(2.00 pm)
LADY JUSTICE HALLETT: Yes, Mr Keith?
MR KEITH: Madam, before the short adjournment I detected from my right a certain fluttering in relation to my submissions on Article 2. Can I, in order to attempt to smooth any --
LADY JUSTICE HALLETT: He's not -- I don't know if you've upset him to the extent he's left, Mr Keith.
MR KEITH: Were he to be here, I would attempt to smooth any of his feathers that I have ruffled by making clear that it's not part of our submissions that there is an Article 2 obligation in any case of death, and, madam,

you asked me to repeat the passage about when such an obligation is raised --

LADY JUSTICE HALLETT: Mr Keith is trying to address your concerns, Mr Garnham.

MR GARNHAM: Perfect timing as always.

MR KEITH: In an attempt to ruffle any feathers -- to smooth any feathers that might have been ruffled, may I make it clear that I don't suggest that there is an Article 2 obligation arising in any case of death. I said, and I repeat, some sort of effective investigation is required in any case involving state agents or bodies for deaths occurring under their responsibility, or where there's been some systemic failing.

The inquest process, provided for statutorily by the Coroners Act 1988 --

LADY JUSTICE HALLETT: Is it not the latter part that Mr Garnham is worried about, that it's where the state responsible for death -- but what kind of systemic failing are you saying? I think that's where Mr -- as I understood the concern.

MR KEITH: As Lord Rodger said in JL, if somebody dies in custody, whether or not a person in custody automatically falls under the responsibility of the state, it is at least possible that there has been some failure of a system and some failure to prevent death.

LADY JUSTICE HALLETT: You are qualifying the systemic failings by somebody in custody. It sounded as if you were making it much broader.

MR KEITH: No, I don't mean an entirely wide --

LADY JUSTICE HALLETT: I didn't think you did.

MR KEITH: I don't put it on a completely wide basis, because, plainly, the statutory inquest process forms part of the state's overall obligation to put into place effective machinery for protecting Article 2 rights, and the Coroners Act 1988 doesn't require for an inquest in every case. There must plainly be a sufficient cause to resume and there may or may not be sufficient reason for a jury. If a person simply falls down dead in the street there will be no need for an effective official investigation.

It all depends on the facts, and the point that I make is, in fact, broadly in agreement with the submissions put forward by Mr Garnham, which is that because Article 2 will only be engaged and, therefore, Article 2 can only be engaged in an enhanced way where there is some level of responsibility, it follows from that that cases concerning custody, where there is a high level of responsibility, gross negligence in hospital, and the other categories of cases that I've mentioned -- including Osman and the immediate and real

risk type of case -- that such an enhanced obligation would be triggered. That's not necessarily to be equated with every other type of death, including -- and it's a matter for you, madam, to resolve -- perhaps the deaths in the present case.

Madam, we were looking at JL before the short adjournment at tab 38, and I think we were looking at paragraph 59 where, in fact, Lord Rodger said in response to the argument by the Secretary of State that Article 2 did not require an independent investigation to be held unless there was some positive reason to believe that the authorities had been in breach. He says:

"That argument is mistaken. Whenever a prisoner kills himself [and it's "whenever a prisoner kills himself" that is the important part of that sentence], it is at least possible that the prison authorities, who are responsible for the prisoner, have failed, either in their obligation to take general measures to diminish the opportunities for prisoners to harm themselves, or in their operational obligation to try to prevent the particular prisoner from committing suicide. Given the closed nature of the prison world ..."

Madam, if I may interpose there, hence my reference earlier to the closed world of custody.

"... without an independent investigation you might never know. So there must be an investigation of that kind to find out whether something did indeed go wrong. In this respect, a suicide is like any other violent death in custody."

In relation to Lord Brown at paragraph 98 his Lordship said:

"Unsurprisingly, therefore, the law imposes upon detaining authorities special duties with regard to safeguarding those (whether of sound or unsound mind) in their custody: a common law duty to take reasonable care for their safety [he refers to Reeves] ... where ... Lord Hoffmann describes the duty as 'a very unusual one, arising from the complete control which the police or prison authorities have over the prisoner, combined with the special danger of people in prison taking their own lives', and a duty under Article 2 ... to protect them [and] to account for any injuries suffered in custody, which obligation is particularly stringent when the individual dies."

So there madam the two distinctions to which I drew your attention -- namely, between custody and non-custody and death and near-death -- are drawn in fact together, because you can see there there is a distinction between custody and non-custody and

a particularly stringent obligation when the individual dies.

To like effect, paragraph 102, further down the page:

"It by no means follows, however, that the Article 2 investigation required in every case of near-suicide must match in all respects that achieved in this country in the case of all actual prison suicides ..."

Madam, that will be relevant to the survivors' arguments to which I'll return later, and at paragraph 113 in the speech of Lord Mance:

"In common, I understand, with all of your Lordships, I would reject the state's submissions that an Article 2 investigation is only required where the state is in arguable breach of its substantive Article 2 duty to protect life, in the sense that it ought arguably to have known of a real and immediate risk of a prisoner committing suicide and failed to take out reasonable preventive measures. While it is dangerous to generalise and I confine myself for the present to circumstances such as those of the present case, I agree that the relationship between the state and prisoners is such that the state is bound to conduct an Article 2-compliant inquiry whenever the system for preventing suicide fails and as a result the prisoner

suffers injuries in circumstances of near-suicide significantly affecting his or her ability to know, investigate, assess and/or take action by him or herself in relation to what has happened."

So, madam, in respect of the submission advanced by Mr O'Connor that there is a separate freestanding obligation other than where there is an arguable breach, may in our submission -- and of course, it's entirely a matter for you -- be restricted to those cases in which there is some element of special care or custody or vulnerability or where some additional responsibility arises such as -- and it's the paradigm case -- custody, and it would follow from that submission, madam, that the three cases to which you referred specifically in the context of this argument -- namely Menson, Vo v France and Humberstone -- the judgment of Mr Justice Hickinbottom -- add nothing. In Menson, the Article 2 obligation was engaged on account of suspicious death -- I referred earlier to the fact that Article 2 might be engaged where there is suspicious death -- but primarily because of the failings by the police to investigate properly and the relatively uninformative nature of the inquest that was held. It wasn't concerned with this question of whether or not there was a special relationship with the state.

Vo v France was a hospital case, in which the claimant suffered injury to the amniotic sac following a termination and the doctor was prosecuted, but the European Court of Human Rights did not conclude that heightened Article 2 obligations were required. In fact, it made reference to the fact that, where a violation of Article 2 was negligent or accidental as opposed to intentional, remedies other than the criminal law, such as civil or disciplinary proceedings, might be available and appropriate.

Humberstone adds nothing because, as Mr Garnham rightly submitted, it's plain from the judgment of Mr Justice Hickinbottom that, having addressed the special care scenario, he then returns to the ordinary principles of arguable breach for the purposes of reaching the decision that he did.

So we would respectfully suggest that the weight of legal authority supports Mr Garnham in relation to his submission that, for there to be an arguable breach of Article 2, you must find an arguable breach rather than some freestanding obligation invoking the procedural requirement or giving rise to the procedural requirement.

The next legal issue is the question of individuals in the context of the Osman test, and, madam, you have,

if I may say so, already shown yourself to be highly alert to this issue and to the way in which in fact the principle should be applied, but because we submit that the European Court of Human Rights in Mastramatteo has shown that the relevant risk, which was identified in principle in Osman, is not necessarily restricted to identified individuals, and Mr Garnham, to be fair, in ignorance of Mastramatteo, submitted that there had not been a single case since Osman in which that requirement had been departed from, but in fact Mastramatteo shows that there has been such a departure, and we would submit that, although Mastramatteo is no answer to the Secretary of State's submission on the merits of whether there was an arguable breach here -- that is to say his arguments on the facts -- it does present considerable difficulties for his attempt to apply a knockout blow to Mr O'Connor's arguments that Osman -- if it is the correct test -- is applicable, because if Mr Garnham were to succeed in demonstrating that as a matter of law, you would need to be satisfied that the risk posed by Khan, Tanweer, Hussain and Lindsay was to identified individuals, then plainly that could not be established because of the very nature of the indiscriminate effects of a suicide attack.

LADY JUSTICE HALLETT: So are you saying that the public put

at risk by a potential terrorist bomber are sufficiently identified, even if you don't know which country, which city, what means?

MR KEITH: It's a difficult question to answer, madam, because Strasbourg principle is, as is often the case, broad and ill-defined, and there must be some limit. The Commission, at paragraph 89 in Osman, made plain that there must be a limit and we wouldn't derogate from that proposition.

LADY JUSTICE HALLETT: Mr Garnham said there's a clear limit, which is where you have -- where the state can reasonably and proportionately intervene to prevent.

MR KEITH: That is his gloss on Osman, but Osman doesn't say that. Madam, you correctly pointed out that Osman simply says real and immediate risk to an identified individual, whereas Mastramatteo refers to members of the public at large. Between those two definitions, there exists, of course, a whole spectrum of factual possibilities.

To give you two examples, we would suggest that his practical submission -- which is that the name and the place must be known, or the name and the place of the risk crystallising must be known to the state, and Mr Hill's argument that the class of people must at least be identified, is too narrow.

We would say that if, for example, Khan, Tanweer, Hussain and Lindsay had left Alexandra Grove with a peroxide bomb which was ready to be exploded but, for whatever reason, the authorities decided that they would not intervene because they wished the four men to provide further incriminatory evidence, and whilst under their surveillance and perhaps after a lapse of time they stop at a service station where they deliberately detonate the device, there would be, we would suggest, a strong argument that, in principle, there was a sufficient nexus between the four men and the risk that they pose and the service station, or putting it another way, a sufficiently identified risk that the Osman principle would at least be engaged.

LADY JUSTICE HALLETT: That's similar to Mastramatteo -- I can't pronounce it -- in the sense that there, as Mr Hill said, there's a clear way the state can prevent just by arresting them at an earlier stage --

MR KEITH: Yes.

LADY JUSTICE HALLETT: -- and in Mastramatteo they didn't need to release him, or them.

MR KEITH: Madam, you're absolutely right. There is an element of chicken and egg to this.

LADY JUSTICE HALLETT: Certainly.

MR KEITH: Because any examination of whether or not there

is a sufficiently proximate relationship depends on examination both of the nature of the duty as well as whether or not there's been a breach. Exactly the same way as in, for example, gross negligence manslaughter cases in a criminal jurisdiction, there must be an examination of what was expected before you can then decide whether or not the departure fell so far below the standards expected as to be criminal.

For all those reasons, it's very difficult to set out in general terms, in broad principle, that would appear to cover all the eventualities, but we would say that we needn't go as far as that, because on Mastramatteo it is absolutely plain that the Grand Chamber went on to consider the facts and, therefore, must necessarily have accepted the principle that you may -- or at least it's open to a national court to conclude that a relevant risk will be engaged if it's a risk posed to members of the public at large.

Now, of course, as ever, all depends on the facts. It may well be that there will be cases where the crystallisation of the plot is so far removed from the particular failings of the state agents, which are relied upon, that there will be no sufficient nexus, or the failure by the state agents -- for example, to arrest when the bomb is primed and ready to go -- may be

so close to the crystallisation of the risk that that relationship is met, or rather the nexus is achieved. That, madam, is the issue for you.

LADY JUSTICE HALLETT: I'm sorry to interrupt you. I'm troubled by the decision.

MR KEITH: I think it's loose, madam, isn't it?

LADY JUSTICE HALLETT: It is because (a) it wasn't necessary to the result, because in the result they found against the claim.

MR KEITH: Yes.

LADY JUSTICE HALLETT: And (b) they don't seem to have addressed in any terms -- I don't know if in argument it was put to them -- they don't seem to have addressed the use of the qualifying words "identified".

Now, if this were a series of English decisions, I would expect a court that was departing from an established principle of law to say: ah well, when the Court of Appeal in X used the expression "identified", they didn't really mean "identified", they meant something else.

That has not been addressed at all here, so what we go from is a well-entrenched principle of law, nobody has questioned it, and then we seem to have just moved on with no explanation, and I find that troubling.

MR KEITH: Madam, yes. I must resist the temptation to

express general views on the benefits that are derived from the way in which Strasbourg expresses its principles, but perhaps I could make two points.

One, there is no doubt from paragraph 74 that they do identify the relevant risk as being a risk to life of members of the public at large and then they go on to consider the facts. So they plainly did not take the course, which they could have done, of saying: we do not depart from the identification of the relevant risk in Osman, which is towards identified individuals.

That is a clear statement itself of principle, and, secondly, Mr Garnham made the point quite rightly that that in paragraph 74, they cite Osman and the phrase "to do all that can reasonably be expected of them to avoid a real and immediate risk to life of which they had or ought to have had knowledge", and he made the point that they don't cite there that part of paragraph 116 of Osman where the reference to identified individuals can be found.

That is because in paragraph 116, Strasbourg expressed itself twice. The first time they put in the phrase "identified individuals" and the second time the court used the phrase which we can see there cited in paragraph 74 of Mastramatteo.

There is certainly an argument that that is

deliberate. They relied upon Osman in paragraph 116 for that part of the principles enunciated there, which assisted them in the expansion of the principle to the facts in Mastramatteo.

LADY JUSTICE HALLETT: An argument it might have been deliberate. I don't find it a very convincing argument, Mr Keith.

MR KEITH: Happily, in my role, madam, my remit includes putting forward matters for your consideration.

LADY JUSTICE HALLETT: Right.

MR KEITH: I do -- if one were to assess the strength of the two points, there is, in my respectful submission, considerable force in the first point, because it is hard to get behind those actual words "relevant risk being a risk to life of members of the public at large". They could then have said in terms on the basis of Osman there was plainly no identified individual in this case.

LADY JUSTICE HALLETT: These were the words that the House of Lords thought were clear and needed no further exposition, as I recall.

MR KEITH: Yes, that's quite right, but that, I'm afraid, is subject to some qualification because Mastramatteo, although cited to their Lordships' House in Van Colle, was not -- did not form part of their Lordships' speeches and it was neither cited by counsel nor

referred to by their Lordships' House in the case of Gentle, which is regarded as being the paradigm case where the obligations in relation to Article 2 and arguable breach are set out.

So I'm afraid it's just one of these areas where there is argument for both sides, but, madam, you may, I think, with respect, be entitled to conclude that the unconditional nature of Mr Garnham's submissions in relation to "this is a knockout blow" must be tempered by the clear departure in Mastramatteo, but it provides no answer to the related, but in fact different issues as to whether on the merits, even if Mastramatteo establishes that there need be no identified individuals, whether the individuals who tragically died in this case did properly fall within the scope of the risk when it crystallised, established by any failings that there were in March 2004.

I'll come back to that issue later.

LADY JUSTICE HALLETT: Right.

MR KEITH: Perhaps I could say finally on this point, my submissions in relation to Mastramatteo do accord with your instinctive assessment, which you've expressed in your observations to Mr O'Connor and Mr Garnham in advance of the discussion of Mastramatteo, that it would be very strange indeed, if, however gross the departure

from reasonable conduct the failings on the part of a state body were to be, that there could be no triggering of Article 2 merely because the victims were not identified.

Mr Garnham's argument, although, as ever, attractively put, leads to very unattractive consequences in relation to the attempt to limit Osman in that way.

Madam, he also relied upon Van Colle in support of his arguments in relation to Osman. Could I simply make this one point in relation to Van Colle?

Van Colle, of course, was concerned with the proper remit of liability to damages at common law and the difficult issue of whether or not the public interest demands that, in principle, there can be no ability to claim in negligence against the police and other equivalent authorities for negligence in the course of the investigations and prosecution of crime. My Lady will remember the reference to Lord Keith in Hill and also liability of the Crown Prosecution Service in El Gouzouli-Daf. They are, as a matter of principle, not open to be sued. But their Lordships in Van Colle did nevertheless make the point that the common law in this issue was different to that which arose under Article 2 and in particular Osman.

So there is a limit to the support that can be derived from Van Colle in support of my learned friend Mr Garnham's arguments on Osman. There were different considerations in play and their Lordships recognised that.

May I then turn to the application of the test? That's to say the merits of the arguable breach argument.

LADY JUSTICE HALLETT: Sorry, just before we leave it, identified victims, or the public at large as was said later, they all get qualified in any event by the words "real and imminent risk", don't they?

MR KEITH: That is this next topic, yes, madam, I would agree.

LADY JUSTICE HALLETT: Do we begin with the real and imminent risk before we even look at the question of individual? Because it's only then that we get even to any kind of classification of victims or public at large, be it in this country or wherever.

MR KEITH: If, in your judgment, the events relied upon -- namely, the alleged failings in March 2004 -- gave rise to no real and immediate risk, then it would render academic the debate about Mastramatteo, but I must cover all eventualities, of course, and Mastramatteo will be relevant, of course, if you were to conclude that those

alleged failings in March 2004 did give rise on the facts to an immediate and real risk.

LADY JUSTICE HALLETT: Thank you.

MR KEITH: On that point, madam, in relation to real and immediate risk, can I simply summarise some of the general principles which can be derived from all the submissions that you've heard.

Firstly, it's a matter for your judgment as to whether the test is arguably engaged, whether the Osman -- there is an arguable Osman breach.

Secondly, the authorities make plain that there is a high threshold. It was described by Lord Carswell in Officer L -- for your note, paragraph 20 -- as stringent, and Lord Hope in Van Colle as a very high threshold, as indeed so did Lord Brown describe the threshold in Van Colle at paragraph 115.

Thirdly, drawn to your attention was the distinction between Lord Bingham and Lord Phillips in Van Colle as to whether or not "ought to have known" means "ought to have known on the information then available" or "ought to have known on the information available plus further enquiries".

Lord Bingham made the notable remark about how the obligation was a wider one, it was "ought on the material then known plus further enquiries" and he went

on to say:

"Therefore, stupidity, lack of imagination and inertia do not afford a defence to a national authority."

It's paragraph 32, for your note. Lord Phillips, by contrast, with a narrow approach, was at paragraph 86.

We would suggest that this approach -- in order not to become overly engaged with this difficult distinction -- hindsight is plainly not permissible, but you may conclude that, if there was an obvious failure to make further reasonable enquiries, whether or not those further enquiries would have added to the risk known to the national authorities may be neither here nor there, because, if there is such an obvious failure, that may assist you in determining whether or not there was a failure to take a reasonable step or to reasonably respond to the immediate and real risk presented at the start of the process.

I'm sorry, that's a rather long-winded way of simply saying you don't need to wait for what might have been discovered if further enquiries had been made, because, if there is an obvious step that needs to be taken, that may tell you something about the level of the failing at the beginning.

The last point that we would make is that we would

respectfully agree with the points made by Mr Coltart on behalf of his families instructed by Kingsley Napley -- I'm sorry, in our written submissions at paragraph 188 we said these were submissions made by Lovells; they are in fact submissions made by Mr Coltart on behalf of Kingsley Napley -- the risk is present and continuing, we agree, and Mr Garnham did not dissent from that proposition.

It must be a real prospect, it's not a "but for" test, we are in agreement. It's an assessment for the court, for you, we agree, and gross negligence is not required, we agree.

But we would also add, as Mr Garnham added, that a missed opportunity would not suffice. That's plain from paragraph 121 of Osman, because, when considering the facts, they describe the facts which fail, in their opinion, to give rise to a breach as being merely missed opportunities.

Madam, the matter is very much for your judgment and I don't want to go too far in expressing a view in relation to the merits. I think I can go as far as repeating what we said in our written submissions, which is that, of course, errors in the ISC report and failures of analysis are not determinative of the issue because there may have been errors in approach by the

ISC, the analysis may not have gone far enough, they may not have asked the right questions, but that does not necessarily mean that there was a failing by the Security Service to the requisite high level.

Of course, if there were gross failings in the analysis by the ISC apparent on the open material, then that might assist you, it's just one factor in assessing whether or not there was an underlying failing by the Security Service.

There is a starting point, madam, because the very fact that the second report is entitled "Could 7/7 have been prevented?" indicates that there is an issue, but it plainly is not enough.

With respect, you may have regarded the submissions by Mr Coltart in particular and Mr O'Connor and Mr Patterson on the report as being very powerful points.

It's clear that Khan and Tanweer had come to the attention of the Security Service, whatever and however one describes the process of identification, and they did come to their attention in, on any view, highly dubious circumstances during an escalation of Operation Crevice in February and March 2004.

On any view, Khan and Tanweer, had they been properly identified, or rather had what is now known

about their identity been known, could at least have said of them that they had met Khyam at an extraordinarily suspicious time because Khawaja, the Canadian expert on remote detonation, was plainly in town for criminal purposes and, moreover, Khyam, on 22 February, was heard discussing possible targets. There are certainly highly unusual features to the way in which they met, in terms of the length of time that they met, the movement of the cars, the repeated meetings around that time -- 2 February, 28 February and 23 March -- and the very fact that there was an assessment by the Security Service as to whether or not they should become desirable or essential targets at least establishes that they were worthy of investigation.

But the issue for you is whether or not -- even if the Security Service had done more -- that there was a real prospect that the attacks could have been prevented.

In the course of Mr Hill's submissions, and in a broad sense -- let me start again.

In the course of his submissions, he made the point in the context of what material had been available to Operation Theseus in the criminal trial as to what material was available to the Metropolitan Police in

terms of the specific activities of Khan and Tanweer and the likelihood that they were to assemble and carry out the plot and the explosions that they did.

He made the point that there was little or no evidence before, certainly, the reconnaissance mission in September 2004 and the return from Pakistan of Khan in February 2005 as to what ultimately became the conspiracy to detonate the four bombs in London.

Mr O'Connor and the families, in their submissions, do face the difficulty of needing to provide an answer as to how it could be said that there was a real and immediate risk at March 2004, which is when, if there were failings by the Security Service, they would have been most apparent, because that's when the meetings were, that's when Khawaja was meeting with Khyam and when Tanweer and Khan met them also. But at that time, there appears to be little or no material to suggest that what ultimately became the conspiracy had yet formed.

Mr Hill told you that in relation to Operation Theseus and the two trials -- he gave you a sheet of paper -- that the way in which the prosecution put the case was that it was not the prosecution case that in early 2004 there was any plan to carry out the London bombings. He also pointed to

the fact that the indictment was phrased between 17 November 2004 and 8 July 2005.

That point, whilst valid, though, must however be seen in the context of the fact that -- and it's not something you were taken to -- that a note of the opening of the first trial -- Operation Theseus trial -- shows that the indictment on the first trial was phrased more widely. In fact, the indictment -- and Mr Hill is absolutely right -- the indictment had to encompass what might have been the overall conspiracy, because, of course, it was in pursuit of the overall conspiracy that the three defendants are alleged to have played their part, but it was phrased between 1 January 2004 and 8 July 2005, and moreover, the opening for the first trial did not contain the qualification which you were shown this morning on the written piece of paper at the second trial that it was the prosecution case that there had been no plan in early 2004 to carry out the London bombings.

So as, madam, you suspected, the issue may be a little more opaque than might have been the case based on the nature of the second indictment.

At the same time, I think it's right to say that we have seen no material to suggest that in March or April 2004 the conspiracy had crystallised, and if

the conspiracy had not crystallised -- and of course it is an "if" -- it is hard to see how the immediate and real risk could have presented itself.

It's for that reason -- if no other -- that we suggest that if you conclude that the real and immediate test is not breached arguably on the material before you, that you do keep the matter under review, because, of course, it is entirely possible that in the investigation of your common law obligation -- or discretion, I'm sorry, discretion -- to consider preventability, further material as to when that conspiracy crystallised may come to light.

There were, of course, further aspects and are further failings relied upon by the families. There are obviously issues as to why transcripts of the conversation between Khan and Khyam in the car on 21 February were not transcribed fully then, given that Khyam himself was fully engaged in a terrorist plot that led to arrests just a month later.

There are also issues as to why photographs of Khan were not shown to the relevant detainee in August 2004. You will recall that the ISC report speaks of the photographs being shown subsequently.

There are issues as to why, when the car from the meeting on 2 February was registered to Hasina Patel and

when the car used on 28 February was registered to Sidique Khan the link between Hasina Patel and Sidique Khan was not spotted sooner.

Likewise, why the links between Khan from the Vauxhall Corsa from the meeting of 23 March were not established insofar as they showed a link to the earlier meetings.

But there is certainly a powerful argument to the effect that the high point of the case, put forward very powerfully on the part of the families, is the events of March 2004, because it is then that the unidentified males C, D and E came to the attention in a meaningful way of the Security Service and then that there was arguably an obligation to bring the dots together.

Of course, those further enquiries could have been done at any later stage up to 7 July 2005, and, therefore, it's quite possible that the failings, if failings there were on the part of the Security Service, in fact occurred at a later stage, and obviously with the passage of time it's possible that there was a greater obligation to go back to the old events and reassess them when the other operations such as Crevice and Rhyme had concluded.

But against that, the Security Service would no doubt say: well, the main threat, Crevice, was

prevented, we disrupted that plot, nothing further came to light that indicated a crystallisation of a plot between two of the men, D and E, Tanweer and Khan spotted in March.

As the time passed, and no further significant meetings such as those that occurred in February and March occurred, there is perhaps an argument for suggesting that the obligation on the Security Service to pursue those meetings lessened because there was no further material that added significance to them and no objective material to suggest that a plot -- the plot that subsequently crystallised -- was related to those meetings.

But on any view, Mr Garnham is right to suggest that the argument put forward by Mr O'Connor does proceed on the basis of a succession of ifs: if something had been done, then there was a real prospect that something else would happen, and if that something else had happened, there was a real prospect that something further might have been prevented.

You will no doubt wish to pay due regard to the fact that on the material before them, Mr O'Connor and my other learned friends are hampered in, of course, demonstrating a complete audit trail as to what might more have been done.

But one is, I think, permitted to take an overall chronological view that there was a considerable passage of time between March 2004 and July 2005 and the most significant events, insofar as they were events that became aware to the Security Service, occurred towards the beginning, if not at the beginning, of that period rather than towards the end.

It is perhaps appropriate that I say then, at that point, that, of course, none of this derogates from our submission that, even if Article 2 is not engaged, your common law discretion permits you nevertheless to pursue the issue of preventability.

The next topic I'll come to, if I may, is the question of whether or not the ISC report in law discharges whatever Article 2 obligation may have arisen. Madam, as you've already observed, this issue only becomes relevant if Article 2 is arguably engaged, because, if it's not, then the ISC report need perform no role of discharging whatever Article 2 obligation there was, because there wouldn't be one. It would then only be relevant to the discretionary point, the wider point, that Mr Garnham makes, which is that, even if you go down your common law jurisdiction, there's simply no point because it's been done already by the ISC and it's unfair and impracticable.

I'll come back to that later.
But in relation to the discharge, our submission is the requirements of Article 2 do have a minimum level. Accepting, as we do, that Article 2 is flexible and requires different procedural requirements for different factual circumstances, there is nevertheless an irreducible minimum. The basic minimum requires some involvement on the part of the families and some degree of public scrutiny, and we say that those minimum levels were not met by the ISC.
If I may, I hope, not do Mr Garnham's arguments a disservice, his response to that is JL shows in the House of Lords that there is such a degree of flexibility in what Article 2 requires in terms of the procedural requirements, that it's plain that there are no minimum standards, such that it can be properly said that the ISC report fell below them, to which we say the point that I've already made, which is that JL was not concerned with death.
For your note -- I'm not going to take you to them because they are very well-known and they've been referred to repeatedly in the written submissions -- the passages that we rely upon to establish the proposition that, in terms of death falling arguably under the institution of the state -- because, of course, this

whole argument is predicated upon you finding that there is an arguable breach of Article 2 -- that there are minimum standards, is established by the House of Lords in Amin at paragraphs 20, subparagraphs (8) to (10); paragraph 27 where Lord Bingham makes it clear that he disagrees with the position taken by the Court of Appeal in Amin that there were no minimum standards, in fact, and he rejects the argument where there is a death that there is some -- there is no minimum standard below which an effective official investigation can go, and also paragraph 32.

In relation to JL, we would rely upon Lord Brown at paragraph 107 and we would also refer you to Edwards at paragraphs 81 to 84 in your bundles at D2, tab 15.

Again, if I may paraphrase Mr Garnham's arguments, it is to the effect that, if not in principle, the exceptional nature of the circumstances of this case -- because of the high degree of sensitivity and intelligence -- the conscientiousness of the ISC, the amount of time, trouble, man-hours that the ISC took to investigate this issue, mean that whatever Article 2 obligation there is was discharged.

We say that there were features of the ISC report that meant that however conscientious, however much time, however much trouble was taken, it did not and

could not discharge the bare minimum of what Article 2 expected because of the lack of sufficient family involvement and sufficient public scrutiny, and these arguments have been explored at length by Mr O'Connor, so perhaps I can put them very shortly.

In relation to independence, Mr Garnham accepted that the ISC was institutionally not independent and it does seem to us plain that it lacked hierarchical and practical independence from the executive through the appointment process, lack of tenure, or security of tenure, and the connection to the Cabinet Office for what is plain was a very large proportion of its investigative role.

In relation to sufficient family involvement, although, as you've heard, at the suggestion I think of the Secretary of State, the minority of the bereaved families were permitted to meet with the ISC, that level of executive consent was reflective of an exercise of the prerogative of the government rather than an entitlement to which those families should have been able, or an entitlement which they were owed under Article 2.

Lastly, in relation to sufficient public scrutiny, you'll know that the ISC, as you've heard, heard and received evidence in private, no transcripts were

published, and indeed even the annexes to the reports which give details of the witnesses that the Committee heard identifies mostly by position, gives no detail of what the evidence was of course, and refers indeed to "other officials" without any reference to their names at all.

My learned friend Mr Garnham rightly submitted that the obligation under Article 2 is one of means, not result, and that assertion with which we entirely agree presents a difficulty to the Secretary of State because, if one concentrates on means rather than result, you would not be permitted to have regard to the conscientiousness of the result, to the detail -- and there is a lot of detail in the report -- but to the means, and the means include the absence of family involvement and the absence of public scrutiny.

In relation to the ISC report, may I make two further points which are relevant to arguments that Mr Hill put forward?

Firstly, there could be no question, of course, if you were to be persuaded by the argument that you should investigate the open material forming the basis of the ISC report and nothing else, of you receiving the ISC report into evidence. Rule 37 of the Coroners Rules prohibits the admission of hearsay evidence other than

where all the parties are agreed, and it is not for one moment likely that the parties will agree to that. Therefore, the report cannot be taken as read in an evidential sense. It has no evidential value. Therefore, if there is consideration of the substance of the report, you will necessarily have to have regard to here, and determine, with or without a jury, witnesses who can talk to the matters discussed in the report, and if that is so, you may feel that it is a counsel of failure to resume inquests into these exceptional circumstances only for you to consider in a different evidential forum, a different legal forum, the same matters which were considered by the ISC and which find reflection in their open conclusions, but in a way which could not possibly match their level of detailed analysis, because although I will submit in a moment you can go some way into the intelligence material, I do accept that you would never be able to have the full extent of consideration -- particularly if you sit with a jury -- as the ISC.

So to have an inquest in which you would merely re-explore the same issues -- but only the open issues revealed by the ISC -- would be to repeat the exercise, as Mr Garnham has submitted, in a way that could not possibly do anything other than raise and then dash

terribly the expectations of the families.
It's for that reason that we depart fundamentally from any submission that you should resume these inquests in order to perform that task. If the task is to be done, it must go further into the intelligence material.
On that point, may I then turn to the arguments of impossibility and unfairness?
Impossibility because of the submission that practically it will not be possible to consider any useful degree of intelligence material, and unfair because of the point made by the Secretary of State that the Security Service will be condemned, if it is condemned at all, on the basis of the partial account because necessarily it will be an account based on a lesser degree of material than that considered by the ISC.
In our written submissions, madam, we expressly referred to the fact that there were very real practical difficulties in relation to intelligence in these inquests. I'm afraid somewhat blithely it has been asserted that the issues of PII are manageable. I'm afraid those submissions are open to some doubt.
The submission that preventability should be investigated was advanced at the level of principle, but

I'm afraid there is no easy way of avoiding the hard, practical, factual issues consequent upon that submission.
If this issue is to be investigated, in our submission as of course it should be, it's going to be necessary to deal with this within the procedures of a coroner's inquest and that may be with a jury.
The difficulties are very real and substantial and Mr Garnham, in our respectful submission, is entitled to submit to you with the experience that the Security Service has in this area that if there are very real difficulties, then there are likely to be difficulties. It's a roundabout way of saying that that point must have some merit because of the experience that his institutional clients have.
The procedures suggested by the families, through their counsel, are not a panacea and they don't provide a complete solution.
We must say that it has to be recognised that if you investigate preventability, the sensitivity of some of the material may mean that some of the questions cannot be fully answered.
I will return in due course to the sorts of questions -- in fact, let me do it now.
There is obviously a range of questions that might

be asked. Some questions will automatically take you straight into intelligence issues. Some may not until you get to the third or fourth time of asking or you strip away the answers and one is reduced to relying upon raw intelligence material.

But there are obviously questions that can be asked which go to the heart of the families' concerns which will not immediately engage intelligence material. For example, who assessed the significance of C, D and E? Did a single officer look at the issue of these meetings? Did a single officer look at the registered addresses? I've addressed you in relation to the links between the registered addresses on 2, 28 February and 23 March.

What did the Security Service make of the fact that the men subsequently identified as MSK and T -- Tanweer -- but then known to be C and D, or I think D and E, were meeting at the same time as a known bomber was in town, as I've said, for the purposes of a plot that had already been assessed to be imminent, and were meeting at the same time as, even in advance of the identification of D and E, Khyam was heard discussing possible targets on 22 February.

Your question, madam: did Khyam and Khawaja, and Khawaja when he was over, meet other people, and if so

how many? That question can be answered without showing the means by which that information has come to the Security Services, if it did come to the Security Service. Were they followed? Again, that admits to a "yes" or "no" answer, and if it's "no", why not? That might lead to an intelligence-driven answer, but it may not.

Mr Garnham refers to the 4,020 or so contacts but we'd respectfully submit that it misses the point that D and E were also in contact with Khyam and, through him, Khawaja, and were, therefore, significant contacts, which is why they were desirable targets.

So to suggest that to follow them is to put them in the same par as 4,020 insignificant targets misses, with respect, the point.

Could they have been put under full surveillance? Well, a witness might say, "I can't say without going into intelligence matters why precisely we didn't put them under full surveillance, but I can tell you that we had two operations in the north of England, we had 56 officers, for example, on surveillance that week, there were other threats at the time which I can't give you the details of, but I can say that they were incredibly resource-driven and they necessitated a complete diversion of our officers, and this was a lower priority

because, although there were meetings, there was no reference to operations other than this single reference by Khyam, because that reference was in the context of Crevice, there was no suggestion that there was a separate terrorist plot, to the extent that there was separate facilitative activity it was merely a reference to facilitation and that's not the same as a conspiracy to detonate an explosive device", and so on.

There will be an answer in our submission.

LADY JUSTICE HALLETT: If we go down this path, I think one of Mr Garnham's fears on behalf of the Security Service is there are a number of questions, as you say, that one can ask without venturing into this territory. What happens when, if we had a witness from the Secret Service, who said, "Well, I can't answer that question because we are now going into intelligence areas, which are just too sensitive", where do we go from there? What are my powers, what are Mr Garnham's powers on behalf of the Secret Service or what's the Secret Service's powers, what happens?

MR KEITH: Well, in a broad sense, the witness cannot be made to go further because, if he were to go further, it would be blocked, properly blocked, if you were to accept a claim for public interest immunity, by a claim that any answer would seriously damage the national

interest.
LADY JUSTICE HALLETT: So I then have to see the material?
MR KEITH: Can I come back to that in a moment? There are very real difficulties and they depend, of course, on whether you sit with a jury or not.
In the criminal jurisdiction, madam, as you know, there are very real difficulties about a judge being the judge of fact -- for example, on a section 78 application or on an abuse of process argument -- taking account of PII material which he or she has seen in the course of a PII application, because plainly that offends against the principle that the defendant is entitled to see any material that the judge relies upon for such decisions, and if you rely upon PII material for deciding section 78 or abuse, that entitlement has been infringed.
Different considerations may apply in the inquisitorial process, because the rights of the families to know are not necessarily to be equated with the right to a criminal defendant. But that said, there is a practical limit, because if you were to allow your judgment -- assuming for one moment you sit without a jury -- to be significantly informed by intelligence material that the public have not seen, then, firstly, there must come a point when you start to derogate from

giving proper effect to the principle under Article 2 or at common law for public scrutiny, and you start to derogate significantly from the principle behind the Coroners Act, which is that you sit in public, and secondly you will necessarily restrict yourself from the material that you can refer to in the course of a judgment or a Rule 43 report. I say "judgment", a narrative verdict.

So there must be a limit to what you can do, but for our part, we see no difficulty in principle with you deciding public interest immunity issues as well as being a coroner, if you sit without a jury.

If you sit with a jury, as Mr Garnham submitted, the difficulties will be very much more severe because of the need to subject the jury to developed vetting, and since the jury might not be chosen until the last minute, at the conclusion of the summonsing process, I'm not sure, or I've not investigated it yet, how you could DV the jurors who are chosen as opposed to DV-ing everybody in the panel. I see Mr Smith nodding his head, and he's far more well-versed in these issues than I am.

So there are very real difficulties, but that --

LADY JUSTICE HALLETT: I'm sorry to interrupt you again, but let's envisage I have a witness who says "I'm sorry, I'm

not telling you any more, but I am prepared for you, judge, to see, or you, coroner, to see the material." I look at it, I'm not of course an expert in assessing the interests of national security, I would do my best, and I say, "No, I think you should reveal it, I disagree with you, I don't think it is in the interests of national security". Mr Garnham's point is, if this were a prosecution, in a criminal trial, the prosecution would say, "Well, with the greatest of respect, judge, coroner, we disagree with you, and we're just not going to go on".

What happens in an inquest if I say, "Mr Secret Service agent, I disagree with your assessment of what's in the national interest and I want you to disclose material"? What happens?

MR KEITH: I agree with Mr Garnham that in the criminal trial process, the state always has the option of discontinuing if the judge has concluded that disclosure of material to the defence would so harm the public interest that it cannot be disclosed, and yet, at the same time, the relevancy of the material is such that the defendant is deprived of a fair trial, the difficulty in H. The state, therefore, is forced into the position of discontinuing.

But the analogy breaks down, on analysis, because,

in truth, there will be no one single piece of intelligence material the absence of which from your inquiry renders your process factually or legally irrelevant or useless.

In a criminal trial, there may be a single piece of information where the judge will say, "The defence needs to have that, and it can't have a fair trial and, therefore, I must stop the whole proceedings" or, rather, the Crown must discontinue. But it would be highly unlikely for there to be a single piece of intelligence material the absence of which from your proper consideration would force you to say, to use the vernacular, "Right, that's it, I'm throwing up my hands, I cannot go further". Not only are there issues in relation to the detailed circumstances of the deaths, but as those very short few questions I read out demonstrate, you may ask and have an answer to one question but you may not get an answer to another question. But no one question will be determinative of the utility of your entire inquest process.

LADY JUSTICE HALLETT: What if there were, to use perhaps another unfortunate expression, a standoff between the judge coroner who says, "I don't think it's in the interests of national security" -- "it's necessary in the interests of national security to keep this secret"

and the secret services who say, "It's our job, we are the professionals and we say it is", what happens then?
MR KEITH: I confess we've not turned our mind to the exactitude of the practicality, but in principle, we would say it would be open to those whom Mr Garnham represents to put forward either a certificate, drawn from the civil process, as you know well, or a witness statement, as a police officer or a senior police officer might do in the criminal jurisdiction, and say: you cannot -- or, rather, the witness cannot answer this question because of the following reasons, all of which are concerned with the likely serious harm to public interest. You would then have to rule on it and you'd have to rule on it with your PII hat on rather than your fact-finding hat on. That is assuming you sit without a jury.
That will obviously be a cumbersome process, but I'm sure that with the goodwill of all the parties involved the areas on which that's likely to happen will be identified well in advance.
Secondly, not every impossible question will be met with a claim for PII. Counsel can either withdraw and not seek to continue to get an answer to a question that is obviously going to reveal intelligence material or, frankly, the question can be asked in a different way or

the broad issue can be explored in a different way. There will obviously be gaps and stopping and starting and difficulties, but bluntly, madam, you have a wealth of experience from the criminal and civil jurisdictions which encompasses very real practical difficulties, with witnesses, with evidence, with claims of PII, with the emotional and humanitarian concerns that go with the receipt and calling of evidence. There is nothing about this case, in our submission, which puts it into the exceptional category such that you could properly conclude the process is useless.

LADY JUSTICE HALLETT: It wouldn't have been the first inquest in which there had been security implications.

MR KEITH: No. One of the other points that I want to make, though, is that I would certainly not wish to depart from a submission that this is not really to be equated with the inquest into the death of Diana, Princess of Wales. The intelligence issue there was but one issue: was there an involvement on the part of the state in her death? Also, peripherally, whether or not there was some kind of role played by the Security Service or the Secret Intelligence Service in Paris.

In this case intelligence forms the very heart of one of probably two main issues, namely preventability. So I think the analogy can be made, but I'm not sure

how far it will take you, madam.
Coming back to your question about the practicalities, there are procedural difficulties -- and you've highlighted them -- because in the criminal sphere everybody is familiar with Johnson Rowe and Davis and the guidelines and the Criminal Procedure Investigation Act, and H, and there are criminal procedure rules in play that allow the process to be conducted in a way that adequately reflects the interests of the defence, the judge and the intelligence agencies.
There is no comparable body of learning or procedural rules to which we may have regard in this process, and there's a further complication, I should say, because, although Mr Garnham, perhaps knowing that he's on a strong round in relation to highlighting the practical difficulties in relation to intelligence and material generally, need not go as far, but if we -- and we simply do not know -- intelligence available to the Security Service in March 2004 included RIPA material -- that is to say intelligence material covered under that Act, the Regulation of Investigatory Powers Act -- then the provisions of that Act would not only absolutely prohibit as a matter of law rather than as a discretion the admission of such material into these proceedings,

but they also prohibit absolutely any enquiry as to whether such material exists or was used at all. I'm afraid we are, without doubt, in the Rumsfeldian world of not even knowing what we do not know. If, for argument's sake -- and I will never know because of the prohibitions -- if, for argument's sake, there was RIPA material, then that would provide an absolute bar, there would be no way round it. But in our respectful submission, it is highly unlikely that, if there is RIPA material, that material would be so extensive as to be absolutely determinative of your fact-finding mission.

Mr Saunders suggested that yourself, madam, and your counsel could vet material for relevancy or sensitivity, and I agree that, if you were to sit without a jury, that is quite possible, but it must be subject to the caveat to which I've already made reference, which is that there must be a limit to the material to which you may be permitted to have regard secretly and privately for the purposes of informing your judgments on the facts, lest you depart so far from the obligation of public scrutiny and familial involvement that you render the whole process conceptually irrelevant.

But I would agree in principle that that role can be performed.

If, however, you were to sit with a jury, then I'm bound to say the prosecution would be very much more difficult, because you could not have regard to material for the purposes of the verdict, for obvious reasons, if the jury were not made privy to it, but that must stand to reason, lest you were to have regard to that material for the purposes of a Rule 43 report. But then you would be faced with the difficulty to which Mr Justice Beatson made reference in Butler and Lord Justice Sedley made reference in Lewis which, is that you have to -- you may put material forward for the purposes of your Rule 43 but, if you sit with a jury, it must necessarily be considered by the jury.
So I am constrained to accept that, if you were to sit with a jury, there would be very real practical difficulties and it may be -- and I come back to the point I made at the beginning -- that on reflection -- and the written arguments advanced by my learned friends representing the families did not attempt to grapple with this issue at all -- it may be that, on reflection, there will have to be an acceptance that if public scrutiny and familial involvement are to be given due weight, then the role of the jury in this process may have to be given less weight. May I address you on that?

Article 2 does not demand the existence or use of a jury.

LADY JUSTICE HALLETT: The civil systems don't place anywhere near as great an emphasis upon juries as we do.

MR KEITH: Absolutely. So I think one can proceed from the starting point that, although the jury occupies a very special place in our legal and institutional history, it plays no particular role or has no significant role, or a determinative role, in giving due weight to the need for public scrutiny and familial involvement.

Publicity, or rather public scrutiny, will be met by, if you will allow me to say so, your appointment and your conduct, by the giving of evidence in public, by the examination of those witnesses by counsel for the families, counsel for the other interested parties and unrepresented properly interested persons.

The whole process will take on a significance of its own in terms of paying regard to the need for publicity and for the families to play their part.

The mere fact -- I say "mere" not in a pejorative sense, but the mere fact that the ultimate decision-maker has to be a jury does not add to that process unless one is of the view that a jury has an institutional or hierarchical independence that you cannot match, but, dare I say it, it would take a braver

advocate than myself to suggest that you would be deficient in that regard and, if you will also allow me to say so, I can conceive of no sensible argument that you are deficient in that regard by comparison to a jury.

So ultimately, one hugely important but nevertheless not determinative public consideration or wider public interest -- namely, the role of the jury -- might have to bow to the needs for public scrutiny and for the families to play their role.

Putting it another way -- and more sharply -- my learned friends and those whom they represent may be forced onto the horns of a dilemma of having to resolve: would they rather your inquest went further than Mr Hill's inquest, which would be a re-examination of open material, and into the intelligence sphere and delve, to some extent, into the intelligence matters which underpin the ISC report and whatever events occurred in March 2004 as opposed to insisting -- I mean that not in a legal sense, but in a general sense -- on the presence of a jury.

Can I --

LADY JUSTICE HALLETT: Pausing there, Mr Keith, I think that is an important point and one that requires emphasis, and at some stage I will want from all those who have

argued for a jury confirmation that, in the light of everything that has been said during the course of the last three and a half, four days, those remain their instructions.

MR KEITH: Thank you.

Madam, it will not have escaped your attention -- I'll come back to this later -- but it will not have escaped your attention that Mr Gibbs bravely attempted to address the issue of section 8(3)(d) which is a mandatory requirement.

LADY JUSTICE HALLETT: My comment, of course, relates to if I have a discretion.

MR KEITH: Of course, of course. The issue of 8(3)(d) renders all these conceptual arguments academic because if the mandatory requirement is triggered, you must have a jury regardless of the consequences in terms of whether or not that jury can assess intelligence material, but which may therefore require you, or may lead you to suppose that the question of 8(3)(d) will form one of, if not one of the most important issues in this entire process.

Therefore, if they will allow me to say so, Mr Gibbs is to be commended for at least addressing 8(3)(d) which presents an insuperable problem to the conceptual solution that I have attempted to put forward. But his

submissions have not been matched in any other area, because they were simply adopted wholesale without further development.

It is an issue on which, madam, you may in due course -- I'll come back to this when I look at 8(3)(d) -- require further thought to be given.

Madam, is that a convenient moment?

LADY JUSTICE HALLETT: Yes, of course. Is ten minutes sufficient? I have no idea how far people have to go if they want to go outside or get any fresh air. When I break for ten minutes, are people finding that's enough? Ten minutes, then, please.

(3.20 pm)

(A short break)

(3.30 pm)

LADY JUSTICE HALLETT: Yes, Mr Keith?

MR KEITH: Madam, Mr Hill has very kindly passed me some further information about the process by which the indictment in Operation Theseus came to be amended because, as you've heard me submit, the first indictment was drafted with the conspiracy in it in a way that the particulars commenced on -- the particulars were drafted in such a way that conspiracy commenced on 1 January whereas subsequently it was 17 November 2004.

At a pretrial hearing on 8 April 2008, which was the

start of the first trial, counsel for the prosecution -- or rather Mr Hall, who I assume was counsel for the prosecution -- he was defence counsel -- made representations that it would be more appropriate that the indictment should reflect the specific evidential case as it was being put by the prosecution, and the prosecution agreed that that submission had force and would help the jury to focus on the exact nature, I presume, of the conspiracy.

Counsel addressed the judge about the fact that there was a change of plan occurring some time after Khan and Tanweer left for Pakistan, but they were not able to say when, and, therefore, the proposed amendment was that the indictment should be amended from 1 January 2004 to 17 November 2004 as being the commencement of the conspiracy to which the three men, Waheed Ali, Sadeer Saleem and Mohammed Shakeel had allegedly lent themselves.

They made clear that it wouldn't change the evidence that would be sought to be called and they therefore made a formal application to amend, which was granted, and the judge, who was Mr Justice Gross at the pre-trial hearing then as well, said that, given that it was common ground and didn't involve any concessions as to the evidence that was going to be called, but was merely

for the assistance of the jury, that that application should be granted.

Therefore, it's plain that there was a movement in terms of the particulars in the indictment -- which is the point that I made to you earlier -- and also -- which is Mr Hill's point, which appears to have considerable force -- that the change in the indictment didn't reflect a change in the evidential nature of the case being submitted by the prosecution at the first or second trial, and, madam, I made the point that the first indictment had as its date 1 January 2004, which would appear to be the sort of nominal date that many conspiracies are drafted with.

LADY JUSTICE HALLETT: I'm not sure from what I've been told whether the nature of the prosecution case on a conspiracy to cause explosives changed because it sounds as if they may have said there was an agreement. The specific target may have changed, but a conspiracy remains a conspiracy, even if the -- to cause explosions -- it remains a conspiracy to cause explosions even if the target changes.

MR KEITH: Except that the conspiracy would have to have some particular, and the particular would have to identify the object of the conspiracy, and if the first indictment had as its date 1 January 2004, that would

seem to indicate, in accordance with the usual practice, that the prosecution were unable to say with exactitude when the conspiracy started, which is why they take a nominal date, but subsequently focused down on the actual date as opposed to the nominal date.

LADY JUSTICE HALLETT: The date alleged in this indictment would have been in relation to these conspirators and when it was said they joined the conspiracy. It doesn't say when the conspiracy started.

MR KEITH: Well, madam, I'm not sure. I heard Mr Hill saying that the conspiracy was an indictment -- was indicted for three men with others known and unknown, four bombers and others unknown and known.

LADY JUSTICE HALLETT: The charges presumably would have been X, Y and Z conspired with the four bombers and others between certain dates. Therefore the dates are relevant to the people on trial. It doesn't necessarily mean that is the extent of the dates of the conspiracy as alleged as a whole.

MR KEITH: Madam, as a matter of law, with respect, I agree. The one conspiracy is not determinative of the scope of the other. But in practice, if the prosecution allegation is that three men lent themselves to an existing conspiracy, the particulars in the indictment would ordinarily reflect the scope of the underlying

conspiracy, and that would seem to be supported by the 1 January nominal date.

I've got the indictment here in fact. Between 1 January 2004 they unlawfully and maliciously conspired together and with Khan, Tanweer, Lindsay and Hussain and with others unknown. So it appears that the conspiracy is drafted in a way that encompasses the wider conspiracy, rather than the mere conspiracy between the three defendants on trial.

LADY JUSTICE HALLETT: I think I'm going to have to beg to differ, Mr Keith, but I don't think it takes us anywhere.

MR KEITH: Madam, quite so.

Can I return then to the vexed position of intelligence?

Having emphasised the difficulties, may I attempt to draw the argument up the reverse side of the valley into the sunnier uplands by saying that, in our submission, the Secretary of State's arguments perhaps go too far in suggesting that there are insurmountable impediments? The reality is that we do know the broad nature of the manner in which Khan and Tanweer came to the attention of the Security Service. We do know of the meetings, of the transcript, the phonings, the car registration addresses and the material on the

databases.
The questions that I have shortly introduced do establish, in our submission, that there will be proper areas of enquiry which will go a significant way to answering the questions and which can be done.
LADY JUSTICE HALLETT: Can I ask you, if I were to accept that line of argument and to direct that it would be a legitimate area of exploration what the Security Services and the police -- obviously we'll just use the Security Services as a catch-all -- knew about the four bombers, but, more specifically, Khan and Tanweer, for these purposes, but anyway, let's say the four bombers, what meetings they knew of, what telephone calls or audio surveillance they knew of between certain dates, if all the material were then revealed -- and for all we know it already has been in the ISC report, but we don't know -- if all the material were then revealed, (a) do you see how that kind of exploration would offend the interests of national security, but (b) would that kind of investigation be sufficient to answer the questions?
Because Mr Garnham is saying that the minute we go down that line we've then got to look at, "But who else was Omar Khyam seeing, to what extent were the Intelligence Services committed to many other lines of

enquiry?" He argues you then go further down that path.
MR KEITH: Madam, the answer is, in the same way that there will be a range of practical difficulties, there will be a range of broad issues which can be explored and, therefore, I would respectfully depart from Mr Garnham's submission that, as soon as you get into the intelligence issue, the enquiry has to stop in factual terms. Because whilst, of course, there will be a limit on what a witness can say about the nature of the other comparative threats which impacted upon resources and the decision as to why C, D and E weren't pursued, it doesn't prevent the witness from saying in practice: look, we had other threats ongoing at the time, I can't tell you what they are in detail, but, as I've said, we had two possibilities of a ring of potential terrorists elsewhere in the country which were very close to fruition in the sense that there was intelligence suggesting they were very close to carrying out their criminal conspiracy.
Mr Garnham himself, in fact, in the course of his submissions, gave information about the heavy demands of surveillance, how many officers are required and the witness can say equally: we have a finite number of witnesses -- of surveillance officers, all, or 80 per cent of them, were engaged on other duties for

the following four months after that, it was impossible to change their operational duties and to bring them to bear in relation to C, D and E, and the threats were just one from other quarters, just one aspect. We also had an issue that we had to get on and deal with Operation Crevice. C, D and E were peripheral because they weren't present at the time of an operation to blow up Bluewater, as we then thought, but subsequently, it transpired that Khan was in the car but we didn't know that then, and, yes, it's possible that if we had known he was in the car, the reference to "operation" on the transcript at the time that he was in the car with Khyam might have made a difference.

But until we ask, we'll never know, madam.

LADY JUSTICE HALLETT: Thank you.

MR KEITH: So it follows from those submissions that with the procedural assistance of devices such as sitting in camera, screens, anonymity, a fashioned PII procedure, a substantial investigation is possible.

The intelligence material itself will vary in sensitivity. There are some areas where, with the goodwill of the Security Service, I have no doubt that material will be provided where in other legal circumstances, or legal fora, they might not have been provided, and to give you one example, even in control

order cases there are some levels of intelligence which are not provided even to Special Advocates. There are certain aspects of raw material where the Special Advocates themselves do not have full access, and where the intelligence presented -- and I don't wish myself to breach the legal obligations on myself concerning my role as Special Advocate, but there are corporate views expressed in a way that properly allow intelligence issues to be explored without necessarily having to get into the guts of the raw documents.

Now, of course, almost invariably there will be some enquiry of the raw intelligence material, but, as I've said, not always.

It's always open to a witness to say, "No, I can't answer that", or to say, "The answer is 'yes', but I can't give you the reasons why, or I can give you partial reasons".

To the rhetorical question, why should you engage in that process, when, as I've observed and accepted your factual enquiries will never be able to go as far as the ISC's because of the need for your process to be in public to greater extent, a greater or lesser extent, but predominantly in public and because of your need to give, if you sit without a jury, a narrative verdict, why should you undertake that process at all? The

answer we would give is it's a question of balancing the competing considerations.

The ISC, for its part, ex hypothesi -- that is on my hypothetical arguments -- failed to permit the families a proper role and failed to give due regard to the public scrutiny.

For your part, you will give greater emphasis and weight to those aspects, whilst perhaps not going as far into the detail, but one can only reach the conclusion that your process will be deficient or will fail or be impossible or unfair -- all of which are the points made by Mr Garnham, and understandably -- if you start on the premise that one issue -- which is the scope and extent of your factual enquiries -- is more important than the need to give due regard to the families and the public interest.

Therefore, in conclusion, we submit that the undoubted difficulties -- and they will be very severe difficulties -- should not lead you to rule that you will not conduct such an investigation.

The suggestion that you should stop now or that you should restrict yourself to a halfway house is a counsel of failure.

Madam, can I now turn to properly interested persons and survivors, and I can say that I'm reaching the end.

With respect to Mr O'Connor, we do not support the first part of his submissions in relation to whether or not survivors should be granted Rule 20(2) status, therefore empowered to examine witnesses. I'm bound to say, with respect -- and I hope you'll forgive me for saying this -- that I found it difficult to follow the submissions in relation to the need for them to be represented in order to give full weight both to their anticipated evidence and to the process by which that evidence is extracted.

He started on the premise that, on account of the perfectly understandable trauma, unless they were legally represented, there would be no opportunity to tease out with expert skills their full accounts, but asserted at the same time that they would be a major source of material for the examination of other witnesses. But we are unclear as to how that can be said in ignorance of what they might say, because, if the account has not been teased out, one cannot say that they will be a major source of material for examination.

It was said that Oury Clark and my learned friend have a headstart, but we do not know in what sense that assertion is made.

Secondly, the suggestion was made that only representation will enable the necessary information to

be extracted, but you may conclude that a very large number of witness statements have been taken by the Metropolitan Police Service already, who will no doubt, through their role as coroner's officers, continue to take statements, and there has been no proper suggestion that those statements have not been obtained properly, sufficiently and in detail by vastly capable and trained officers.

Thirdly, if there are difficulties with obtaining statements from survivors, then one must surely hope that it is within the ability of the inquest team to overcome those difficulties with the help of the Metropolitan Police Service and, if necessary, specialist assistance.

It was asserted that in some way the representation of survivors would allow examination of witnesses in a way that your counsel could not achieve because they have not been associated with the process of eliciting information from the survivors if such a process has occurred through their lawyers as opposed to through the Metropolitan Police.

Madam, I'll say nothing about the suggestion that your counsel will not fearlessly, fully and fairly explore every proper evidential issue and confine myself simply to observing that the material for examination of

witnesses will come from a wide variety of sources and a host of other material, and it is not clear to us why representation is needed in order to assess that other material.

It is absolutely part of our function to examine, collate and assemble all the other material to assist in examination of the witnesses that you deem it proper to call, and it is, therefore, you may think, not clear why representation of these survivors as opposed to all the survivors is necessary for us to discharge that role.

In relation to the fundamental legal issue, there is at least an argument that there is an entitlement to be represented through the rubric of Article 2, although it is an argument that, ultimately, in our written submissions, we invite you to reject.

The written submissions are contained at paragraphs 170 to 184 of our submissions. I'm not going to take you to them. There is, if I may simplify the submissions in this way, a fairly short answer.

If the enhanced Article 2 procedural obligation does not apply to the deceased, then it cannot apply to the survivors, because the claim through Article 2 by the survivors is made by them -- if I may delve into Latin -- qua survivors. It is made on account of their own interests rather than the interests of the deceased.

They do not wish to be represented because there are interests in relation to the deceased that they wish to put forward. They wish to be represented because of their own position as survivors, and the interests of survivors, although they are hugely important, must necessarily be less than the interests of the dead, because this is an inquest process.

Secondly, even if Article 2 did apply to the survivors, the requirements of Article 2 are flexible and I've already taken you to the passages in JL, in particular the speeches of Lord Phillips, paragraph 20, and Lord Brown at 102, where the point is made that death is a matter of particularly grave concern and this is an important distinction between death and serious injury.

3. The survivors are entitled to effective participation because they will be called as witnesses before you in a process that gives due weight to the roles of the families and public scrutiny, promptness and expedition.

Even if they had a Convention right to participate more fully, they could not get further than the rights set out in the Court of Appeal case of D, which was a near-suicide case and the issue arose as to whether there should be a public inquiry, in which the rights of

the claimant were held to include engagement in the process by way of the giving of evidence and the ability to make submissions as to scope and lines of inquiry, but expressly did not include the right to examine, and, therefore, one may properly conclude that Article 2 does not require a favourable invocation of Rule 20(2)(h). In any event, even if one puts to one side the issues of Article 2, there are a number of discretionary factors to which you may wish to have regard -- the reservations expressed by the families and, although not all families are of one view on this, there is a certain body which expresses concern about whether or not allowing survivors the same full procedural entitlements as the deceased may in some understandable humanitarian way derogate from their own role.

2. Their own interests must be connected in order to engage with Rule 20(2) with the death of the deceased as opposed to wider issues or their own important role in the events.

3. Some legitimate concerns have been raised in relation to whether or not, in fact, the issues of the survivors are identical to those of the deceased, and my learned friend referred twice to the expression "commonality of interest". It's notable that the judicial review proceedings in which claimants sought

a public inquiry were commenced by both deceased and survivors represented by Oury Clark and, amongst the legal arguments in support of the argument that there should be a public inquiry was an identification of the issues that they would wish to be explored.

Necessarily, there was, therefore, exact commonality of interest between all the claimants and they included, as I've said, survivors and deceased's relatives.

Lastly, there are certain practicalities in terms of duplication or extension of the length of these proceedings, if you were to accede to such applications.

May I also bring to your attention -- but I do so not as my primary point, but by way of a codicil -- the case of the Police Complaints Authority v Green. You will find it in your bundle at C2, tab 25.

The Police Complaints Authority v Green, madam, was a case that went to the Lords in which an issue arose as to whether or not a complainant, who said that a police officer had deliberately driven his car at him and seriously injured him, was entitled to become engaged in the process by which the Police Complaints Authority decided to supervise the investigation of the police officer and bring disciplinary proceedings against him, and the issue was whether or not the complainant victim was entitled, not just to be aware of the broad nature

of the investigation and what its outcome would be and how the process was to develop, but whether or not he could see all the witness statements and documents assembled in the course of the authority's investigation.

Lord Rodger in particular -- I'll just give you the note, it's at paragraph 71 -- made the point -- and the majority of their Lordships agreed -- that Articles 2 and 3 did not apply and did not therefore give the complainant a legal entitlement to disclosure of the evidence, and you may find that's of some analogous assistance here, but went on to conclude that there were concerns as to whether or not, if the complainant were to be given all the evidence, it would affect the credibility of his evidence when he came to give evidence himself.

Lord Rodger observed that, even an honest witness -- and of course, there's absolutely no suggestion any of the survivors are anything other than the most honest witnesses -- even an honest witness may suppress a genuine doubt about exactly what he saw or heard if he discovers that another witness is going to give evidence to certain effect.

Although it may plainly be said that the appalling trauma of these events is likely to have burnt the

recollection of the events of 7 July on their memories in a way that may not leave them open to any kind of movement in terms of their recollection, it would be terrible if there were to be any factual dispute if it were to be said against the survivors that, because they have seen all the evidence, that their credibility may be open to challenge. We would not wish that to happen.

May I finally turn to the other -- I'm sorry, not finally, there's the question of jury, but I can deal with that shortly. In relation to properly interested persons can I invite you to have regard to our written submissions at paragraph 160 onwards?

If I can summarise it in this way, madam, the majority of the bereaved have automatic designation under 20(2)(a) because they are parents, spouses, children or partners. We would invite to you grant them all.

In relation to siblings, we address their position at paragraphs 160 to 163. We observe that there's no automatic designation because, unlike the new Act which is not yet in force, the old Act doesn't provide automatically for siblings to be designated.

We have put out in our written submissions some of the features and the factors to which you may wish to pay regard, and we observe that you might have to make

enquiries as to whether or not such applicants wish to put forward matters or areas that are not already covered by their own relatives who already have designation, because that was a point that was made in Driscoll, but on balance, you may think it invidious to have to make the enquiries of those applicants as to why, on the particular and exceptional circumstances of these cases, they wish to be represented in addition to their own siblings or relatives -- not their siblings, their own relatives.

Therefore, we would invite you simply to grant the application for all the siblings because, in the general scheme of things, it seems to us that their own role will have a strong humanitarian effect, and can be justified on that basis, and will practically not lead to any extension in any real sense to your inquests.

In relation to the East London Bus Company, Mr Psaradakis, the driver of the number 30 bus, it's not clear to us that their application could be granted under 20(2)(d), which is the provision that they've sought to invoke. There's no suggestion that they were at fault in relation to the fact that one of the men boarded the number 30 bus. But in relation to 20(2)(h) we are unable to identify a real role for the East London Bus Company in terms of their operational

response and they're not subject to any criticism. So it's a matter entirely for your judgment, madam, but we are unable to assist you in relation to identifying positive grounds for granting their application.

The Metropolitan Police, City of London Police are entitled under 20(2)(g), as they had jurisdiction in their respective coronial areas. The West Yorkshire Police, as you've heard, have identified good reasons for partaking in these inquests in the way described by Ex parte Driscoll.

British Transport Police, London Fire Brigade, London Ambulance Service, Transport for London and Tube Lines, in our respectful submission, have also demonstrated reasons for playing a part over and above the giving of mere assistance to the inquests and the giving of evidence.

May I finally turn then to jury?

Madam, I've -- many of the points I make in relation to jury I've prefaced in the course of my answers to your questions.

Our submissions are contained in our written argument at paragraph 195 onwards.

There appears to be unanimity of view that 8(3)(c) doesn't apply. I won't detain you, madam, with explaining why RIDDOR is not applicable to the facts of

this case, or RIDDOR are not applicable to the facts of this case.

In relation to 8(3)(d) the matter is more vexed.

At paragraph 203, we've set out the legal principles. Perhaps I can summarise them in this way.

The provision applies only to circumstances the continuance or recurrence of which was preventible or to some extent controllable, Ex parte Peach. It's not necessary to have a causal link between the circumstances which are possibly continuing or recurring and which are prejudicial to the safety of the public and the deaths. That's Linnane.

The threshold for the prospect of recurrence is low. A possibility suffices. Paul at paragraph 32.

The court should assess the prejudice to the health and safety of the public at the time of the inquest, not at the time of the deaths, and if steps have been taken to ensure that there is no prospective risk, then the subsection is not engaged. Takoushis paragraph 64.

Finally, there is a distinction between systemic and individual failure which is a point which was considered by the Court of Appeal in Ex parte Wright which is at -- this is my final citation -- volume C1, tab 11.

LADY JUSTICE HALLETT: Sorry, name again?

MR KEITH: Ex parte Wright, madam, R v Her Majesty's Coroner

for Surrey, a decision of the Court of Appeal, Lord Justice Aldous and Lord Justice Brooke. The facts shortly was that the applicant was the mother of a man who died when his airway was blocked when he was recovering from an operation to the removal of his wisdom teeth. The issues that arose concerned whether or not the mask that had been worn had contributed to the death -- that was an oxygen mask -- and also as to whether or not there had been failings in relation to a monitor and also the management of the crash team that intervened to try to save his life. If you turn, madam, to page 59 of the report, it concerns the judgment of Lord Justice Aldous, at the bottom of the page. The coroner had concluded that there was no mandatory requirement for a jury because the issues that had arisen could not arguably have given rise to a continuance or possible recurrence of matters that were prejudicial to the health and safety of the public. At the penultimate paragraph, Lord Justice Aldous said: "I accept that a coroner could have come to a different conclusion to that reached by this coroner. However, we have to consider whether it is arguable that no reasonable coroner, properly directing himself to the

matters, could have come to the conclusion that he did. I, like the judge [the first instance judge] believe it cannot be said that the conclusion reached was Wednesbury unreasonable.

"It was also submitted that the judge applied the wrong test when he concluded that the difficulties in management were individual rather than a systemic failing. The statutory test concerned 'continuance or possible recurrence' and I do not believe the judge, by using the words he did, failed to apply himself to the correct test."

So the ratio is this: there may be aspects of the issues that properly arise which concern individual failings rather than systemic failings in a way that it can properly be deduced that they will not continue or possibly recur, because, of course, if they are individual failings, there will be no likelihood that they will.

LADY JUSTICE HALLETT: I am afraid you're going to have to say that again. My file was exploding, Mr Keith.

MR KEITH: Madam, yes. It's authority for the proposition that there may be individual failings rather than systemic failings, in relation to which you can properly conclude that there will be no continuing effect or possible recurrence because, if a failing is an

individual one, logically it's unlikely to arise again. In our submission, that section, subsection, does require an examination of the issues that arise in this case and whether or not they are systemic.

Paragraph 42 of the decision of Lady Justice Smith in Paul is binding authority for the proposition that you must have scope in mind when considering 8(3)(d), which, as we all know, mandates the calling of a jury, because the paragraph -- paragraph 42 -- makes plain from these words that the Divisional Court had both 8(3) and 8(4) in mind when they said that one must first consider scope, because her Ladyship said:

"In our view, the logical approach is for a coroner first to determine the scope of the inquest and only then to make a decision on the relevance and applicability of sections 8(3) and 8(4)."

Furthermore, on the facts of Paul, the surrounding events of which included the activities of the paparazzi, it's very hard to argue that scope did not also incorporate the acts of the paparazzi, even though the actual cause of death was the crashing of a car.

So if you apply that case by analogy to the present, we have real difficulty with the argument that, properly analysed, the circumstances which arise in this case can properly be limited to the simple -- and I don't mean

that in a general sense, but in a legal sense -- the simple act of explosion as to which a number of the interested parties then say there is no possibility of recurrence of a single act of explosion in this way and, therefore, 8(3)(d) is not triggered.

If, madam, you start to consider jury, it must of necessity be after you have concluded that there are issues to be considered as part of scope and, for all the reasons that we advocate, they will include any failings, if there have been such failings in the past, of the Security Service in failing to prevent the events of 7 July, if they did, and the role of the emergency response services.

They form part of the circumstances.

LADY JUSTICE HALLETT: So if I were persuaded to have an inquiry into preventability and role of the -- or response of the emergency services, how would you then expand the word "circumstances"?

MR KEITH: Madam, we would suggest that it's possible that, when one starts to dig into what the issues actually are, perhaps in the light of further time for reflection and perhaps further written submissions -- because although, again, if you'd allow me to commend him, Mr Gibbs attempted to address this issue by describing the circumstances as simply the act of killing and the

saving of life, you have heard very little argument as to how, if at all, the issues that the interested parties wish to raise impact upon the operation of 8(3)(d).

It may be -- I know not -- that, when we get down to it, the argument for the families is that the failing in relation to preventability was an individual failing rather than systemic one because --

LADY JUSTICE HALLETT: A judgment call.

MR KEITH: A judgment call.

LADY JUSTICE HALLETT: Whoever saw or didn't pay sufficient attention, it is said, to the material.

MR KEITH: Exactly. A judgment call in relation to the significance of C, D and E in the light of the meetings, if the meetings are the high point of their case. Of course, it may be -- and you've heard detailed submissions from my learned friends -- that the alleged failings go far wider than consideration of the events of March 2004. But if, on reflection, you can characterise what failings are said to have occurred as individual failings rather than system failings, two benefits may follow.

One is there will be a way round, to put it bluntly, 8(3)(d) in relation to preventability and, secondly, you may find that the proper nature of this issue is less

concerned with the much more difficult practical areas of resource and policy, all of which will tend to bring with them more difficult intelligence issues than the factual, understandable, common sense question of: was there a wrong assessment?

In relation to emergency response, we are unclear as to whether, when the interested parties raised the issue as being one of emergency response, they are concerned, not with whether or not the evidence will show that a particular loved one might have survived if medical attention had been given more promptly, but, rather, whether there were systemic failings on the part of the emergency services generally. We simply do not know.

But in that regard, madam, there are other complex issues to be addressed because you will know from the London Assembly report and the London Resilience Forum report, issues such as, for example, communications between the emergency services underground have been addressed in great depth and there may be a consequential argument that even if they might have occurred from the time of the deaths, there might be a recurrence judged from the time of the deaths, now, at the time of your inquest, there is not likely to be a recurrence, and, therefore, 8(3)(d) is not triggered.

By way of one example, I will be corrected if I'm

wrong, but I understand that the communications equipment used by the emergency services following the reports was replaced, certainly in relation to the police, and possibly in relation to the London Ambulance Service. I'm afraid I've misplaced my note in relation to the nature of that equipment. I think it was called TETRA.

Madam, you've heard very little on that issue and if I may say so, with respect, very little attempt to grapple with the requirements of 8(3)(d) in the submissions that you've heard.

You might, in our respectful submission, consider inviting written submissions, perhaps within seven days, from the parties in relation to their submissions as to whether or not a more precise examination of the likely issues and, in particular, whether reason to suspect that the circumstances will continue or possibly recur, might reveal a more clear view as to what their opinion is on 8(3)(d), and if it is to be argued that the circumstances before the events of 7 July, as well as those after, in terms of the emergency response, are likely to recur, or to continue, whether or not, certainly in relation to the emergency responses, but perhaps also in relation to the Security Service, steps have been taken between the events of 7 July and today

which reduce that risk.
Lest it be suggested that my attempt to invite you to adopt a course that narrows the issues in this way means that there will be no proper issues remaining for consideration, let me reject that possible suggestion. It's quite permissible for there to be a very significant examination as to whether or not there had been an individual flaw or flaws, without necessarily raising wider systemic issues.
Madam, those are our submissions.
LADY JUSTICE HALLETT: Thank you very much. Do you have any suggestions as to what we should do now?
MR O'CONNOR: Madam, I warned my learned friend that there is an issue I wish to mention now.
LADY JUSTICE HALLETT: Certainly, Mr O'Connor.
MR O'CONNOR: I hope you'll agree for good reason. May I just explain what it is?
LADY JUSTICE HALLETT: Of course.
MR KEITH: Could I, to answer, madam, your question about general -- I think Mr O'Connor raises a specific legal issue he wants to argue. Could I answer your question about the procedure for arguing that issue?
A number of the interested parties have indicated to me, madam, that they would wish to respond both on points that I have raised as well as points raised by

their learned friends.
Given that you have tomorrow available, it seems to me, with respect, invidious to go down the suggestion that I formally advance, which was simply not to hear those parties in relation to the points they wanted to raise, but could I invite you perhaps to impose a time limit on each of the parties, perhaps a quarter of an hour for the -- for those parties who have raised fewer arguments, and half an hour for the most significant of the interested parties, which would, of course, include the families and the Secretary of State, and perhaps the Metropolitan Police Service, so that everybody has an equal chance of being heard by you during the time that remains.
LADY JUSTICE HALLETT: Well, let's find out, just before we turn to Mr O'Connor -- Mr O'Connor apart from the issue -- actually, in all, how much time do you think you need to reply, if it is a reply, because this isn't a trial, but anyway?
MR O'CONNOR: Precisely. Madam, we actually have positively suggested some sort of guillotine mechanisms. This has to be manageable, we can't go round on a roundabout forever.
LADY JUSTICE HALLETT: Exactly.
MR O'CONNOR: We absolutely recognise that. We have

something which will be completed tonight in writing, and I will stay within whatever timetable you impose. Subject to the written submissions, if I was to go into them in depth, they would take significantly longer, but we will hand them in and distribute them and in terms of oral submissions we will be disciplined as you advise us.

LADY JUSTICE HALLETT: Mr Coltart, we started with you back on Monday morning. How long do you think would be reasonable to allow you to reply, given that I do have to, I'm afraid now, start becoming rather strict?

MR COLTART: If I was completely unconstrained -- if I was -- I suspect, in fact, it would take me nearly an hour to respond to the various points which have been made primarily by the Secretary of State and some by Mr Keith.

I recognise that that might be unrealistic.

If I was given half an hour or, pushing my luck, 45 minutes, I would obviously do everything that I can, with work overnight, to make those submissions as succinct as possible.

LADY JUSTICE HALLETT: Whatever limits I impose, Mr Coltart, if there are matters that you genuinely believe have not been properly covered by the time I rise tomorrow, then I am perfectly prepared to receive written submissions,

but they would have to be with me within a very short period of time, because obviously I'm going to start my deliberations very soon.

MR COLTART: Yes, of course. I respectfully recognise that. I do also adopt Mr Keith's suggestion that it might be possible to afford some of the parties who have raised more significant issues slightly longer than some of the parties who have raised more discrete matters. I would invite you to set any guillotine timetable accordingly.

LADY JUSTICE HALLETT: Right. Mr Patterson, do I take it you, too, wish to make further submissions?

MR PATTERSON: Possibly it wouldn't take long. Might I ask for something of the order of 20 minutes, and if it's likely to take longer I'll submit something in addition in writing?

LADY JUSTICE HALLETT: Mr Saunders?

MR SAUNDERS: I'll be less.

LADY JUSTICE HALLETT: We are now talking about a number of submissions which are, for the most part, going down the same kind of line.

MR SAUNDERS: Exactly. Can I help you with this: that most of my learned friends and I have been discussing, as the days have gone by. I know what both Mr Coltart and Mr Patterson have in mind and I'm hoping I will be very

short.
LADY JUSTICE HALLETT: Ms Sheff?
MS SHEFF: I'm in a very similar position, madam, in that we've all had conversations concerning all these issues, and I think my submissions could well be incorporated in those put forward by Mr Coltart and Mr Patterson and, indeed, Mr O'Connor.
LADY JUSTICE HALLETT: Thank you.
Mr Garnham I'm going to come to you next, because obviously you're the most significant player, as it were, the other side of fence. How long do you believe you would require to do justice?
MR GARNHAM: 20 minutes.
LADY JUSTICE HALLETT: Thank you. Mr Hill, do you have much more to add?
MR HILL: No. If you would allow 15 minutes, I may or may not take that up.
LADY JUSTICE HALLETT: Right. Mr Skelt?
MR SKELT: I'll reflect on it overnight, madam, but I'm not presently intending to reply at all. There is a discrete issue which I would appreciate dealing with before we rise this evening.
LADY JUSTICE HALLETT: Yes, we have to deal with the letter, don't we, before I go?
MR SKELT: Yes.

LADY JUSTICE HALLETT: If I appear to be walking out, stop me.
MR SKELT: I will, thank you.
LADY JUSTICE HALLETT: May I take it that the other parties don't wish to reply? Those that were succinct this morning? Ah, Mr Gibbs?
MR GIBBS: I will have nothing to add, I think, and I hope you will forgive me if someone else is representing the force tomorrow.
MS SIMCOCK: Likewise, madam.
MS BOYD: Likewise.
MR MORTON: I'm the same.
LADY JUSTICE HALLETT: I think, gentlemen and ladies, those who do wish to reply can work on the basis that Mr Coltart and Mr O'Connor, we will see how far we can get in half an hour each, but it may be that I can allow you a little more leeway when we see how things pan out tomorrow morning.
MR COLTART: Thank you.
LADY JUSTICE HALLETT: Anybody else I think I'm going to have to restrict to 15 minutes, save for, obviously, Mr Garnham who must be entitled to half an hour, if he requires it, and possibly even more, if he requires it. Right, now, Mr O'Connor, we need to deal with -- or shall we deal with the letter first and get that out of

the way?
MR O'CONNOR: I'm sure a letter is preferable to what I'm going to have to say.
LADY JUSTICE HALLETT: Right, the letter, Mr Skelt, what are we going to do about it?
Further discussion re fingerprint letter
MR SKELT: Yes, madam. The position has been reached -- I've had the advantage of dealing with my learned friend Mr Keith's first junior over the course of the day. It seems, I think, to both West Yorkshire Police and those representing you, as it were, madam, that there's a happy course whereby the letter can be disclosed in an appropriately redacted form, so as, lest there be any confusion about it, to remove personal data, which I think is probably an appropriate phrase, together with ISC source material, or references to ISC source material, whilst of course accepting that those redactions have to be reviewed as the matter progresses and directions and decisions are made regarding that type of material in general.
But we have redacted and obviously redacted a letter, and that being said -- and I assume and anticipate the matter is agreed -- that could then be disclosed.
LADY JUSTICE HALLETT: Well, I'm prepared to allow

disclosure in that form, but I want it to be known this is not setting any kind of precedent.

MR SKELT: Quite.

LADY JUSTICE HALLETT: I am not, at this time of day, being addressed on the principle as to whether or not everybody is entitled to every document that's put before me and, therefore, I am prepared to go along the path as long as the parties are happy, but this is not setting a precedent. Next time, if there is a next time, I will wish to hear full argument.

MR SKELT: Yes. Can I make it plain that this is, as it were, a pragmatic solution to a problem that has arisen within this context.

LADY JUSTICE HALLETT: Thank you very much.

Right, so is that dealing with the letter, Mr Keith, you're content?

MR KEITH: Yes, thank you. If I may say so, I entirely agree, because it does raise wider issues about whose duty it is to disclose and whether or not these documents are covered by the confidentiality undertaking, and those two matters raise much wider issues than may be apparent from the disclosure of this single issue.

LADY JUSTICE HALLETT: Exactly.

Right. Yes, Mr O'Connor?

Discussion re new powers

MR O'CONNOR: Madam, you will rapidly see how much more attractive the letter point is than what I'm going to have to say.

It's really with your leave, madam, tomorrow, we will be mentioning, at the very least in writing, an issue which may need careful thought by you and your team and by all my learned friends, and if I don't mention it now, it may threaten having a neat conclusion, as it were, as much as we can tomorrow.

It really relates to Mr Garnham's submissions, as he used the phrase, that there is really no way for him to pull the plug, as can happen in criminal proceedings, and that when -- if and when confronted with any adverse PII ruling from you, madam, then there's no way out and the proceedings will be facing a brick wall and this is a fundamental problem which we have to face now.

All I'm going to do is point the way and alert everyone to some legislation which actually is intended precisely to address this situation.

There are various problems and complexities about it, so all I'm going to do is set it out.

These issues were hotly debated in Parliament over the last year or so.

I'm talking of the Coroners and Justice Act 2009,

section 11 and schedule 1, paragraph 3, under which the Lord Chancellor can request a coroner to suspend an investigation -- I say "investigation" and unless there is an exceptional reason, the coroner is duty-bound to suspend the investigation or the inquest, and this arises where an inquiry under the Inquiries Act 2005 is set up to cover the same issues, the whole point being that under the Inquiries Act, first of all, there is no jury and, secondly, there can be in camera hearings and, thirdly, there can be ex parte hearings excluding some of the interested parties.

Paragraph 5 of schedule 1 also gives a general power to suspend.

There is a question about whether an inquest is an investigation. Section 6 seems to include an inquest with an investigation.

LADY JUSTICE HALLETT: Are all these sections and schedules in force?

MR O'CONNOR: That's the very next point I'm going to come to. They're not, but can I just put that in block first, drawing everyone's attention to it, to see if it can possibly apply in principle?

Secondly, section 11 and, therefore, those parts of the schedule 1, are not in effect yet. They will come into effect on days to be appointed by the

Lord Chancellor. That is section 182(4).
But if one looks at section 177(3) to (5) there is a reading of those provisions whereby the Lord Chancellor by transitional provisions can by statutory instrument make section 11 apply to ongoing inquests or investigations.
The potential conclusion therefore is that at the whim of the executive, a statutory instrument could bring these provisions into effect so as to enable -- well, practically oblige you on a request to suspend this inquest so that there is an inquiry with those "advantages", or disadvantages as one may put them.
LADY JUSTICE HALLETT: The transitional provisions in section 177 are in force, are they?
MR O'CONNOR: Well, whether the -- I can certainly look at that. We'll look at that.
Madam, since the whole thing can be brought into effect by statutory instrument at the whim of the Lord Chancellor, then the transitional provisions can be brought into effect at the same time. So it makes no difference. The whole thing --
LADY JUSTICE HALLETT: I think you need the statutory power first before you can have the subordinate legislation power in force.
MR O'CONNOR: No, the statutory power is -- under

sections 182 and 177, is by statutory instrument, to bring in the commencement and the transitional provision. So there is the statutory power.

LADY JUSTICE HALLETT: Anyway, I see why you prefaced your remarks by what you did, Mr O'Connor.

MR O'CONNOR: Madam, yes, it's not a billet-doux, madam, I'm afraid. All I ask is -- there may well be an answer to this that it doesn't apply, but -- and this is my separate and third point -- this whole controversy arose because of a stalled public interest immunity RIPA issue in an inquest into a police shooting death called Rodney, which has been stalled since 2005.

Proposals were placed before Parliament to enable coroners' inquests to sit in private and ex parte, et cetera. They were the subject of all sorts of headlines, great hostility in the House of Lords, they failed and so these provisions were the way in which the government got round the House of Lords' hostility.

Now, what has actually happened in the Rodney inquest, four weeks ago, is that, not under these provisions at all, but simply under the Inquiries Act, an inquiry was set up with all the powers to sit in secret and exclude, et cetera, and thus, again, that -- and with none of these transitional or commencement difficulties whatsoever, I'm just raising this so it can

be considered -- is a quite separate potential way in which, if and when faced with insuperable difficulties of the kind feared, it is perfectly possible for there to be a way around it, if there is the will, but of course it is at the whim of the executive whether indeed to set up such an inquiry.

LADY JUSTICE HALLETT: The case you referred to, that is an inquest or was an inquest until the inquiry was set up, an inquest under the new Act?

MR O'CONNOR: No, it's not, because the new Act is not in effect. What actually happened is a far more straightforward and direct thing, that in the discretion of the coroner, because of the setting up of the inquiry, which could be effective, the coroner simply, under current discretionary powers, adjourned the inquest because the inquiry was going to be set up. Now, that --

LADY JUSTICE HALLETT: That would have been an inquest started under the old legislation as we are.

MR O'CONNOR: Correct. That's why this is highly relevant. Even if there are all sorts of issues and problems over the 2009 Act, this is a live route -- which I just ask my learned friends to consider -- by which, if there really is a genuine, bona fide goodwill with the Security Services to have an effective investigation

into this, by which that could be achieved, and, madam, my fourth point again -- I'm afraid this may well need much more thinking about than I've given to it -- that one option then is that you have an inquest into the circumstances of the deaths and aftermath and a 2005 Act inquiry into preventability in order to overcome any -- and I'm not conceding that we can see them now at all -- but any forthcoming insuperable confidentiality issues.

LADY JUSTICE HALLETT: Mr O'Connor, the fourth day of legal submissions you raise this new animal, part inquiry/part inquest. Is there any particular reason why it's taken quite so long?

MR O'CONNOR: Yes, there is, because it's on the third day that we hear explained on behalf of the Security Services this can't conceivably work. So overnight, we have thought about it and it's really Mr Garnham who has raised -- we submit it's vastly premature -- an in terrorem brick wall. It's not a brick wall. There are ways around it potentially.

MR KEITH: Madam, can I say that we are aware of the Rodney inquest. The coroner declined to resume, or refused to resume, because of an insuperable difficulty about the receipt of intelligence material, the receipt of which is absolutely banned by law in the way that I've described. We will look at the provision. We will give

this important point our consideration overnight. But we do note immediately that it is only of any relevance at all if you decide not to resume. If you decide that there is an insuperable difficulty and every single submission that you have heard is to be operated on the basis, or to be answered on the basis that you take no further steps.

LADY JUSTICE HALLETT: Thank you very much.

Is there anything else we can conveniently deal with this evening?

Should I sit any earlier than 10.15, or are we confident that 10.15 will suffice?

Mr Garnham, you look as if you have something to add?

MR GARNHAM: No, only that I ought, I'm sure, to be in a position where this is the only piece of work I'm doing at the moment, and 10.15 would be splendid and I would just urge you not to start before 10.15.

LADY JUSTICE HALLETT: Very well. Just remember that, Mr Garnham, when you're preparing your submissions.

MR GARNHAM: Yes, I will not be allowed to forget it, I suspect.

LADY JUSTICE HALLETT: 10.15, thank you.

(4.32 pm)

(The case adjourned until 10.15 am the following day)

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