquest will include the immediate response to the bombings and that is a matter in respect of which Transport for London was intimately involved.

In the light of the submissions of others, and in particular Counsel to the Inquest at paragraphs 185 to 191 of their submissions, I don't propose to develop this point any further, unless it would assist you for me to do so.

Madam, the only other point I make publicly so that it's clear is that, of course, as you would expect, Transport for London stands ready to assist you in any way it can.

Madam, those are my submissions.

LADY JUSTICE HALLETT: Thank you very much, Mr Morton.

Right, well shall we take a break now? When I return, Mr Keith, I think we need to discuss the extent to which, after I've heard from you, we deal with

any possible responses.
MR KEITH: By all means.
LADY JUSTICE HALLETT: Thank you. 11.40 am I shall return.
(11.26 am)
(A short break)
(11.40 am)
LADY JUSTICE HALLETT: Yes, Mr Keith?
MR KEITH: Madam, in view of the number of issues which have been raised, I regret to say it's likely that I will now be the rest of the day, in which case a more convenient moment may present itself at the end of the day to see how many issues are still disputed in the light of what I have had to say and how many issues the advocates would wish to respond to you on.
I certainly offered Mr O'Connor the possibility that he would subject himself to your guillotine in relation to the nature and number of issues that he would wish to come back to you on, and graciously he accepted that offer, subject to the caveat that there may be some opportunity for him to submit further written submissions to you. But in the light of the fact that you still have tomorrow available, it may well be that the guillotine can be put back where perhaps it belongs and he could simply indicate at the end of the day along with all the other advocates how long they think they

will need in order to respond to all the outstanding issues, and if that can be encompassed within tomorrow then that would be that.

LADY JUSTICE HALLETT: I've given everybody a certain amount of leeway, Mr Keith, because there are so many issues and because this is the first time many people -- well, everybody here present -- has had the opportunity to air views and voice concerns. So I am sympathetic obviously to hearing essential issues in reply, but I am at some stage going to have to start exercising a guillotine if I see that we're running out of time.

MR KEITH: So be it.

Madam, may I raise one other administrative matter? As with the Metropolitan Police Service who made the offer through you to the families that if there were issues that they wished to raise falling outside the scope of your inquest that they could do so through the Metropolitan Police Service, the City of London Police has made a similar offer, but, as was suggested a day or two ago, we would ask simply that any questions that the families would wish to pose to the City of London Police be directed through Mr Smith and the inquest office so that we have sight of the concerns of the families and the issues that they are raising in that way.

LADY JUSTICE HALLETT: Very well. I agree that that is

a sensible course and I invite all those who want to pursue those issues to do so, using Mr Smith's good offices.

MR KEITH: Thank you very much.

Submissions by MR KEITH

MR KEITH: Madam, as was prefaced in our written submissions, I will attempt to try to summarise the main issues which have arisen and to address and in part answer the important points arising in those submissions.

The lawyers amongst us will know what the proper scope is and the function of Counsel to the Inquest, but for those non-lawyers, may I very shortly make one or two points concerning my function so that they can understand how far I am able to go in responding to the points that have been raised?

Madam, this is your inquest or inquests. It is your judgment that matters, of course, and our role is merely to assist you in reaching the proper, legal and discretionary decisions that you must reach.

In relation to the law, my role, therefore, is akin perhaps to the role of an amicus or advocate to the court, in the higher courts in this land, where he or she will perform the task of assisting in identifying points that can be made on points of law, identifying

different points of law and assisting in formulating the argument.

In relation to the facts and the exercise of your discretion -- and your discretion is obviously being sought to be engaged in a number of different ways in the course of these arguments -- I may and cannot be seen to hold any specific brief for the families or for any of the parties, subject to two important caveats.

One, there are a number of families who are, of course, and remain, unrepresented, and to them I say that I will put all arguments that they would have wished to be put, had they been represented.

Two, these inquests and the terrible events of 7 July 2005 engage a far wider public interest, and to that public interest I will therefore direct many of my submissions and I hope I will support that public interest in the points that I make.

It follows that although I may express views in relation to the legal points, it forms no part of my role to advocate one particular answer or another in relation to the discretionary decisions that you must make.

If I indicate in the course of my submissions a discretionary route, or appear to indicate that I prefer one discretionary route over another,

I apologise. It may well be that I will indicate signposts, but I cannot and I hope I will not be seen to indicate the final destination.

My submissions will involve an unavoidable amount of law, but because you've been greatly assisted by the many comprehensive, if complex, submissions that you've heard from counsel, I need not, I think, take you back to the authorities themselves in any great detail and I will attempt to restrict myself to four or five references.

Resumption firstly, if I may. Madam, in short, there are very powerful arguments in favour of resumption. I will, however, just address a few of the points that have been made and which arise in relation to resumption because the points made in relation to resumption, although the issue of resumption is necessarily a very wide one and calls for a very broad exercise of your discretion, will, I think, inform many of the other decisions that you must make.

None of the written submissions seek to argue against resumption. All the submissions on the part of the families strongly support it. You need only be satisfied that there is sufficient cause to resume.

Lord Justice Simon Brown as he then was in Dallaglio in 1994 held that your power is highly discretionary.

He put it in this way:
"Would a full inquest now be a practicable proposition and would it satisfy any worthwhile purpose?"
We suggest that the answer is a resounding "yes", and I would make the following six points.
Firstly, the interests of the bereaved.
Their interests are powerful factors to be considered and the authority for that proposition is, of course, the case of Paul v The Deputy Coroner of the Queen's Household, the Diana case. The vast majority of the 40 per cent or so replies received to Dr Reid's questionnaires supported resumption.
Two. More particularly, the giving of evidence as to the detailed circumstances of each of the deaths at each of the sites is certainly a worthwhile purpose, given that many, if not all, of the families had not previously been aware of the facts in the scene reports.
The written submissions advanced by Russell Jones & Walker stated that the families simply wished to understand better why their loved ones died. I cannot improve on that submission. They wish to obtain closure, and, as Mr Saunders submitted again in those written submissions, it is better to have knowledge of the true facts than to suffer the horror of endless

imagination.
Another point was made in the Dallaglio case. Many of the survivors, eye-witnesses, and employees of the rescue services, have yet to give full evidence.
Mr Saunders again made the point that delay is immaterial. There obviously has been a great deal of delay since the events in question. With respect, we agree.
Thirdly, whether in due course you conclude that a separate and distinct Article 2 investigative obligation arises in these inquests -- the Middleton point -- or whether you conclude that the inquests should simply fulfil the ordinary purpose set out for many, many years by the common law of investigating the full facts, and thereby simply forming one part, in Convention terms, of discharging the state's overall Article 2 obligation to determine the cause of death, an effective investigation of some kind or other is required.
We are concerned in this case, madam, with acts of unspeakable horror and brutality. The events of 7 July were events unparalleled in execution and scale.
In the course of his submissions, Mr O'Connor set out twelve points which you will recall. Actually, in the context of his submissions in relation to scope, but

you may feel that, properly analysed, they were powerful reasons in fact for resuming and we would commend them to you for that purpose.

There is, putting it at its most basic, a strong instinctive expectation that these inquests will resume and that the understandable humanitarian needs of the families will be met.

Moreover, on any view, the terrible events of 7 July have spawned questions as to whether it could have been prevented and whether the 52 lives could have been saved. The very fact that the ISC published a report entitled "Could 7/7 have been prevented?" is testament to the fact that there are wider public concerns regardless of the legal consequences that flow from those two reports.

Madam, Lord Phillips -- now President of the Supreme Court -- observed in JL -- the case you will recall that concerned the near-death or attempted suicide, and the case in which, you will also recall from the authorities, Mr Justice Langstaff gave judgment at first instance -- that there are many aspects of human activity which carry with them so great a risk to life that the duty of the state is to put in place a framework of laws and procedures and means of enforcement, and that includes a duty to require

investigation of one form or another in the event of a mishap.

This is no mishap of course. These terrible events are a fortiori -- that means to say they plainly fall within the principle to which Lord Phillips referred. The act of suicide bombing is an activity which carries with it so great a risk to human life for obvious reasons that I hesitate to say the point at all, that it plainly calls for the triggering of an investigation.

But equally, the activities of the state, both in the investigation of terrorist activities and in the state's response, through emergency services to the consequences of the filthy scourge of terrorism, are additional matters of state activity which require investigation.

Lord Phillips further observed that the primary purpose of the inquest procedure is to learn for the future.

The same point was made by Lord Bingham in Amin.

Over and above the general obligation to expose past violations of Convention rights, there's a general need to promote measures to prevent or minimise the risk of future violations.

The lessons of history must be learnt.

Madam, there will be a debate in due course requiring your resolution as to whether or not the lessons that must be learnt in this case are of individual failings or of wider systemic importance. That is an issue that will require your resolution because it will be relevant to the determination under section 8(3)(d) as to whether you must sit with a jury. But that is a more narrow, focused issue for the purposes of resumption, whether or not there are individual or systemic failings, if they are found to be established, lessons must be learned.

That submission, madam, finds support in the statutory purpose, in section 8, and you've already made reference to the categories which are identified in section 8(3) in which a jury must sit. Again, I say that without prejudice to any future arguments as to whether or not they are triggered on the material before you today. But certainly there is a broad correlation between the purposes of inquests, the need for the lessons of history to be learnt, and the statutory provisions in 8(3).

It's also a reflection of the Broderick Committee which stated in its beliefs in 1971 that the public interests of the inquests system included the need to allay rumours or suspicion and to draw to the attention

of the public the existence of circumstances which, if unremedied, might lead to further deaths.

For many centuries, madam, coroners have been obliged to investigate the deaths of those who died in custody. Custody was and remains one of the greatest manifestations of state control over the individual. But the influence of the state and the ways in which the rights of citizens and their right to life have been intruded into has increased massively. The investigation, detention and prevention of terrorist acts is an area in which there is a high degree of state control and, although it does not compare, for the reasons that I will submit in due course, to the closed world of custody, certainly it is a shadowy world which may repay further investigation.

There are, for the reasons I'll come to in due course, far wider issues raised in this case than those associated with the single acts of criminal, brutal violence.

Madam, of course it may be said that there has been a trial -- Operation Theseus of course -- and that a number of reports have looked at the events of 7 July. Each in our submission was deficient -- I don't mean that in a pejorative sense, but in a legal sense -- in their own ways. I will return specifically to the ISC

later. But, as you know well, the trial of Ali, Saleem and Shakeel on the charge of conspiring to cause an explosion was concerned with the alleged reconnaissance mission to London in December 2004.

It was, therefore, necessarily concerned with very few of the issues with which we are potentially concerned, and Mr Hill, naturally and properly, did not seek to argue otherwise.

The London Assembly 7 July Committee in June 2006 heard evidence from some 20 survivors only for the purposes of that report and focused on communication issues. It's not clear if a significant number of first responders gave evidence or not.

The ISC report, having, of course, not heard from survivors for the purposes of the May 2006 report, did, as you know, permit the survivors represented by Oury Clark to put questions to it for the purposes of the July 2008 report, but it heard written and oral evidence in private. Many passages in both reports, but predominantly the second report, are redacted, and in terms of meeting the expectations of the public, in terms of publicity and scrutiny, and in terms of meeting the expectations of the families, that report, for reasons I'll develop in due course, or those two reports, cannot suffice to fulfil those expectations.

There was a very helpful report from the London Regional Resilience Forum in September 2006 which did address key issues such as strategic coordination, communication, resilience, the Resilience Mortuary, but it's not clear if it heard from a significant number of the survivors.

In brief, the reports hardly compared to the possible available 12,500 witness statements taken by the Metropolitan Police Service to which the official report refers.

The fifth point, madam, is this: I acknowledge that there are very real, practical difficulties concerning intelligence material which will need to be circumnavigated if you resume. I would simply say in agreement with the parties in their written submissions that this is not necessarily, though, a factor against resumption, but it is plainly relevant to the Secretary of State's arguments in relation to scope, if you conclude that Article 2 is not engaged.

In relation to the issue of resumption, if and to the extent there are other issues that justify resumption on their own, such as the need to enquire into the circumstances of the deaths and whether or not, in particular cases, lives could have been saved by more prompt medical attention, then it would be wrong not to

resume on account of practical problems arising in one particular area.

Two. We are not able to say at this stage how intractable the difficulties will be, but we think you are entitled to proceed on the basis now that the parties -- especially the Secretary of State -- and the Security Service and the police, being state bodies, will give whatever assistance they properly can, and it is notable that, notwithstanding the many forceful legal points made by Mr Garnham and, to a lesser extent in scope, Mr Hill, both have offered you the full resources as far as they are able to be offered within the proper extent of the law of the agencies that they represent.

Thirdly, madam, if we were to acknowledge defeat in advance of the battle lines even being drawn, we would, dare I say, simply not be in keeping with your personal and judicial determination to ensure that the relevant facts are fully, fairly and fearlessly investigated.

Putting it another way, a certain degree of robustness will inevitably be required and only that degree of robustness will properly reflect the proper needs and expectations of the families.

Lastly on this point, not resuming the inquests would not necessarily lead to the adoption of an easier means of finding answers to the events of 7 July. There

is no other alternative means available at the moment of considering alleged intelligence failings, for example, because, as you know -- and you've made reference to it in the course of argument -- the government has maintained its earlier refusal to hold an independent public inquiry, and we believe that you may not proceed on the basis or the expectation -- because it may have no proper foundation -- that if you were not to resume, there would be such a public inquiry.

The last major point on these six points is to formulate an answer to the question, if it is said, "What is the point? What more will be discovered?" For those who have lost loved ones, there is every point. For those who query the utility of an exercise in endeavouring to disclose and put before the public further facts, could I refer you -- and I won't take you to the judgment itself -- to the words of Mr Justice Megarry in the case of John v Rees in 1970? It's a famous passage. For these purposes it's relevant because it was cited by Lord Steyn in the case of Amin, which, of course, was a case absolutely central to the duties of the inquest procedure in relation to deaths. It concerned the question of whether there was any benefit in a further enquiry. Mr Justice Megarry said: "As everybody who has anything to do with the law

well knows, the path of the law is strewn with examples of open and shut cases which somehow were not, of unanswerable charges which in the event were completely answered, of inexplicable conduct which was fully explained, of fixed and unalterable determinations that by discussion suffered a change."

Those words, which we would commend to you, we say are adequate to describe the unwavering determination of the families to find an answer.

Joinder, if I may. Madam, I addressed you at the start of this hearing in relation to joinder. We say there are plainly overwhelming reasons for joining all 52 deaths together.

In relation to the four, I repeat my invitation to adjourn the question, lest Messrs Imran Khan do subsequently receive Legal Aid or decide to engage in this process, and that suggestion has met with no real objection from any of the parties in their submissions.

For the families, may I, however, go further and answer the question which you posed rhetorically, which is why, assuming Legal Aid is granted and/or that submissions are made by them to join the four to the 52, should the four men be entitled to ask questions at all? There are legal answers to this, however unpalatable those answers may be.

Firstly, the four men themselves have no interests through Rule 20(2). They are not and could not be properly interested persons in the inquests of the 52 deceased because they're dead. Dead persons have no legal entity, and nor could those interests be represented through personal representatives because 20(2)(a) deals specifically with the possibility of a personal representative acting as an interested person at an inquest, but 20(2)(d), which is the provision on which the four men would theoretically wish to apply on through their families, makes no express reference to personal representatives at all.

Whatever interests they had died with them.

But their interests, such as they might have been, had they not died, are not synonymous with those of their own families and, dare I say it, their loved ones.

Their families can apply through 20(2)(h). They are not the perpetrators. They are, for these purposes, the parents of the perpetrators or the siblings of the perpetrators, and there is, we would suggest, at least one potential common interest which is that the parents or the siblings may have a legitimate interest in knowing -- assuming for this argument that there is good reason to suppose that the Intelligence Service could have prevented the events of 7 July -- why they did not.

Further, I regret to say, because it is an unattractive aspect of the law, if they had survived and if any alleged murderer survives, in these circumstances, the incident which they brought about, they would have had a mandatory right under 20(2)(d) to appear because plainly their acts would have caused the deaths. Indeed, in certain inquests, where the state's overall investigative obligation is not met by criminal proceedings, occasionally a person accused or found guilty of murder or manslaughter has applied for and been granted the right to attend the subsequent inquest into the death of their victim. That does not plainly apply here for the reasons that I have observed, namely that they are dead. But I'm afraid to say that, contrary to some of the submissions you have heard, our respectful view is that the legal issue as to whether or not their families and siblings would have at least an arguable right to be properly interested persons, is not necessarily determined in the way that has been advocated.

Could I, however, because of the absence nevertheless of any positive reasons for joinder or for Rule 20 status, invite you to make clear the three points that I made in the course of my submissions on Monday concerning the increased likelihood that, if no

positive reasons are advanced soon, such applications are more likely to be refused?

Scope. The first point in relation to scope, madam, is whether or not you should defer or adjourn the issue of whether or not Article 2 is arguably breached. Mr Coltart aided by Mr O'Connor invited you to decide now whether preventability was a proper issue, but to defer to later a decision as to whether in law there was an arguable breach of Article 2, and thus in effect to adjourn also the necessary consequential characterisation of these proceedings as being Middleton or Jamieson.

We do agree with the general arguments that, firstly, there is little difference in practice potentially in the scope between Jamieson and Middleton. Madam, you've already been referred to, and I won't therefore take you to, the words of Baroness Hale in Hurst. There was also judicial learning in relation to the similarity of approach in Takoushis in the Court of Appeal and also in the words of Lord Justice Moses in Lin in the Potters Bar case.

LADY JUSTICE HALLETT: Just before we pass by Baroness Hale's comments, I was also taken to other comments -- I think it was Lord Brown --

MR KEITH: Yes.

LADY JUSTICE HALLETT: -- who seemed to undermine what Lady Hale had said.

MR KEITH: It is a difficult issue because subsequently, in fact, the Court of Appeal in the case of Smith, when it was pointed out in the course of argument that there had been a discrepancy of approach between Lord Mance and Baroness Hale and Lord Brown, observed that it was curious that there should be such a difference in Hurst because, of course, Lord Brown had also been party along with Lord Bingham to the judgments in Jamieson and Dallaglio.

But they again observed that perhaps the difference was more one of appearance rather than actuality.

LADY JUSTICE HALLETT: So this was the Court of Appeal in?

MR KEITH: In Smith. But there's no doubt that Lord Brown had a point in this regard. He said that there is a difference in principle because, if, of course, you're not sure whether or not you are in Jamieson or Middleton territory, you may end up with the worst of both worlds because, on the one hand, the parties are not clear as to what the legal rubric is of the scope of your inquest and, secondly, if, in fact, a higher court or Strasbourg were to determine that you were and should properly have been in Article 2 territory, it would necessarily mean that, because you were not and you had not declared

yourself to be, you were acting unlawfully and in breach of the Convention throughout the entirety of your inquest procedure. That is why, in our submission, he referred to the fact that there may be the worst of all worlds.

But in practice, this argument may have little consequence, although conceptually it does, and I'll come back to the conceptual aspect in a moment, because the inquiry is almost certain to stretch wider than strictly required for the purposes of the verdict and it is the verdict to which all the jurisprudence on Article 2 is directed.

The etymology of this debate about Article 2 started with the difference about whether or not the verdict for the jury was to consider by what means or by what means and in what circumstances. It's a technical argument, therefore, to that extent, concerning the form of the process and a procedural argument concerning what that process is designed to achieve. But in practice, concerning evidence, because the common law is so very wide, it may have little practical effect, and that is, we would suggest, the point of those cases.

That is, of course, all subject to the issue of remoteness, because whether or not you are in Article 2 territory or you're in common law territory, there must

necessarily be a limit on the evidence that you may permit yourself to hear, and you were referred in that regard to the words of Lord Rodger in Hurst in saying that, on the facts of that case, the acts of the authorities in failing to intervene were too remote, I think it was paragraph 8 of the speech of their Lordships' House.

That said, remoteness is a moveable feast, and you may think we are not yet in the stage where you can reach any definitive views as to whether or not particular issues are remote or too remote, other than perhaps -- I'll come back to this in a moment -- some of the issues concerning the aftermath.

The issue of remoteness, which in Article 2 terms is undefined, but in common law terms has been declared to be very wide, is, however, a different issue to the points raised by Mr Garnham in relation to whether or not you can look at preventability, because he, of course, has raised a legal argument in relation to whether or not Article 2 is breached at all -- arguably breached at all -- because of the absence of a real and immediate risk to identified individuals, and a discretionary argument, nothing to do with remoteness, to the effect that, if you're not in Article 2 territory, but in common law, Jamieson territory,

whether it would, in fact, be quite contrary to the public interest to reinvestigate matters before the Intelligence and Security Committee as well as being unfair to the Security Service who would, on any view, have had a far greater opportunity to put closed material before the ISC than it will ever do before you whether you sit with or without a jury.

I'll return to both those issues in due course, but they are quite separate issues for the purposes of deciding which issues may properly be investigated, and that is why, in our submission, the parties are broadly correct in suggesting that whether or not this is Article 2 or Jamieson may not necessarily affect whether you can look in principle at preventability.

So whatever the decision, it is, with respect, not to be doubted that you will exercise your personal and judicial determination to ensure the relevant facts are fully, fairly and fearlessly investigated.

We do, however, invite you to exercise a degree of caution before accepting the invitation -- however seductive -- to adjourn this issue, despite what I've said about perhaps the absence of a real practical effect, and we do so for principal reasons.

Firstly, logically, it's preferable to determine, without there being a legal vacuum, the issue of whether

particular issues are properly within your scope? Logically, identification of proximate -- that is to say issues that fall within a reasonable range of relevant matters -- must be proceeded by examination of the width of the functions that you or a jury will, in due course, exercise under Rule 36, because Rule 36 talks of the fact that it applies to proceedings -- I emphasise -- and evidence at an inquest.

The question of whether Jamieson or Middleton logically, therefore, affects the width of that function, because it's clear that there is a difference, logically at any rate, between the test by what means deceased came by their deaths and by what means and in what circumstances they came by their deaths, being the two differences between -- or the difference between Jamieson and Middleton.

A number of the parties have referred to Lord Justice Moses' judgment in Lynne, the Potters Bar case. We would invite you to exercise some caution in relying upon that authority for the proposition that there really is no difference at all and, therefore, you can adjourn the whole point about Article 2 because it won't matter.

His Lordship was being asked to decide in advance of a renewed inquest whether there should in fact be

a public inquiry, and for the purposes of that argument, it was plainly important that the issue whether Article 2 be determined be engaged and addressed. But in practice, because he had assurances that the renewed inquests would meet all the issues that might arise under an Article 2 public inquiry, the matter became somewhat academic.

Secondly, the ruling on whether there is an arguable breach is of importance for other reasons.

(a) the Secretary of State, in our submission, is entitled to know where he stands, because you will have noted from his written submissions that he has put to one side the issue of whether or not the Security Service should apply to be an interested person under 20(2).

In fact, the way in which the written submissions are phrased, they suggest that they need not address you in relation to 20(2)(h), but in truth, if you were to find that there was an arguable breach of Article 2 because they failed to take reasonable steps to prevent a real and immediate risk to life, 20(2)(d) would be engaged, because then it would be arguable that their acts or omissions might have caused or contributed to death, and he is entitled to consider his position on that.

(b) the applicability of the separate investigative obligation in Article 2 affects the arguments on the survivors. If Article 2 is fully engaged, then it's at least arguable that the survivors of a claim under Article 2, putting aside, because of the flexible nature of the Article 2 investigative obligations, what those rights might be, but in principle, if Article 2 is not engaged at all for the deceased, how could it, I ask rhetorically, be engaged for the survivors?
(c) if you do not decide the issue, you will leave no time, in our respectful submission, for a sensible challenge. The Secretary of State's arguments concerning Osman and whether or not it may only be breached, the principles may only be breached, in the case of an identified individual, and Mr O'Connor's argument as to whether or not you need find no arguable breach of Article 2 at all because there is a self-standing, self-supportive obligation upon to you hold an Article 2 inquiry, as there is, for example -- and I'll come back to this in due course -- in custody cases and gross negligence cases in hospitals, these are hard-edged questions of law, and I hope I won't set any hares running if I simply observe that they are more readily open to challenge than your discretionary decisions, and the parties -- all the parties -- are

entitled to know where they stand on that.
(d) as I observed a few moments ago, you may think it unwise to take the risk of acting incompatibly with the Convention. If it applies, you must act compatibly with it and, if it is engaged, you need to know the limits within which you may lawfully act.
Putting it in another way, perhaps in a broader sense, there is a resonance in a declaration by you that you will adhere, because you must adhere, to the rights and the obligations set out by the European Convention on Human Rights in Article 2.
(e) if Article 2 does apply, it may require you to act in certain ways, whereas in its absence you would be required to fall back -- I don't mean that in a pejorative sense -- you would simply be then returning to the historic common law position which gives you a very wide discretion to consider scope and issues and matters that might be raised in the course of an inquest.
The nature of your powers thereby may reflect an obligation to act in a certain way as opposed to your judicial discretion to act in a certain way, and that may -- I put it no higher than this -- in due course be helpful to your inquest team in eliciting evidential assistance from certain quarters.

Those were (a), (b), (c) and (d) in relation to point 2. I'm sorry for the sequential way in which I'm addressing you, but it's the only way to get through such a large number of points that have been raised.

Point 3. There are practical consequences. The issue of whether there is a separate investigative obligation under Article 2 may affect the way in which the jury is likely to go about its duties. Evidence bluntly needs to be assembled. It needs to be called and presented in a way that reflects the duty, and it may be undesirable for the jury, and for the parties who have to consider, assemble and present the evidence to the jury, if they don't know their position until the very end.

The last point, the fourth point, I make in relation to this decision of adjourning is this. There are, in fact, two possibilities in relation to the adjournment, and it's not been made entirely clear what you are being invited to do. Putting aside the fact that an invitation to delay the issue might give the unfortunate impression that the current submissions in relation to Article 2 by the families lack sufficient material and that further investigation might reveal more, there is a difference between adjourning the point generally and deciding the point now but keeping it under review.

Whether or not your final conclusion is that Article 2 is engaged, it's not necessary for you to adjourn that decision in order to see if further material might be forthcoming. It's quite permissible, in our respectful submission, for you to give an answer now but keep the issue of Article 2 under review so that if, for example, you were to conclude it was not arguably breached now and this was not a Middleton inquest, but, if further evidence came to light which changed your mind, you could then make the declaration that you were sitting with the additional mandatory aspect of Article 2.

LADY JUSTICE HALLETT: How does that resolve the problems of Mr Garnham's clients who you've said already are entitled to know where they stand? Do they apply to become properly interested persons or --

MR KEITH: I'm afraid it doesn't. I can provide no answer to the problem that would confront Mr Garnham with, except to say that it may very well be the case that the Security Service and Secretary of State will continue to play a role in these proceedings, whatever your judgment and whatever your rulings on the law, and if evidence were to be adduced that changed the position, they'd obviously have an opportunity of addressing you in relation to it.

If you were subsequently to decide that, contrary to your initial ruling, Article 2 is not engaged, Article 2 was plainly engaged because it became plain there was an arguable breach, they would have the opportunity of addressing you at that stage. But for practical purposes, it may not make a difference other than insofar as a challenge to you would only arise at that stage. But again, a challenge, for all the reasons I've outlined, may not have a practical effect, but it would have a declaratory effect and of course a legal consequence, which is why I say the parties are entitled to know where they stand. So it wouldn't in short derail your inquests, but it would obviously be declaratory to the legal position and that has a benefit of its own.

A second aspect of the point, that you have the option to decide the issue now but keep the matter under review, is that it reflects one important aspect of the inquest process, which is that there is a benefit in the process itself. More may indeed be discovered. The letter from the West Yorkshire Police is proof of that possibility.

In relation to Article 2, all that is required is a decision as to whether it's at least arguable. You're not required, of course, to consider whether or not

ultimately the Article 2 argument will succeed. But the families and the wider public are entitled to the benefit of the process and the fact that it may give rise to the possibility that ultimately something will be discovered. That's why we suggest you must keep the matter under review.

Can I then turn to issues generally? Because the question of issues arises or gives rise to a number of different points, both concerning the legal issues as to the scope of issues and the factual issues themselves. We do suggest that you decide the question of Article 2 now and that then therefore requires me, with respect, to set out certain general propositions about the issues and the way in which they've been argued before you.

There are five points I make.

Firstly, as I've said already, there is a wide discretion. It is for you to set the boundary. The cases of Jamieson and Ex parte Thompson to which you've been referred establish the undoubted proposition that you must seek out and record as many of the facts concerning the death as the public interest requires. It's for that reason that the common law is arguably wider than the Convention insofar as we are in Osman territory, because although Article 2 is wider in terms

of the procedural benefits that it gives rise to, in terms of practice, of hard evidence, Osman, as you know, requires quite a high threshold: real and immediate risk to individuals, whether identified or not.

In the specific context of Osman, different considerations apply in custody cases obviously, but in relation to Osman territory, the test is a high one.

But the common law is not so circumscribed because the authorities and Jamieson make clear that the public interest, which is an opaque and ill-defined notion, requires you to seek out and record as many facts as it requires.

The second point is that you are not required to rule, of course, at this stage on the precise scope of issues. It's simply, in our submission, too soon to do so because the evidence has not been collated, and although obviously the submissions have been assisted by the scene reports, the official report, the ISC reports, the London Assembly report, you haven't, and nor have the parties, seen the evidence.

We invite you, therefore, to indicate the broad scope of the issues that seem to you at this stage to arise for determination. I won't take you to it, but in our written submissions, at paragraphs 80 and 124, we have set out our views on how you might go about that

task. I'm going to return to and deal separately with the question of aftermath.

Thirdly -- this is where remoteness is considered -- even under the Jamieson process you are not limited, with respect, to the last link in the chain of causation. That is a point and was a point made by Sir Thomas Bingham, as he then was, Master of the Rolls in Dallaglio at page 23 of the report.

There is a broad need, therefore, to consider remoteness, but all the authorities point in one way, that there is potentially a very wide remit, and furthermore, following the case of Lewis in the Court of Appeal and the judgment of Lord Justice Sedley, you have a power, but not a duty, to put matters before a jury, if you sit with one for factual findings, even if that was for the purposes of Rule 43, but that must be subject -- and, with respect, madam, you were absolutely right to identify that that principle must be read subject to the proposition of Mr Justice Beatson in the case of Butler, when he said: but, yes, you can't go so far that you use Rule 43 to admit evidence before you that could not otherwise have been properly admitted.

Now, there is obviously a certain degree of difficulty or discrepancy between those two propositions or, indeed, even an element of circularity, but what is

plain is you do have a very wide remit.
Fourthly, this means, as we have argued in our written submissions and as I've suggested orally, you can in principle examine preventability whether Jamieson or Middleton. But, as I've said already, that's subject to your determination of the points from the Secretary of State. As to if it's a Middleton inquest, whether or not because these issues have already been examined by the police and the Intelligence Security Committee and those investigations suffice for Article 2 terms, because Article 2 is very flexible, and therefore you don't need to examine them, or, two, if you go down the Jamieson route, it's simply unfair to reinvestigate because you could never investigate to the same degree of detail as the ISC, and wrong in principle because you would have necessarily to engage with very difficult questions of sensitive evidence.
Subject to those two points, preventability is, in principle, available to you.
So may I simply summarise it in this way? There are, I suppose, three main options. There are other variations on a theme. But the three options are these: it is open to you to conclude that the Osman test is engaged because individual victims are not in law required to be identified; that the Goodson line of

authority is inapposite, and by that I mean that you must consider whether there is an arguable breach of the substantive obligations of Article as opposed to concluding that there is a freestanding obligation on you to investigate, because these are akin to custody cases or gross negligence in hospital cases; that there is an arguable breach on the material before you, and that, therefore, you are, if not in law, in practice, bound then to examine preventability. If you were to conclude that Article 2 was arguably breached, you could not, of course, then not go on to consider preventability. It would be a nonsense.

That is, of course, as I've repeated, all subject to Mr Garnham's argument about whether or not the ISC report discharges the Article 2 obligation if it arises.

The second option -- assuming you don't defer -- and on the base that you decide that the Osman test is not met, that there is no arguable breach of Article 2 at this stage and that, therefore, these are Jamieson inquests, you may nevertheless, in the exercise of your discretion, conclude that preventability remains a point worthy of exploration and you will keep Article 2 under review as I have suggested.

Thirdly, you can conclude on the basis of all that you have heard that there is simply nothing in

preventability at all and then you would not be obliged to pursue it under any rubric. It won't surprise you, madam, to know that our submission is that it is too early to reach that conclusion and it would not be proper to reach that conclusion on the basis of the material before you.

Option 2 is, of course, subject, as I've already said, to Mr Garnham's alternative argument, which is that, even if it's not Article 2 when we are in common law Jamieson territory, it is still impracticable, impossible and unfair to go down that route.

The fifth point in relation to the introductory area in relation to issues concerns aftermath, as I said I would --

LADY JUSTICE HALLETT: Sorry, before you go on to aftermath, dealing with the Osman test, when you said my three options are the Osman test is engaged because individual victims don't in law require to be identified, you didn't there refer to the first half of the Osman test, the real and imminent risk. Are you making any submissions on that or not?

MR KEITH: I am and I will be in due course. That's because that assessment of whether the real and immediate risk was engaged was incorporated in that option in my submission to you that you do conclude that the arguable

breach is made out, because the arguable breach, of necessity -- the argument about whether there's an arguable breach, of necessity requires you to examine whether there was a real and immediate risk.

The only legal issue -- the two legal issues are, one, must you go down the Osman test, or is there a freestanding Article 2 obligation, and, two, if you do go down the Osman route because it's the only route, need you identify specific identified individuals?

In relation to aftermath, different considerations apply in contradistinction to preventability through the work of the Intelligence Services and the Security Service. That's because of the words of Sir Thomas Bingham in Dallaglio. I don't think, madam, you've been referred to it, so may I take you to Dallaglio, which is at C1, tab 6?

Madam, you will remember in relation to the case of Dallaglio which concerned of course the terrible events concerning the collision between the Marchioness and the Bow Belle that there was an issue, very regrettably, about the fact that the hands of some of the deceased had been amputated for identification purposes and that issue and the expression of views by the coroner in relation to that issue gave rise to the legal argument about apparent bias, and also, because of the issue as

to whether or not the coroner had been apparently biased, whether or not, if he had been apparently biased -- I make clear for the wider public there was no suggestion that he was, in fact, biased; apparent bias is a legal term of art concerning the expectation of the wider public -- if, in fact, he was or had been apparently biased, whether or not there was a good reason to remit to a fresh coroner, and, therefore, there was discussion by their Lordships in relation to how the exercise of that discretion should be applied, and in the judgment of Sir Thomas Bingham at page 236 the report, the last page in the tab, he said these words:

"It is, however, clear, as was accepted by counsel for the applicants in argument, that the treatment of the bodies of the deceased after death could not form part of a properly conducted inquest."

Now, his views on that do not find reflection, in fact, in the judgments of Lord Justice Farquharson or Simon Brown as he then was, and was, therefore, obiter, meaning that it didn't form part of the guts, if I may use that expression, of the legal proposition to be derived from that case.

But it raises the point that there may be some issues which come to light or which are engaged after

death which are not inextricably linked to the deaths themselves.

The return of property is an obvious example. Communication with the families is another; with the greatest of respect, that is an obvious example. The post-mortem procedures may also, in our submission, be outside the proper scope of the inquest, because nothing that occurred in the course of the post-mortem process was directly concerned with what caused the death. It is merely that process is merely a reflection or part of the evidence-gathering process which will assist you in determining what the cause of death was.

Mr Patterson made a number of points in relation to the lack of an invasive post-mortem. Regrettably, it is now a matter of fact, for good or ill, there is now, as far as we understand it, no internal pathology evidence that might assist you with the time of death, but that is merely a facet of the factual position. It is not an issue which is relevant to how or why the deceased died.

LADY JUSTICE HALLETT: Had there been invasive post-mortems, as I understand the argument, there might have been information --

MR KEITH: There might have been.

LADY JUSTICE HALLETT: -- as to how the deceased died.

MR KEITH: There might have been.

LADY JUSTICE HALLETT: But you say we can't go there because we have a fact there wasn't.

MR KEITH: Because we can never put the clock back and provide for the consideration of yourself and the jury evidence which is now no longer available, and that is not something that is, in a causative sense, linked to the deaths.

A distinction, however, may properly be drawn between that issue and the points made by Mr Saunders concerning place of recovery, conflicts of evidence, as to whether or not there were apparent delays in getting the persons caught up in the terrible events of 7 July to hospital, because issues concerning first response may also include consideration of delays in identification. It may well be that there were difficulties encountered in the tunnels and on the number 30 bus concerning identifying the bodies that were there and, if that's so, there may also have been difficulties in relation to the operation of the triage process. We simply don't know.

It may well be that the evidence concerning the difficulties in identification highlights a wider problem which was that there was chaos, that there were very real difficulties in deciding who could be saved -- I apologise for using these words -- and who could not

be.
We are, you may think, not yet at the stage where the scope of those issues is sufficiently identified as to allow you to make that judgment call.
Mortuary arrangements -- and the one area in which I would, if you would allow me to do so, depart from our written submissions is in relation to mortuary arrangements. We made the concession in written form at paragraph 83 -- and it's a point, madam, that you picked up on on Tuesday -- that we had conceded that mortuary arrangements might properly fall within the proper scope of an inquest or inquests.
On reflection, we think -- I apologise that that concession may have been wrongly made -- at the moment we do not see -- although, of course, as I've said, this is prefaced by my observation at the beginning of my submissions it is entirely a matter for you -- that the mortuary arrangements were necessarily connected, even arguably, with the causes of death. They fall into the same broad category, if you like, as the issue of whether or not there were good reasons or not for an absence of internal pathology evidence.
So could we, therefore, in relation to scope, invite you to indicate in your judgment which areas, on the submissions you've heard, appear plainly not to be

relevant and reserve for further argument in due course those issues that may appear to you to be on the cusp such as delays in identification.

Can I then turn, please, if I may, to Article 2 and the legal issue raised by Mr O'Connor as to whether or not it is necessary to establish that there has been an arguable breach of the substantive obligation in Article 2 before the procedural obligations are triggered, or whether or not, as he has submitted, there is a stand-alone obligation because of the circumstances of this case.

There are -- and I hope these principles will not be challenged to any great degree -- a number of points that can be made which I think are common ground.

Firstly, some sort of effective official investigation is required by Article 2 in any case involving state agents or bodies to ensure their accountability for deaths occurring under their responsibility, or where system permits or fails to prevent death.

Madam, you may think that is broadly the same position at common law because, under the Coroners Act 1988, and as noted by Lady Justice Smith in the Paul case, 8(3)(a) and 8(3)(b) of the Act deal with cases -- custody in fact -- in which the state might be said to

have some responsibility for the death. But all that is required is there be some sort of official investigation that is effective.

LADY JUSTICE HALLETT: Could you repeat that again? Some sort of official investigation required in any cases where state agencies might be responsible -- I missed the last bit -- where state systems ...

MR KEITH: Yes, in any case involving state bodies or agents to ensure their accountability occurring under their responsibility. So where they might be responsible or where the system permits or fails to prevent death.

It's a very broad proposition, madam, and of course, much depends on what is required, because I've said some sort of investigation is required.

The second point follows on from that. Mr Garnham is quite right to submit that what that investigation will consist of depends on the circumstances of the case. So, as we've seen from the authorities -- I won't take you to any of them -- the cases range across a number of different factual scenarios.

There's force used by the state -- McCann and Jordan -- there are cases in which the deceased is involuntarily in the custody of the state -- Edwards, Amin, Middleton, Sacker, D, Scholes, JL, the list is a lengthy one. There are then cases with which we are

concerned in which a responsibility is assumed to protect life, Osman, because of the immediate and real risk, the state assumes a responsibility, and in a broad sense that's exactly the same position as in Mastramatteo. Because the state released the three bank robbers, they assumed a responsibility to whoever might then be in their path and it was the unfortunate Mr Mastramatteo who was killed by them after they had robbed the bank whilst on release on home leave.

Then you've got the hospital cases -- Khan, Goodson, Takoushis, Vo v France, all of which you've been referred to -- and in those cases there could be a broad range also of failure by the state from simple negligence to gross negligence.

Then lastly, there are cases in the authorities in which deaths have occurred in horrendous circumstances, which was the phrase used by Strasbourg in the case of Edwards, or in suspicious circumstances, which was the phrase used by Strasbourg in Menson, the case of the man set on fire by racist thugs.

But because those factual scenarios cover such a broad range, what is required to make the official investigation effective in each case necessarily differs.

The third point is the inquest procedure has got to

be seen in two different ways. It plays a part in discharging the state's overall obligation to put in place effective judicial enquiry. Whenever there's a death, the inquest will play a role. But that's not to say necessarily that it has to take on an additional obligation of discharging all of the state's obligations under Article 2. Much will depend on whether or not there had been other proceedings; for example, for negligence, or criminal proceedings or disciplinary proceedings. But those proceedings may have been settled litigation might be settled in which case there is no public airing of the facts giving rise to the death.

All that will also feed, therefore, into the question of whether or not inquest procedure is just doing its bit, alongside other procedures, or is taking on the full responsibility of discharging all and any Article 2 obligation that arises.

So, as Mr Garnham rightly submitted, in our respectful submission, what is required in each case is quite different. The requirements of Article 2 are flexible and I think he took you to the part of the speech of Lord Phillips in JL where, at paragraph 31, his Lordship set out a general observation concerning the flexibility of Article 2 and the different

circumstances that will then trigger the need for different types of investigation.

That is the starting point of Mr Garnham's submissions about whether or not the ISC report therefore suffices to meet whatever Article 2 obligation arises in this case, assuming that there is an arguable breach, and that, of course, brings us back to whether there was a real and immediate risk to life.

I'll come back to JL, if I may, later, but could I simply at this stage make this one short submission? JL was not an inquest case. JL did not die. It was a near-death suicide attempt in custody. The House of Lords in that case didn't say in terms that there may be cases of death where the state can dispense with the minimum requirements of procedural fairness, and that's a very important aspect of JL, because unless you conclude that the requirements in this case brought about by the deaths on 7 July -- the procedural requirements -- are of such a low order that the ISC report acts to discharge that obligation -- that is to say it has carried out all that in law was required to be done in terms of public scrutiny, accountability, involvement of the families -- then his Article 2 argument fails, and we'll suggest in due course that, in fact, the argument that he puts forward attractively and

powerfully must fail because it's contrary to the clear principle in those cases which are concerned with death, like Amin, Edwards, Middleton, which make clear that there is a minimum threshold below which you cannot go or, rather, below which the state cannot go, and if the state cannot go below those minimum requirements, then we respectfully suggest the ISC report failed in fact to discharge those requirements.

Those I hope are the general principles, the general background to Article 2 and although I've strayed into the territory of making observations in relation to JL I hope the general broad thrust is not in dispute.

Can I then turn to the legal argument about whether or not you're obliged to consider whether there is an arguable breach of Article 2 or whether or not there is a freestanding obligation.

We suggest that there is no freestanding obligation in this sort of case.

The other cases in which the heightened -- that's to say the other cases in which Article 2 was found to apply procedurally, bringing with it heightened procedural obligations -- were all cases in which there was some special link, we suggest, between the state and the victim, either because the victim was in the special care of the state, in custody, and the large proportion

of these cases concern deaths in custody, or a position of vulnerability, or where some additional responsibility arises, like a soldier in the TA which was, in fact, the facts of Smith, to which I've made mention, or hospital cases, not in the usual run of cases concerning a negligent act by a doctor, but in cases in which a patient was treated so grossly negligently that they died, that it can properly be said that the state has taken on an additional responsibility.

Lastly, although of no relevancy to the facts of this case of course, you may have cases concerning mental patients, and the liability of the state in relation to mental patients was addressed at length in a case called Savage which was commented upon by the Court of Appeal in Smith.

Because the cases are different, madam, in our submission there are very different considerations applying in this case, which is a death case, death cases, as opposed to, for example, near-suicide cases, hospital cases concerning simple negligence as opposed to gross negligence, manslaughter.

Can I take you to two authorities briefly?

Takoushis, which is at C2, tab 26.

Takoushis, madam, you're aware concerned the issue

of whether or not Article 2 was engaged and the Court of Appeal, in particular the Master of the Rolls, as he then was, Sir Anthony Clarke, decided, in fact, that there had been an error of law below, and it wouldn't have made a difference whether Article 2 was engaged or not.

But paragraphs 108 to 109 the Master of the Rolls -- I think I'm right in saying it was the Master of the Rolls rather than -- it was the judgment of the court, I'm grateful to Mr O'Connor -- said at 108:

"We add only this. We do not accept Mr Fitzgerald's submission that the principles in the custody cases which have been analysed in some detail in Amin and Middleton apply here because Mr Takoushis would have been detained if the hospital had been aware that he was about to leave the hospital. In our opinion there is an important difference between those who are detained by the state and those who are not. Mr Takoushis was not."

109, over the page:

"It is important to note that the principles applicable to a case of this kind are different from those which apply to a death in custody. In the result, however, we allow the appeal, quash the verdict and order a new inquest ..."

The point being made is that there are differences

between death in custody cases and, in fact, on this particular case, which concerned whether or not Mr Pavlos Takoushis, whose body had been found in the River Thames, had been properly treated by medical officials and by the doctors and nurses who treated him in psychiatric hospitals.

In JL, which is in bundle C3, the same distinction is drawn between cases in which persons die in the custody of the state, and I should say also in cases where they do not, and also a further distinction between death and near-death. It's tab 38, please, of that bundle. It's the last reference I will make before the short adjournment, if I may.

Paragraphs 19 to 20., in the speech of Lord Phillips.

Lord Phillips deals here with the first of those two distinctions, which I'll come back to for the purposes of the survivor submissions:

"It is common ground that this regime [at 19] satisfies the obligations imposed by Article 2 where a suicide takes place in prison. It has also been common ground that Article 2 imposes no more stringent obligations in relation to the investigation of a near-suicide than it imposes in relation to an investigation of a successful suicide. No-one has

submitted that a near-suicide necessarily requires an investigation that has all the attributes of an inquest. It follows that it is implicit in the submissions made to us ... that the investigation that takes place in the case of a suicide will in some cases at least do more than is necessary to satisfy the requirements of Article 2."

Madam, that passage will be relevant to my later submissions in relation to the submissions from the survivors, because they say that their rights are engaged, of course, on account of their own interests. They claim a different interest from that of the deceased, for obvious reasons. They claim in their role as survivors not as deceased.

What Lord Phillips is saying there is that there is a difference between deceased and non-deceased between suicide and near-suicide.

Then at 20:

"I am not persuaded that it is correct to proceed on the premise that the requirements of Article 2 in respect of investigation are identical in the case of a suicide and a near-suicide. In this jurisdiction, the law has always treated death as a matter of particularly grave concern. There is, I believe, justification for a regime that imposes requirements as to investigation

where a death occurs that do not apply automatically in other circumstances."

Madam, I bring to your attention those two paragraphs because they will be relevant later and I don't want to come back to this case. After lunch, if I may, I'll address you specifically on those passages that concern the principle that custody is different from other cases and, in particular, different from cases such as the present where the state involvement is considerably less.

LADY JUSTICE HALLETT: 2.00 pm, please.

(1.00 pm)

(The short adjournment)