

Coroner's Inquests into the London Bombings of 7 July 2005
Pre-Inquest Proceedings - 30 April 2010 - Morning session

1 Friday, 30 April 2010

2 (10.15 am)

3 LADY JUSTICE HALLETT: Yes, Mr Coltart?

4 Submissions by MR COLTART

5 MR COLTART: Madam, can I say in preparing my final
6 submissions overnight, I have borne very firmly in mind
7 the timetable which we discussed yesterday evening.
8 Whilst there is the possibility that I might sneak
9 over the 30-minute limit, subject, of course, to your
10 direction, madam, that was identified yesterday, that
11 would only be because through discussion with my learned
12 friends who represent the other families -- save for
13 Mr O'Connor, with whom I've not engaged in discussion on
14 this topic -- they may be correspondingly a little less
15 time than was identified yesterday. So overall the
16 timetable remains the same, and I hope that's acceptable
17 as we proceed this morning.

18 LADY JUSTICE HALLETT: I think the expression is "I hear
19 what you say", Mr Coltart.

20 MR COLTART: I'm very grateful, thank you.

21 I'm going to deal almost exclusively with the
22 applicability of the Osman principle to these
23 proceedings -- in other words, the legal argument that
24 Mr Garnham has identified -- followed by the application
25 of that principle -- because I say, of course, it does

1 arise -- to the facts of this particular case.
2 In a minute, starting with Mr Garnham's argument,
3 I'm going to provide a working example of the principle
4 in action, and using that as a foundation, I'm going to
5 seek to illustrate why I say Mr Garnham's analysis of
6 the position in law is wrong. Having done so, I'm going
7 to attempt to formulate how the class of identifiable
8 victims arises in so-called general public cases such as
9 Mastramatteo, and then seek to apply that principle to
10 the facts of this case.
11 Now, the work example is not in any sense intended
12 to be facetious but it's necessarily extreme in order to
13 illustrate the principle under consideration. It's 4.55
14 on a hot Friday afternoon in south London. PC Smith is
15 manning the front desk at Clapham police station. He's
16 staring at the clock, waiting for 5 o'clock, when he's
17 due to knock off and go round the corner to the
18 Dog & Duck with a few of the lads from work.
19 The phone rings. An agitated, anonymous caller
20 tells him that just round the corner, at number 30
21 Acacia Avenue, is a man by the name of Mr Jones. Jones
22 has assembled a homemade explosive device which he is
23 planning to deploy in a suicide attack.
24 The caller knows that the attack is due to take
25 place in the near future but doesn't know where or when.

1 PC Smith puts the phone down. He knows what he should
2 do, which is immediately notify his superiors, the
3 firearms squad, the bomb squad and assemble a team to go
4 and arrest Mr Jones at 30 Acacia Avenue. But that looks
5 like a lot of hard work and he's very hot and thirsty.
6 So he persuades himself this can, in fact, wait until
7 Monday and he goes to the pub. The next day, in
8 Bicester shopping centre, near Oxford, Mr Jones blows
9 himself up and kills ten other people in the process.
10 Now, Mr Garnham's position is that in those
11 circumstances the Osman principle does not arise. In
12 other words, the police were under no duty to take
13 preventive action because they had no information as to
14 where or when Mr Jones was proposing to blow himself up.
15 Now, in my respectful submission, common sense
16 dictates that that must be nonsense. It's difficult to
17 conceive of a more blatant failing on the part of the
18 state to protect life. So the issue is: what is the
19 flaw in his argument and how does it arise?
20 I suggest that the key to identifying the flaw is to
21 appreciate that the Osman principle can be engaged in
22 a number of different ways. In relation to bomb
23 attacks, it is engaged, I suggest, in primarily one of
24 two ways which, for ease of convenience, I'm going to
25 refer to as category 1 cases and category 2 cases.

1 In category 1 cases, Osman is engaged by virtue of
2 the police having information as to the time and
3 location of the blast itself. Plainly, that gives rise
4 to a duty to protect the public from that bomb blast and
5 that will involve preventive measures of a certain type,
6 such as disabling the device and/or evacuating the
7 premises in question.

8 In category 2 cases, the Osman principle arises
9 through the police having information not about the time
10 and location of the blast but about the bomber himself.
11 This equally gives rise to a duty to protect but is
12 susceptible to different types of preventive measure,
13 for example arresting the bomber.

14 Now, in my submission, one can see, on that
15 analysis, where the Secretary of State's assessment of
16 the position has gone wrong. In insisting that the
17 Osman principle can only be engaged if details as to
18 time and location are known, he has only taken account
19 of category 1 type cases, and that is, I suggest, why he
20 has no sensible answer to my example involving the
21 hapless PC Smith, because that is a category 2 type
22 case.

23 LADY JUSTICE HALLETT: Which you say is a Mastramatteo case.

24 MR COLTART: It is. I'll come on to say a bit more about
25 that in a moment or two but Mastramatteo was plainly

1 a category 2-type case.

2 So in the PC Smith case, the police have no idea

3 where and when the device is to be detonated but that

4 doesn't mean either that the attack cannot be prevented

5 or that Osman isn't engaged. There is a duty, at least,

6 to try to prevent the impending attack and the answer is

7 you eliminate the problem at source by arresting

8 Mr Jones. In that way, you take the issues of timing

9 and location completely out of the picture. They're

10 irrelevant.

11 Using that analysis, can I invite you, madam, to

12 turn to the question of the class of identifiable

13 victims in each category.

14 In category 1 cases, the class of identifiable

15 victims is those people who, absent any preventive

16 measures, will be killed when the bomb goes off in that

17 particular location and at that particular time. In

18 other words, the class of identifiable victims attaches

19 to the time and location of the bombing. They are the

20 people in respect of whom Osman is engaged. They are

21 the people who could rightly claim a breach of Article 2

22 if the police fail to act on information.

23 In category 2 type cases, the identifiable class of

24 victims are those who, absent appropriate preventive

25 measures, the bomber will kill when he detonates his

1 bomb, whenever and wherever that may be. In other
2 words, the class of identifiable victim attaches not to
3 time and location -- which are unknown -- but to the
4 bomber himself instead and the police owe a duty to
5 those people by taking out the bomber.

6 This raises the further issue of at what point the
7 Osman principle -- assuming it applies to both
8 categories of cases -- becomes disengaged, because
9 plainly I accept that there is no absolute obligation to
10 protect, nor is it possible to keep people under
11 surveillance all of the time or rather to keep everybody
12 under surveillance all of the time. There must be
13 a cutoff point in terms of engagement of principle.

14 In my submission, that point arises when the class
15 of identifiable victims in either category is no longer
16 reasonably capable of identification, and in both
17 categories the clarity with which the class of victims
18 can be identified is dependent upon the quality of the
19 information available.

20 So in category 1 cases, the degree to which the
21 class of victims can be identified depends upon the
22 information available as to time and location of the
23 bombing, and in relation to category 2 cases, I suggest
24 that the ability to identify the class of potential
25 victims depends upon (a) the ease with which the

1 putative bomber can be identified and (b) the extent to
2 which his intentions can be ascertained. The more
3 information the police may have about who he is and what
4 he might be planning, the easier it is to protect those
5 people who would otherwise be affected by his actions.
6 But in both categories, there is, I suggest,
7 a minimum level of information required to engage the
8 principle beneath which it's not reasonable to claim
9 that the potential class of victims could be identified.
10 In other words, by that point, it's not reasonable to
11 have expected the police to have done anything about the
12 supposed threat.

13 Can I seek to apply that analysis to the facts of
14 our case? I suggest it has an effect in a number of
15 different ways, the first of which is that the Osman
16 principle is plainly capable of engagement. This is
17 a category 2 type case.

18 The Security Service had some information about the
19 identity and the possible intentions of our bombers even
20 if they had no details at an early stage or were not
21 able to ascertain details at an early stage of where or
22 when the bombings might ultimately be carried out, and
23 I suggest the duty at that stage was properly to analyse
24 the information which was already available to them and,
25 once that information had been analysed, to investigate

1 the position further. I'll come on and deal with some
2 of the factual submissions underpinning that observation
3 shortly if I may.

4 LADY JUSTICE HALLETT: Before you do, are you suggesting
5 a failing in the system or are you suggesting a failing
6 in the judgment call?

7 MR COLTART: Both. There were failings in the system in the
8 sense that database checks failed to reveal what was
9 stored either on the Security Service's own database or
10 on the database of West Yorkshire Police at West
11 Yorkshire Police Special Branch, for example, and
12 individual judgment failings based on the analysis of
13 the various meetings which took place, assuming that the
14 ISC conclusions reflect the explanations which were
15 given to them at the time.

16 LADY JUSTICE HALLETT: Sorry, why do you say that the
17 database check failings are systemic as opposed to
18 individual?

19 MR COLTART: I'm perfectly prepared to accept, for the
20 purposes possibly of a different argument, that they
21 were individual failings rather than systemic.

22 LADY JUSTICE HALLETT: I just wondered, do we have any
23 material that shows us that we are talking systemic
24 rather than individual as far as this aspect is
25 concerned?

1 MR COLTART: There was, from recollection -- I can check the
2 cross-reference in the ISC report -- some reference to
3 IT failings, for example, and the nature of the IT
4 infrastructure which was in place. I've listed, at the
5 end of the relevant chapter in my original submissions,
6 what I've described as the systemic failings. It may be
7 possible, on proper analysis, to describe each of those
8 in individual terms.

9 In a sense, for my part, it matters not. I'm not
10 concerned with the labels as such and indeed, as
11 Mr Keith points out in his response to my written
12 submissions, Lord Bingham identified the extent to which
13 there is often an overlap in any event between
14 individual and systemic failings. It might be useful if
15 between us we were to dig out the reference for you in
16 relation to that. I'm sure we can. I think it was in
17 Middleton. The industry to my right suggests that that
18 exercise is already in hand.

19 LADY JUSTICE HALLETT: Right, sorry, I interrupted you.

20 MR COLTART: Paragraph 47 in Middleton. In fact, contrary,
21 sadly, to the way in which I framed this point in my
22 written submissions, he specifically urged caution in
23 trying to identify separately individual and systemic
24 failings and often it is a combination of the two.
25 I have indicated that in my submission the principle

1 is engaged and outlined in very brief terms what should
2 have been done. If that action had been taken -- either
3 to join up the dots already in the possession of the
4 Security Service or to conduct further enquiries, as
5 I suggest they were under an obligation to do -- then
6 either in due course the details as to time and location
7 of the bombings would, or at least might, have become
8 known -- in other words, turning this into a category 1
9 case -- or, even if it had, at all times, remained
10 a category 2 case, sufficient information and evidence
11 could have been collated in order to take preventive
12 preemptive action.

13 I'm going to go on to deal with the next point in
14 this list as to how the principles affect the facts but
15 before I do, can I just diverge a little to deal with
16 the issue which Mr Hill raised yesterday about the
17 relevance and significance of the indictment and the way
18 in which matters were put in the criminal trial.

19 The point he seeks to make, as I understand it,
20 through that analysis is that there was no suggestion
21 in February or March of 2004 that the plot eventually
22 involving the July bombers and, as was said in the
23 criminal proceedings, Ullah and the other defendants,
24 was not, in any sense, crystallised by that time. He
25 invites you either to give no weight to the events

1 of February/March 2004 for present purposes or, at the
2 very least, to reduce the weight which might be accorded
3 to those events accordingly.

4 I suggest that there's no need whatsoever for you to
5 be satisfied that the specifics of that plan had been
6 crystallised by February or March 2004 in order properly
7 to infer -- as indeed it was open to the
8 Security Service to infer -- that MSK and ST had, by
9 that stage, already formed a commitment to taking life,
10 even if at this stage you have to go that far.

11 Plainly the details of the July bombings were formed
12 at a late stage in the proceedings. Even during the
13 course of the indictment period as finally settled,
14 when, on the Crown's case, during that period an
15 agreement to kill had already been formed through the
16 conspiracy to cause explosion, the location of the
17 bombing hadn't been settled upon. If it had been, there
18 would have been no need for the reconnaissance trip on
19 16 December, which took in a variety of landmarks --
20 London Eye, Natural History Museum and so on.

21 So in assessing whether or not there is a real and
22 immediate risk to life, it will suffice, in my
23 submission, if the suspect has evinced, at its highest,
24 an intention or an inclination to take life as and when
25 the opportunity arises.

1 LADY JUSTICE HALLETT: That's incredibly broad.

2 MR COLTART: It is, and I'm going to go on to qualify it, if
3 I may.

4 The greater the level of discernible commitment or
5 the greater the level of apparent preparedness to put
6 a plan into effect, the more immediate the risk and the
7 greater the duty to intervene. So of course, as ever
8 with this case, there is a sliding scale which has to be
9 considered, and at some point you will fall far enough
10 down that sliding scale that the principle is
11 disengaged. But it's not necessary to be up the top end
12 of it, where Mr Hill, I respectfully suggest, was
13 seeking to place the court yesterday.

14 In support of my submission, I respectfully remind
15 the court that the definition of "real and immediate
16 risk" is "present and continuing". So it is not defined
17 by or arguably even circumscribed by purely temporal
18 factors. Other matters can be taken into account as
19 well, including a suspect's apparent commitment to
20 taking life.

21 LADY JUSTICE HALLETT: Why doesn't "immediate" or "imminent"
22 mean "about to happen" and therefore impose a temporal
23 restriction?

24 MR COLTART: I respectfully suggest it can mean that
25 because, on one reading, those are the ordinary, natural

1 interpretation of the words. But the way in which the
2 courts have interpreted it is in a wider sense, as
3 explained in Officer L, and it's been given a specific
4 meaning of a present and continuing threat.

5 So whilst it can mean "about to happen", it doesn't
6 necessarily have to do so, because, if it did, arguably
7 the duty to intervene would only arise right at the last
8 minute. So if one takes the facts of Operation Crevice,
9 for example, whilst, yes, the police did wait as long as
10 they thought they respectably could in order to have
11 a sufficient evidential foundation for the arrests, they
12 didn't wait right up until the last possible minute --
13 for obvious reasons, the dangers which might be
14 involved -- but that isn't to say that the duty wouldn't
15 have been engaged if, in fact, the arrests hadn't been
16 effected at the time that they were.

17 Of course, the duty to take preventive measures in
18 a category 2 type case like this one, doesn't
19 necessarily or automatically mean the duty to arrest.
20 It can be a duty to undertake further investigations.
21 Can I give you an example in relation to "immediate"
22 from a completely different context? If, for example,
23 one considers duress cases, there's an authority with
24 which I know that Mr Keith is very familiar of another
25 case that we've been involved in where "immediate", in

1 the context of responding to an immediate threat to life
2 and limb for the purposes of duress or necessity, can in
3 fact be a longer period of time than literally about to
4 happen right in front of you. There is a case, the name
5 of which escapes me but we could always obtain it if it
6 became necessary, of a hijacking where the defendants in
7 that case were able to plead duress or necessity even in
8 circumstances that the hijack took place over some
9 period of time and covered a number of different
10 jurisdictions. It's the Stansted case. I'm very
11 grateful to Mr Keith.

12 Now, whether any of that line of authority is of
13 meaningful assistance may be questionable. It's not
14 dealing with the breach of Article 2 rights or the test
15 which applies here. We do have the particular way in
16 which it's been articulated in Officer L, and in my
17 submission, it's capable of bearing a broad
18 interpretation and it's not limited to what is
19 immediately about to happen next.

20 LADY JUSTICE HALLETT: When do you say I should be looking
21 at whether or not there was a present and continuing
22 threat?

23 MR COLTART: Certainly at the latest, from the time that the
24 arrests in Crevice had been effected. In other words,
25 once that whole sequence of meetings had been observed

1 and MI5 were in possession of a significant amount of
2 information -- which they actually knew falls within
3 their constructive knowledge in the sense that it was
4 all stored on their system but perhaps the dots weren't
5 joined up -- by that stage and for the reasons which I'm
6 going to go on to in a moment, because I am going to
7 deal specifically with this issue, there was sufficient
8 to have inferred that these two men -- Tanweer and
9 Khan -- posed, for the purposes of the Osman test,
10 a real and immediate risk to life in the sense that they
11 were committed to murderous activities which were likely
12 at some point to come to fruition.

13 LADY JUSTICE HALLETT: So basically you're saying
14 by March 2004?

15 MR COLTART: By March 2004, there was a duty to undertake
16 further investigation, whether immediately -- although
17 I accept that might not have been practicable because --
18 forgive me --

19 LADY JUSTICE HALLETT: Sorry, my question is: are you saying
20 by March 2004 there was a present and continuing threat?

21 MR COLTART: For the purposes of the definition in
22 Officer L, yes, I am.

23 LADY JUSTICE HALLETT: Thank you.

24 MR COLTART: Can I explain why I say that?

25 Your attention has been drawn to a number of the

1 relevant cases, such as Osman, Van Colle, Mastramatteo,
2 and some invitation has been extended to you to contrast
3 the facts of those cases to illustrate how high the bar
4 is set in terms of satisfying the Osman test. In my
5 submission, there are a number of things which can be
6 said about that and about why there was a present and
7 continuing threat from these men as early as that time.
8 The first is this: that terrorism cases, by their
9 very nature, fall into a different bracket from other
10 Osman-type cases such as those I've mentioned. In those
11 cases, death is sometimes either the byproduct of other
12 criminal activity, as it was in Mastramatteo, or nobody
13 could reasonably have appreciated that an individual who
14 was behaving oddly or aggressively would move to the
15 next level and kill, and one can contrast that
16 immediately with terrorist cases where the whole purpose
17 of the criminal activity is to kill.
18 The second point upon which I rely is the particular
19 nature of the terrorist group with which we are
20 concerned. We're not dealing here with the Animal
21 Liberation Front. This was Al-Qaeda, which specialises
22 in spectacular suicide attacks, mass murder attacks. No
23 criminal activity, in my submission, could pose
24 a greater threat to life or limb.
25 One has to look at the context of the contact that

1 these men had with others in February or March 2004, the
2 timing, the duration, the circumstances of those
3 meetings and who they met, and there is a reasonable
4 inference that they were part of the inner circle and
5 that they had knowledge of and were fully supportive of
6 the murderous plot that was Operation Crevise.

7 One has to take into account the other information
8 which the Security Service had in its possession but in
9 respect of which it failed to join up the dots: MSK's
10 association with another known extremist the year
11 before, part of an MI5 surveillance operation; the
12 connection between a storage facility for Omar Khyam and
13 an address associated with MSK, and I've received no
14 response to my request for further disclosure in
15 relation to that issue; photographs of Mohammed
16 Sidique Khan at a terrorist training camp in Yorkshire
17 in 2001, or links with an extremist bookshop which he
18 had on the Bude Road in Leeds.

19 LADY JUSTICE HALLETT: Extremist bookshop which ...?

20 MR COLTART: He had links with. Do you remember there was
21 telephone contact recorded between him and Mohammed
22 Qayum Khan?

23 LADY JUSTICE HALLETT: I just hadn't heard exactly what you
24 had said.

25 MR COLTART: Yes. So for all those reasons I say that you

1 can infer a real and continuing danger to life by that
2 time but even if I'm wrong about that, I suggest that in
3 all the circumstances it was reasonable and there was
4 a duty to carry out further enquiries at that stage
5 which of themselves would have elicited the information
6 necessary to meet that test.

7 There's the legal point about the Bingham/Phillips
8 difference of approach. We say the majority of the
9 House in that case was with Lord Bingham.

10 So in summary, we submit there is plainly enough to
11 make a case to answer, at this stage, on arguable breach
12 and if so, I respectfully urge the court to take great
13 caution in placing too much emphasis on the explanation
14 from MI5 that has yet to be properly tested. By way of
15 crude analogy, can I say that this is not a dissimilar
16 situation from a criminal trial, if one were to assume
17 that MI5 was in the dock, there was a prima facie case
18 for them to answer but in respect of which they had
19 provided an explanation in interview, but that
20 explanation does not fall to be taken at face value.

21 The proper place for it is to be tested in evidence and
22 indeed that is the whole point of having an Article 2
23 compliant hearing.

24 Madam, those are my primary submissions on the main
25 point I wished to cover this morning. I have five

1 minutes at most, I hope, if permitted, to deal with one
2 or two other issues.

3 LADY JUSTICE HALLETT: Certainly.

4 MR COLTART: Thank you. The first is in relation to the
5 satisfaction of the procedural obligation.

6 Can I again urge caution in relation to the
7 Secretary of State's submissions on the effect of JL for
8 the purpose of discharging the investigative duty? JL
9 was the case about attempted suicide in custody.

10 Can I just read the first line of the first speech from
11 their Lordships in the House in this case. It's
12 Lord Phillips, paragraph 1:

13 "This appeal raises the question of the nature of
14 the investigation that must be carried out by the state
15 whenever a prisoner in custody makes an attempt to
16 commit suicide that nearly succeeds and which leaves him
17 with a serious injury."

18 The issue in that case was whether or not the Home
19 Secretary was under an obligation to order a public
20 inquiry every time a prisoner in custody attempted to
21 commit suicide and, quite properly, concerns have been
22 raised by the Home Secretary about the resource
23 implications of doing so. Whilst the House rejects it
24 in argument by the Secretary of State that any initial
25 investigation into attempted suicide did not need to be

1 Article 2 compliant and said that it did, what it was
2 doing, the whole thrust of that case, was trying to find
3 out what is the very bare minimum that would meet those
4 particular circumstances. So any suggestion that
5 a sensible or meaningful comparison could be made
6 between what was required in that case, or what the bare
7 minimum features identified would be, and the facts of
8 this case, is, I suggest, hopeless.

9 Your attention was drawn on more than one occasion,
10 when advancing submissions about what might suffice, to
11 the case of Ramsahai, which is the Netherlands case.
12 I don't know whether, madam, you've had an opportunity
13 to read that case.

14 LADY JUSTICE HALLETT: No.

15 MR COLTART: Again, can I just urge caution. It turns very
16 much on its own facts, for this reason: that whilst on
17 its face it elicits a principle that an investigation
18 can be Article 2 compliant even if conducted in private
19 and that the families don't need to be involved at every
20 stage, that was a case in which a police officer shot
21 dead a suspected gunman, an investigation took place
22 into whether or not the policeman should be prosecuted
23 and a decision taken that he shouldn't be, a decision
24 that was challenged by the gun man's family, the
25 deceased's family.

1 Under Dutch law, that particular challenge has to be
2 heard in chambers. It can't be heard in open court, for
3 obvious reasons. But the family of the deceased
4 attended the hearing in chambers, so their beef wasn't
5 that they had been excluded from the hearing at which
6 that issue was explored; their concern was simply that
7 it hadn't been open to the wider public to attend or to
8 be reported upon.

9 In addition, whilst the case is authority for the
10 fact that the family don't have to be involved at every
11 stage of an investigation, the family in that case had
12 had access to the entire investigation file before the
13 hearing took place. So in terms of ability to view the
14 hearing unfold and ability to consider the matters which
15 were under investigation, again it doesn't provide any
16 assistance, I respectfully suggest, for the submissions
17 advanced by the Secretary of State. I only mention it
18 because it's referred to quite significantly in the case
19 of JL.

20 In terms of the practical difficulties, the
21 sensitive material and so on, I say don't be put off by
22 the Doomsday scenario which is put in front of you by
23 the Secretary of State, either in relation to this in
24 fact or in relation to what might have been necessary in
25 order to uncover more about these men. We heard about

1 the 36 man hours of surveillance a day. There were some
2 far simpler steps which could have been put in place.
3 Checking their own computer systems, one might think,
4 would have been a constructive start.

5 In relation to the sensitive issues, I respectfully
6 suggest that in all likelihood common sense will prevail
7 and with a little bit of application and imagination at
8 the bar to assist you, there is nothing insurmountable
9 in proceeding with this case.

10 I do have some sympathy with Mr Garnham's
11 submissions in relation to the question of jury. It
12 doesn't provide a reason to narrow the scope of this
13 inquest if a jury has to be summoned but if there is
14 a legitimate way of interpreting the provisions so as
15 not to mandate a jury, then in my respectful submission
16 your discretion under section 8(4), on the circumstances
17 which arise in this particular case, can lawfully be
18 exercised in favour of holding the inquest without one.

19 LADY JUSTICE HALLETT: So you are presently instructed to
20 argue that your lay clients want a jury or don't?

21 MR COLTART: I've had the luxury of having clients who are
22 neutral on this issue, which is why I'm afraid you
23 haven't had a great deal of assistance from me on the
24 specific mechanics of it because I'm afraid I haven't
25 been concentrating my submissions on that point, but I'm

1 not hampered by instructions in terms of clients who
2 actively want a jury for this case.

3 LADY JUSTICE HALLETT: Is there anything you wish to add as
4 to whether or not a jury would be mandatory?

5 MR COLTART: There's nothing I wish to add, thank you.
6 I can see force in the submissions which were advanced
7 by Mr Gibbs.

8 LADY JUSTICE HALLETT: Thank you.

9 MR COLTART: Halfway house, and should we adjourn the
10 decision on breach. In a sentence or two, as far as
11 halfway house is concerned, I respectfully submit that
12 if the decision is made in favour on arguable breach,
13 then the position as to what further should be disclosed
14 to you in the first instance could be reviewed at that
15 point, with submissions from the families if thought
16 appropriate.

17 In relation to adjourning the decision on breach,
18 yes, if the court takes the view that it's absolutely
19 necessary to do so, but in my submission, there's much
20 to be said for Mr Keith's observations that if it's
21 possible to make a decision now, so much the better,
22 particularly if it might avoid delay further down the
23 line.

24 LADY JUSTICE HALLETT: Mr Keith put before me another
25 possibility and I wondered if you supported that. If

1 I was against you on arguable breach, is this anything
2 you wish to add as to the possibility of saying "not
3 presently satisfied arguable breach but keep under
4 review", but in any event have an extended Jamieson that
5 explores the preventability issue?

6 MR COLTART: I've nothing to add on that. If you're against
7 us on arguable breach, that would be the next best
8 alternative as far as the families are concerned,
9 subject to the third way that I identified in my
10 original submissions, but there's a paper thin
11 difference between that and what Mr Keith is suggesting
12 in any event. We obviously say arguable breach but if
13 not, then I've no further submissions to make on that
14 particular proposed course of action.

15 LADY JUSTICE HALLETT: Can you see any significant
16 disadvantages to your lay clients in my following the
17 possible course -- because Mr Keith isn't suggesting
18 I take any particular course, but is there any
19 disadvantage to your lay clients in my following that
20 path?

21 MR COLTART: Only in the sense that it may be suggested by
22 the Secretary of State that it inhibits the parameters
23 of the disclosure to which we're lawfully entitled.

24 LADY JUSTICE HALLETT: That would be a matter for me.

25 MR COLTART: That ultimately is a matter for you.

1 LADY JUSTICE HALLETT: It would be a matter for me whether
2 it was an arguable breach or not, the amount of
3 disclosure. If I say preventability is an issue to be
4 explored, then either way it comes back to me, so
5 I don't think that's a disadvantage.

6 MR COLTART: If that isn't a concern, then for the moment,
7 on my feet, I can think of no other tangible
8 disadvantage.

9 LADY JUSTICE HALLETT: Thank you very much, Mr Coltart.
10 Right, now, Mr Patterson, you might be even shorter?

11 Submissions by MR PATTERSON

12 MR PATTERSON: I will be very short because I've been able
13 to put lines through much of what I was proposing to
14 say, madam. I adopt Mr Coltart's submissions and
15 can I simply deal with six or seven discrete points,
16 I hope very quickly.

17 First of all, on arguable breach and the question of
18 preventability and this issue which we have been
19 focusing on of identifiability of the potential victims,
20 if I can summarise it like that. I accept and endorse
21 everything that he has said on this topic and indeed
22 Mr Keith. Could I remind you, madam, of the
23 interpretative approach of the Strasbourg court, that
24 the protections and safeguards of the Convention are to
25 be interpreted so as to provide practical and effective

1 safeguards and when considering Article 2, this is
2 important because, of course, the balance that is to be
3 struck between the protections for the individual on the
4 one hand and impossible burdens on the state agencies on
5 the other, I would submit, as a matter of common sense
6 should be struck in the sorts of circumstances that
7 we've all been focusing on in these examples. The
8 helpful and workable example given this morning
9 highlights where the balance should be struck out,
10 I would respectfully say.

11 In the Commission's opinion in Osman and in the
12 court's ruling in Osman, again and again they were
13 focusing on avoidability and the ability of the agencies
14 to address the risk, the danger, the source. That, of
15 course, isn't the test, but again and again, that's how
16 it was being equated, both by Mr Garnham and by Mr Hill.
17 "Susceptible to detection" were the words that Mr Hill
18 used, I think more than once, and "the ability to
19 avoid the risk" was how Mr Garnham approached it.
20 Applying that relevant touchstone, there is
21 avoidability, there is susceptibility to detect where
22 you can focus on the individual who poses the source.
23 So whatever way we look at it, the balance can properly
24 be struck in that way when we are focusing on terrorism,
25 the indiscriminate nature of terrorism, and suicide

1 bombings.

2 So, for all those reasons, I would say that in this
3 sort of case, these sorts of facts, there can be
4 arguable breaches of the Osman preventative duty.

5 I say nothing about real and immediate risk other
6 than to support the approach advocated by Mr Coltart.

7 In relation to the procedural obligation, it has
8 clearly, I would submit, not been discharged by the ISC
9 report. You have a concession from Mr Garnham that the
10 ISC committee was not hierarchically independent. One
11 discrete point, if need be: he placed a degree of
12 reliance on the case of McKerr. For your note, madam,
13 it's at D/16. I don't ask you to turn it up but two
14 short points.

15 First of all, this case arose out of a shooting, in
16 Northern Ireland, of terrorist suspects by a number of
17 RUC officers. The RUC themselves investigated the RUC
18 officers involved and under suspicion and in relation to
19 that aspect of the lengthy saga, the shoot to kill saga,
20 the alleged shoot to kill policy, the European Court
21 found that there was a lack of independence.

22 So it wasn't referred to by Mr Garnham, but on that
23 aspect it is a useful authority because those conducting
24 the investigation -- the RUC -- and those being
25 investigated -- RUC officers -- were all under the

1 responsibility of the same Chief Constable, and so there
2 is a similarity, in that respect, to our case in light
3 of that hierarchical link.

4 The particular point that Mr Garnham made in
5 relation to McKerr was in relation to the subsequent
6 independent police investigation, the well-known
7 appointment of John Stalker, the Chief Constable of the
8 Greater Manchester Police, to investigate allegations of
9 false evidence and so forth. He made the point that
10 Stalker had been appointed by the Chief Constable of the
11 RUC on the direction of the DPP for Northern Ireland and
12 that the reports from the Greater Manchester Police
13 would go to that Chief Constable.

14 Madam, that's all that can be said in his favour,
15 I would submit, on that point, because the key thing is
16 that although the European Court didn't criticise that
17 in terms of independence of investigation, we can
18 readily see why. It was a separate, distinct police
19 force coming in to investigate the Northern Ireland
20 police force. So there were no hierarchical links of
21 any kind, and, therefore, unlike our case, investigators
22 were investigating those who didn't have that
23 hierarchical link. So too much reliance, I would
24 submit, on that case and if anything, it assists our
25 arguments as to the ISC not being an independent

1 investigation.

2 Madam, on the three options that Mr Keith touched
3 upon, one of them being analyse preventability under the
4 guise of a Jamieson inquest, if you are against us on
5 our prime submission then, yes, please.

6 LADY JUSTICE HALLETT: Any possible disadvantage that you
7 can see?

8 MR PATTERSON: I agree respectfully with what you observed
9 as to disclosure still being adequately addressed in
10 that way. Provided there's no difficulty as to verdict,
11 and if, in your narrative verdict, you can still provide
12 an answer to the questions that arise so that we do have
13 a determination of that question as to preventability,
14 then we can see no practical difficulties.

15 Madam, may I turn to jury and say that I agree with
16 what Mr Keith says about 8(3)(d). I have taken fresh
17 instructions from the four families who I represent,
18 and, as you know or can probably suspect, their
19 overriding concern is an effective inquest which
20 explores preventability in a meaningful way and they
21 recognise -- and this has been highlighted over the
22 course of these four days of debate -- the real
23 difficulties that are likely to arise with sensitive
24 materials.

25 We don't blithely approach this, madam. We are very

1 alive to those issues. The families don't want to
2 hamper the state agency. Nobody wants to see any damage
3 to the public interest. But it comes to this: their
4 desire for a jury is outweighed by their overriding
5 desire for preventability to be explored and to be
6 explored in a meaningful way in terms of disclosure and
7 so forth.

8 So for that reason, we respectfully agree with
9 Mr Keith that 8(3)(d) may not arise and that a jury may
10 not be mandatory, and, as has been observed, the
11 authorities are very clear that often, what might at
12 first blush look like a systemic failure might actually
13 be properly categorised as a human failure. Provided
14 none of us are hampered in asking questions of witnesses
15 as to these sorts of failings -- however different
16 people might want to categorise them -- provided we can
17 do that, we don't see any difficulty with proceeding
18 without a jury.

19 Finally this, madam: we see the force of what
20 Mr Keith says in relation to the survivors issue and we
21 have nothing to add to his observations yesterday on
22 that topic.

23 LADY JUSTICE HALLETT: Thank you very much. Thank you,
24 Mr Patterson.

25 Mr O'Connor, I suspect you're going to be a little

1 longer than others. I'm just wondering whether before
2 we break we could deal with any other submissions that
3 are going to be shorter, if that's not going to
4 inconvenience you in any way.

5 MR O'CONNOR: It most certainly doesn't. As promised,
6 I have a text, though, and madam, if you were to take
7 a break at any stage, quite obviously we'd give it to
8 you. It's not that long but you could at least begin to
9 have a quick look unless you've got something better and
10 more pleasurable to do. I'm entirely in your hands.

11 LADY JUSTICE HALLETT: Mr Saunders, can we conveniently fit
12 you in before I break?

13 MR SAUNDERS: Easily.

14 LADY JUSTICE HALLETT: We might even then get to Ms Sheff
15 for all we know. Right, yes, Mr Saunders?

16 Submissions by MR SAUNDERS

17 MR SAUNDERS: Madam, Mr Coltart has explained to you the
18 matters we discussed yesterday and I have nothing
19 whatsoever to add to the submissions he's made. In
20 respect of Mr Patterson, as he addressed it, arguable
21 breach and preventability.

22 The question you asked Mr Patterson and Mr Coltart,
23 if you are against unarguable breach, decide to have
24 a wide Jamieson, then clearly, from the families' point
25 of view, that is the next best option.

1 LADY JUSTICE HALLETT: Any disadvantage that you can
2 envisage?

3 MR SAUNDERS: The only obvious one, I think, is whether
4 a narrative would be available but you if you were alone
5 then clearly, however it is done, I take the view you
6 will be answering the questions, either in the course of
7 the inquest or at the conclusion or by Rule 43, that the
8 families wish to hear. So, from that point of view, no.
9 Can I say as far as a jury is concerned, I do not
10 have instructions. As you know, we represent some ten
11 families. Not all have been here. I think eight a were
12 here on the Monday and Tuesday, so I haven't been able
13 to take instructions but will do so. If it assists you
14 for your immediate consideration, when it was being
15 mooted yesterday and on Wednesday afternoon, those who
16 were here -- I think there were three or four of the
17 families -- can see the force of what was being
18 suggested initially by Mr Gibbs and then by, obviously,
19 Mr Keith.

20 You know already from our submissions -- and from
21 the totality of submissions from families -- the sorts
22 of questions they seek to ask in the course of this
23 inquest.

24 LADY JUSTICE HALLETT: So many of those you represent are in
25 the same category as Mr Patterson, where their desire

1 for a jury is outweighed by their desire for the
2 preventability issue being aired properly.

3 MR SAUNDERS: And obviously to deal with the emergency
4 services response. So I put that, as it were, alongside
5 preventability, as a separate matter that can be dealt
6 with, with the right questions, we hope, without the
7 jury if that's the view that's taken.

8 LADY JUSTICE HALLETT: You intend to take further
9 instructions from those you represent?

10 MR SAUNDERS: What I'm minded to do -- if those six or seven
11 who I've not been able to speak to personally have
12 a very strong view, when all matters are explained to
13 them, then we'll obviously notify yourself through
14 Mr Smith.

15 LADY JUSTICE HALLETT: Can you give me an idea of how long
16 that's going to take, Mr Saunders?

17 MR SAUNDERS: Part of my difficulty is my solicitor has been
18 taken to hospital this week.

19 LADY JUSTICE HALLETT: Sorry. Is he all right?

20 MR SAUNDERS: He is fine. That's part of the difficulty
21 we've had in trying to communicate with those who aren't
22 here. But I'm hoping we'll be able to do it by the
23 middle of next week.

24 LADY JUSTICE HALLETT: Thank you very much.

25 Right, well, Ms Sheff -- sorry, is that all you wish

1 to say?

2 MR SAUNDERS: That's all I wish to say, thank you.

3 LADY JUSTICE HALLETT: Ms Sheff, I think we can probably
4 deal with you as well?

5 Submissions by MS SHEFF

6 MS SHEFF: Yes. Madam, I think I can be equally brief.

7 Can I adopt wholesale the helpful submissions of both
8 Mr Coltart and Mr Patterson regarding Article 2.

9 Similarly, regarding Jamieson, if you are against us
10 on Article 2, we would encourage a wide interpretation
11 and can see no further disadvantages than those that
12 have already been identified by my learned friends.

13 With regard to jury, we have been able to take fresh
14 instructions, and madam, as I outlined in regard to my
15 earlier submissions, those instructing us -- the lay
16 clients -- were split with regard to jury. We have gone
17 back to those who were most in favour and can I say that
18 the family who were particularly pressing of the jury
19 concept, being those who were most in favour of a jury
20 system, did have the advantage of being able to attend
21 this hearing on a couple of days earlier this week and
22 when the issue was canvassed with them concerning
23 preventability, as it were, to be balanced against the
24 jury, they were not only very much in favour of the
25 preventability issue taking priority and precedence in

1 this case but they also, I'm pleased to be able to say,
2 made very favourable comments, having seen the setup of
3 this tribunal, as it were, concerning your ability to
4 deal with issues and, therefore, have come over to the
5 other side, if I can put it that way.

6 LADY JUSTICE HALLETT: Thank you.

7 MS SHEFF: Can I just make one comment concerning the
8 application, under section 20(2) by the East London Bus
9 Company? You've heard from Mr Keith that he can see no
10 positive grounds for granting that application. On
11 behalf of the families who lost loved ones in the
12 Tavistock Square bombing, can I, in fact, encourage you,
13 madam, to grant their application on the grounds that
14 they appear to play an equivalent role with regards to
15 the bus companies as that of the Tube Lines with regard
16 to the Underground, in that they are responsible for the
17 emergency response and, therefore, there are matters
18 that their expertise and their experience could assist
19 the inquest with regarding the particular knowledge that
20 they have. Therefore, I would encourage you, madam, to
21 take a positive view with regard to their application.

22 LADY JUSTICE HALLETT: Is that the kind of issue -- for
23 example, why did the buses carry on running -- is that
24 the sort of thing you mean?

25 MS SHEFF: That sort of thing and also any communication,

1 for example, that they may have had with police forces
2 regarding what was happening on the transport system
3 generally.

4 LADY JUSTICE HALLETT: How messages were relayed to the bus
5 drivers, as it were?

6 MS SHEFF: Indeed, and indeed any protocols that they may
7 have had for dealing with terrorist attacks or any other
8 sort of emergency situation. Was there anything
9 particular that drivers were told to look out for? Were
10 there any particular areas that were of risk in that
11 sort of situation? We feel that that would be of
12 assistance to you, madam.

13 LADY JUSTICE HALLETT: There are some families, I know,
14 who -- one of the questions they wish to ask is why
15 their loved one was taken off the underground and on to
16 a bus.

17 MS SHEFF: That indeed is exactly the situation with regard
18 to Miriam Hyman. She was, as her family view her,
19 a survivor of the Kings Cross incident only to be
20 a victim of the Tavistock Square incident.

21 LADY JUSTICE HALLETT: I follow. But that same argument
22 wouldn't apply to the bus driver presumably.

23 MS SHEFF: No, no, it doesn't madam, and I separate him off
24 as being a survivor and therefore falling into the
25 category of cases on which, madam, you've already heard

1 detailed argument from my learned friend, Mr O'Connor,
2 and I don't delve into that area at all. But as regards
3 the company itself, we do see a value in them being
4 joined to these proceedings as a properly interested
5 party.

6 LADY JUSTICE HALLETT: I follow.

7 MS SHEFF: Unless I can assist you any further --

8 LADY JUSTICE HALLETT: No, that's extremely helpful. Thank
9 you, Ms Sheff. I shall return at 11.35.

10 (11.25 am)

11 (A short break)

12 (11.35 am)

13 LADY JUSTICE HALLETT: Yes, Mr Keith?

14 MR KEITH: Madam, may I just say something very quickly in
15 relation to the submissions just made by Ms Sheff in
16 relation to the East London Bus Company. Although they
17 have not been represented before you, their written
18 submissions are contained at tab 4 of the first bundle
19 of the A volumes.

20 LADY JUSTICE HALLETT: I remember them.

21 MR KEITH: Madam, I'm concerned that there should be any
22 public suggestion that East London Bus Company, East
23 London Bus and Coach Company, should have borne some
24 responsibility for the decision for the buses to keep
25 running after the closure of the Tube line which, as far

1 as I understand the submissions, is one of the points
2 relied upon for the purposes of the application that
3 they should be properly interested persons.
4 Ms Sheff doesn't act for them, of course, and
5 I think I should point out that in their own application
6 for properly interested person status, they do not claim
7 to have had that responsibility. What they say is they
8 are in a position to assist you uniquely because they
9 have a knowledge of the vehicle operation, vehicle
10 security systems, public transport protocols, routing of
11 vehicles and large scale passenger movements which may
12 become relevant. My understanding is that the decision
13 that the buses would continue to run was taken, in fact,
14 by Transport for London who carry the overall
15 responsibility for transport in London.
16 My learned friend who represents Transport for
17 London has, I think, over the very short break, taken
18 instructions and confirmed that that is so, and,
19 therefore, I would be concerned if an application put
20 other than by representatives of the East London Bus
21 Company should, in fact, set out a position that does
22 not accord with the actuality.
23 MS CANBY: Madam, perhaps if I could just clarify further.
24 I have had an opportunity to take some further
25 instructions and it is right to say that the decision to

1 keep the bus running was one made by Transport for
2 London.
3 In relation to the other enquiry, in fact the bus
4 company were not the equivalent to the Tube Lines.
5 There is no such equivalent company, of course there not
6 being the necessity for specialist expertise to address
7 any emergency procedure in respect of a bus. In fact,
8 it is Transport for London's understanding that they
9 would ordinarily be dealt with either by the fire
10 brigade or the Metropolitan Police. So it appears that
11 the bus company is responsible for employing the driver
12 and for providing the bus, and it is our understanding
13 that in fact that is the limit of their relevance in
14 relation to your inquiry. My instructing solicitor is
15 going to seek confirmation of that over the luncheon
16 adjournment.

17 LADY JUSTICE HALLETT: Would presumably Transport for London
18 be able to provide information on how information is, as
19 it were, passed down the line to the individual bus
20 drivers?

21 MS CANBY: I understand that that is correct, yes.

22 LADY JUSTICE HALLETT: We all know that bus drivers are now
23 in radio contact with their headquarters and so it would
24 be Transport for London, you say, who could help us on
25 the particular circumstances?

1 MS CANBY: Yes, and in terms of any rerouting and so on,
2 yes.

3 LADY JUSTICE HALLETT: Ms Sheff, it sounds as if, for the
4 time being, it may be your support for the
5 application -- you may want to, as it were, put it on
6 hold?

7 MS SHEFF: Well, madam, I would still support them on the
8 basis of their application as set out, for example that
9 they are responsible for vehicle operation, security
10 systems, public transport protocols, they say, routing
11 of vehicles, large scale passenger movements. It still
12 seems to me, as they suggest themselves, that that might
13 become relevant when discussing the deaths of passengers
14 in Tavistock Square.

15 LADY JUSTICE HALLETT: Could we not, in any event, ensure
16 that we locked into that information or material, if it
17 was relevant, by asking somebody to come along and
18 assist the inquest?

19 MS SHEFF: Indeed.

20 LADY JUSTICE HALLETT: They don't necessarily have to ask
21 questions.

22 MS SHEFF: No, that might be an alternative form.

23 LADY JUSTICE HALLETT: So provided we have their input, if
24 it becomes necessary, that's what concerns you?

25 MS SHEFF: Indeed. Whether as witness or as PIP, I think

1 that their input would be of assistance.

2 LADY JUSTICE HALLETT: The inquest team obviously heard your
3 concern and however we deal with it, we'll ensure that
4 that concern is addressed.

5 MS SHEFF: Most grateful. Thank you, madam.

6 LADY JUSTICE HALLETT: Thank you.

7 Right, Mr O'Connor, I think, we're now back to you.

8 Submissions by MR O'CONNOR

9 MR O'CONNOR: Madam, I hope a text has found its way now to
10 you. It might save, hopefully, some time and, madam,
11 your having to write speedily.

12 May I put the first issue I'd like to address in
13 four sentences. That first issue is whether we have
14 a burden of showing an arguable violation of Article 2
15 in order to trigger the investigative duty. So
16 literally, four sentences.

17 First of all, there is something primitive about the
18 suggestion that putting aside any human rights
19 instruments, the state has no investigative duty in
20 relation to all unnatural, suspicious or violent deaths.

21 Second sentence. Our Victorian state accepted such
22 a duty in our first Coroners Acts, as part of the
23 state's duty to protect life, for example, from
24 infectious diseases, low transport safety standards,
25 et cetera, et cetera.

1 Third sentence. Rhetorical question. Is Article 2,
2 as part of a living instrument and as a practical and
3 effective provision in the 21st Century, to be
4 interpreted so narrowly that it excludes such an obvious
5 duty? Obvious and, may I say, practicable duty.

6 Fourth sentence. That explains why Lord Phillips,
7 at paragraph 29 in JL, set the state's duty to
8 investigate in the context of fatalities from all risky
9 activities and accidents and mishaps. That's all we say
10 on that.

11 Moving to the Osman test, we submit it has been
12 conclusively conceded and established in our penetrative
13 discussions before you -- with you, if we may call it
14 discussing with you rather than making submissions --
15 that Osman is not the last word on the state's duty to
16 protect life from third party crime.

17 We have had to recognise, all of us, that
18 a touchstone of literal identity of a potential victim
19 cannot work, and if we look -- madam, here I may
20 hopefully save your pen -- at paragraph 2.2, we cite
21 from what we submit is the critical paragraph at 115
22 from Osman, which sets out the common feature of Osman,
23 Van Colle and Smith, namely that all those cases
24 involved identified victims under a potential threat
25 from an identified assailants. Those features were

1 a given in all those cases. Thus, before the critical
2 paragraph 116, paragraph 115 in Osman says:
3 "It is thus accepted by those appearing before the
4 court that Article 2 of the Convention may also imply in
5 certain well-defined circumstances a positive obligation
6 on the authorities to take preventative operational
7 measures to protect an individual whose life is at stake
8 from the criminal acts of another individual."

9 So that's a given. That's not in dispute.

10 The scope of this obligation is a matter of dispute
11 between the parties and the court goes on to consider
12 the scope of that obligation.

13 Now, over the page, madam, in our text,
14 paragraph 2.4, the court was not considering any wider
15 duty to unspecified classes or groups of people. That
16 is a more complex question raising wider issues. It did
17 arise in Mastramatteo and the significance of
18 Mastramatteo is that it was not declared inadmissible.
19 Not only was it not declared inadmissible because it
20 didn't fulfil an identified individual Osman
21 restriction, but it wasn't dismissed peremptorily in the
22 court's judgment as failing to comply with any such
23 requirement. The court went on to consider it on its
24 merits and then dismissed it.

25 Now, what is regrettable, as you've pointed out,

1 madam, is that the court didn't accept some sort of
2 conceptual context for that, but what it does do is
3 absolutely destroy any identified individual touchstone
4 as a limit to the Osman duty. Madam, may I add to that
5 it also helps us on whether the temporal factor can
6 possibly be a touchstone either.

7 You will see, madam, that from paragraph 11, the
8 fatal shooting on 8 November 1989, that the two
9 perpetrators had been released from custody --
10 paragraph 14 -- one of them on 1 November, seven days
11 earlier, and paragraph 19, the second, had been released
12 on 21 October, more than two weeks earlier.

13 So again although it's a factor, it's not
14 a touchstone that there is an immediate present and
15 continuing risk but time passes and it doesn't
16 crystallise and come to a terrible fruition for a time.
17 That factor -- the passage of time -- is highly relevant
18 to the steps that can be reasonably expected from the
19 state to protect.

20 Moving on to our paragraph 2.5, the identity of the
21 individual touchstone has also gone, we submit, with the
22 Oneryildiz explosion rubbish dump case, the
23 Grand Chamber case, as we've already argued, the random
24 nature of local inhabitants or visitors and then
25 applying it to a rubbish dump impinging on a motorway

1 nearby and random passing motorists being victims.
2 Their identity cannot be the touchstone. Again, madam,
3 there's help from Oneryldiz in terms of the temporal
4 factor, which is of course relevant but not
5 a touchstone. The awful explosion and deaths were
6 caused in April 1993, but you will see from paragraph 13
7 of the judgment that the danger had been identified by
8 experts in May 1991, two years earlier, and the specific
9 danger of methane explosion.

10 Now, it's right to say -- and Mr Garnham has pointed
11 out correctly -- that Oneryldiz was not a case of state
12 awareness of a risk created by a third party. It was
13 a state run dump and so the state was creating the risk.
14 Absolutely right.

15 However, we submit that there plainly would be no
16 difference in the finding of violation if the dump had
17 been run by a third party -- risk created by the third
18 party -- but the state had sufficient awareness of the
19 risk and didn't take protective steps within its powers,
20 and *Budayeva v Russia*, which was the second case we
21 cited in this area and it's at your bundle D, tab 25,
22 was indeed a risk coming from privately owned land where
23 the state was found not to have taken protective
24 measures. So perfectly valid to point out that factual
25 distinction. Doesn't affect the significance of the

1 cases.

2 Now, madam, location is a highly relevant factor but
3 not a touchstone because otherwise it introduces
4 anomalies. It's been conceded by the Secretary of State
5 that awareness of a targeting bombing conspiracy on
6 a particular station at a particular time would trigger
7 the protective duty even though the potential victims
8 are unidentified and random. But let us say that
9 a bomber is allowed, without any intervention and with
10 the knowledge of the authorities, to go into
11 a particular station. Obviously a protective duty to
12 people who may fall victim there.

13 But if the bomber happens to get on a train and
14 leave that station and blow up the train, or go to
15 a different station, a distance away, the same duty
16 applies, but the standard to be expected of the state
17 obviously becomes lower and lower depending on all the
18 circumstances. The more attenuated the chain of events,
19 probably the lower standard of protection would be
20 expected by the state.

21 So, for example, madam, our paragraph 2.8, strong
22 and highly reliable information about the precise
23 location and timing of a planned gangland ambush or
24 a terrorist bombing, even without any information at all
25 of the identity of potential victim, or the perpetrator,

1 could arguably -- depending on all the circumstances --
2 trigger the protective duty. Of course, the steps that
3 can reasonably be expected will depend on all sorts of
4 other factors: available resources, the time available
5 to the state to take protective measures, et cetera.
6 In other words, madam, it is critically important to
7 bear in mind throughout the policy factors identified in
8 Osman so that no "impossible or disproportionate burden
9 is placed on the authorities".

10 Now, could we move to the way, without a category 1
11 or category 2 which was my learned friend's attempt,
12 which I fully respect --

13 LADY JUSTICE HALLETT: Respect but not adopting?

14 MR O'CONNOR: Because it's not necessary to introduce
15 categories. We have attempted to formulate how a wider
16 application of this principle would work practically and
17 effectively, without imposing impossible or
18 disproportionate burdens on the authorities. Our
19 paragraph 2.10(a) and following.

20 The protective duty is owed to all potential victims
21 of a threat to life from a third party and is violated
22 where (a) the authorities knew or ought to have known at
23 the time of the existence of a real and immediate risk
24 to life from the criminal acts of a third party, and (b)
25 they failed to take measures within the scope of their

1 powers which, judged reasonably, might have been
2 expected to avoid that risk.

3 Now, all those are words from Osman but removing the
4 word "to an unidentified individual". (c) is direct
5 quotation of all the policy factors from Osman:
6 unpredictability of human conduct, operational
7 priorities and resources, police having to act within
8 the limits of their powers, et cetera.

9 (d), over the page. The reasonableness -- and this
10 is our wording now. We will resume quotation with
11 little (e) and (f) but this is our wording. The
12 reasonableness of the available measures being judged in
13 all the circumstances of the case, including, for
14 example, how specific the actual or imputed information
15 was at the time about the identity of the potential
16 victim, the identity of the perpetrators, the nature,
17 location, and timing of the potential crime. I would
18 add, of course, available resources, the time available,
19 response time available to the authorities, the degree
20 and immediacy of the threat, et cetera. In other words,
21 all the relevant circumstances.

22 Then (e), taking from Van Colle -- this could be
23 formulated in other ways. This is the word Lord Bingham
24 formulated it. We're not wedded to this but obviously
25 the Osman principle includes information -- forgive me,

1 a risk -- of which they ought to have been aware. So
2 that needs to go in. We've used Lord Bingham's words.
3 Then (f) again incorporates the current elements of
4 the narrower Osman test. It doesn't have to be
5 tantamount to gross negligence or wilful disregard.
6 Sufficient to show didn't do all that could be
7 reasonably expected, question only to be answered in the
8 light of all the circumstances, and a mere missed
9 opportunity would not be enough.

10 Madam, that is the way in which, if and whenever the
11 Strasbourg court gets actually to conceptualise what
12 they were willing to consider in Mastramatteo, that is,
13 we venture to suggest, the way in which it would be
14 formulated, and there would be every safeguard --

15 I repeat this for the third time -- against impossible
16 or disproportionate burdens on the authorities.

17 Now, madam, applying that to reasonable steps in
18 this case, our section 3, the possibilities which we
19 submit MI5 could and should have acted upon are recorded
20 actually to some extent in the second ISC report as
21 being MI5 assessments at the time. This is not,
22 therefore, with the benefit of hindsight. We give the
23 paragraph references. At the time, MI5 recognised the
24 possibility that others might be involved in the Crevice
25 plot. There might be, for instance, other stores of

1 bomb making equipment; paragraph 31, "allowing for the
2 possibility of planning for a different attack", that is
3 others not arrested; and paragraph 141, "allowing for
4 deceptive appearances", ie the limits of what they had
5 been able to detect. Obviously the limits on audio
6 surveillance, for example, when transferring vehicles,
7 deliberately to have hidden conversations.

8 Madam, my next paragraph, I regret to say, may sound
9 frivolous but it's not, I assure you, because this is
10 exactly what was apparent from what happened with the
11 Crevice plotters on their visit to Pakistan. The point
12 of this is reliance is placed on the fact that the
13 authorities perceived, from overheard conversations,
14 intentions to go to Pakistan or to the border area. The
15 implicit suggestion is, therefore, that has a radical
16 impact on assessment of risk to people in this country.
17 That's what I'm addressing.

18 Now, what was known happened to the Crevice plotters
19 when they were in Pakistan in 2003 was as follows: they
20 met with contacts with militants or potential emirs with
21 an expressed and rather fantastic intention to go and
22 participate in armed conflict in the border area of
23 Pakistan and Afghanistan. They were dismissed as an
24 embarrassment and they were told to go and carry out
25 Jihad back in their own country. The reasons why that

1 happened were not random -- and this is all to the
2 knowledge of MI5 by March 2004. They were wearing posh
3 trainers. They liked their pizzas and their TV sofa and
4 they couldn't have survived one freezing night in the
5 mountains of Waziristan. Their Urdu accent made them
6 stand out in any public place. They prayed too much.
7 All the locals were saying, "Who are these strange
8 people who seem to be praying all the time?" They were
9 praying all the time, as they thought, in order to fit
10 in and in fact they didn't at all.
11 Madam, it's bathetic in the true sense of the word.
12 That is what happened to them in 2003/2004 and the
13 evidence that that is what happened to them was
14 available to all the authorities by the time of the
15 cracking of the Crevice plot, thus the idea that people
16 expressing an intention to go to Pakistan to get
17 training, far from being a source of complacency, would
18 be a source for alarm and alert.
19 Our paragraph 3.3 -- and we agree the prospect of 36
20 surveillance officers a day for 15 months is pure
21 hyperbole -- we set out various absolutely reasonable
22 and practical steps which could have been taken in 2004
23 and 2005 to follow up on the suspects around the Crevice
24 plotters. The failed checks we identify at length in
25 our original written submissions. Using local

1 Special Branch firmly to identify Sidique Khan.
2 A member of the public, madam, it's recorded in ISC2,
3 had actually contacted the authorities to say MSK and
4 Tanweer are involved in terrorism and it's connected
5 with the Iqra bookshop, et cetera. This was supposedly,
6 and on a basis which is simply not identified, reported
7 on by the West Yorkshire Police as being without
8 foundation and showing nothing of interest. Following
9 up, of course, on the Lake District training camp
10 photographs, which are good. Successfully linking MSK
11 to the telephone calls in 2003. Monitoring his phone
12 traffic.

13 LADY JUSTICE HALLETT: I've read through, yes.

14 MR O'CONNOR: Yes. Using all the powers under the Terrorism
15 Act to search his home. Arresting him for failing to
16 disclose information on the Crevice plot and using what
17 didn't exist then but should have done -- a legacy
18 team -- to follow up on information.

19 Coming back to the visit in 2004 to February 2005 to
20 Pakistan, explained by my learned friend Mr Hill. That
21 may well be highly significant, madam, because it's
22 plain from around page 33 in ISC2 that in February MI5
23 had, and had appreciated the content of conversations
24 about "over the border, training and travel
25 difficulties". It was apparent from them that those in

1 those conversations were planning to go to the border
2 area for militant purposes.
3 Now, one would have thought that that means that
4 such people and their later travelling to Pakistan would
5 have been a matter for very careful attention. Indeed,
6 the Pakistan Intelligence Services are close liaison
7 partners of MI5. One would have thought they would have
8 been alerted to the arrival of these potential Jihadis.
9 Their return from months in Pakistan back into this
10 country would have been a matter for great concern
11 precisely because it fits into the pattern observed of
12 what happened to the Crevice plotters.
13 Madam, may I say something now just before moving
14 on. Madam, you will be aware from the Binyam Mohamed
15 litigation how the principle of ownership of information
16 was litigated before the Master of the Rolls and the
17 Lord Chief Justice, and it was recognised as being
18 a very important principle.
19 Now, in the Crevice trial, there was the most
20 extraordinary sensitivity about dealings between MI5 and
21 the Pakistan ISI, one infers because they -- the ISI --
22 are very sensitive and don't consent to discussion about
23 that type of material. Why am I saying that? It means
24 that the complete silence in ISC2 about any liaison of
25 information between the Pakistan Intelligence Services

1 and MI5 about the movements and activities of the 7/7
2 bombers doesn't remotely mean that there wasn't such
3 communication, providing -- of course we speculate --
4 information relevant to the preventability of the 7/7
5 bombing plot. We've set out for you a perfectly
6 credible, indeed likely way in which that there must
7 have been such communications.

8 Madam, my learned friend Mr Hill's point about the
9 need for there to be a detectable crystallised plot as
10 a touchstone for the Osman test again fails and is
11 anomalous. It's a factor, but it's not a touchstone
12 because many crimes are committed arbitrarily. We give
13 the factual example of the authorities being aware of
14 a mentally ill person walking along the street with
15 a knife, not having taken his medication, having no
16 settled plan or plot about what on earth he's going to
17 do but obviously he may well behave in a random, bizarre
18 and sudden way. The authorities are not entirely
19 relieved from any duty, protective duty, by the fact
20 that there is no settled and specific intention in that
21 person's mind as to exactly what he is going to do. So
22 a factor, certainly, not a touchstone.

23 Finally, madam, we do, on practical steps that could
24 have been taken, emphasise that within three days --
25 forgive me, the next day, after the 7/7 bombings, the

1 Home Secretary told the media -- this is recorded in
2 ISC2:
3 "The agencies had not been aware of any credible
4 plots to attack the UK immediately prior to July."
5 That means that it's very difficult to say that
6 immediately prior to July, at any rate, there were other
7 distracting priorities such as Operation Rhyme, which we
8 readily conceded from the outset was an overwhelming
9 priority for some months in the middle of 2004.
10 Madam, those are really the more detailed
11 submissions I was going to expand upon. I'm not going
12 to verbally repeat or expand what we've put in writing
13 on Jamieson --
14 LADY JUSTICE HALLETT: Sorry, just pausing there,
15 Jamieson -- if I wasn't persuaded by your arguable
16 breach and your freestanding duty points but I was
17 persuaded that an extended Jamieson was appropriate, do
18 you say there would be any practical difference or
19 disadvantage to your lay clients?
20 MR O'CONNOR: No madam. Only potentially if a narrow view
21 was taken in relation to narrative verdicts.
22 LADY JUSTICE HALLETT: Thank you.
23 MR O'CONNOR: Madam, on the public interest and
24 practicality, can I just go to paragraph 5.3?
25 You have in your files at tab D/5, the case of

1 McCann, the Gibraltar shooting case. That very
2 helpfully sets out how the inquest into that shooting
3 dealt with the highly sensitive issues of MI5
4 involvement, training and policy, shooting to kill --
5 I don't use that emotively, I use it as shorthand --
6 public interest immunity issues with a jury.
7 Ultimately, madam, in fact the inquest material was
8 expanded by a Commission investigation into the facts
9 when they required more information from the UK
10 government about the planning of the intervention and,
11 madam, you will remember that by one vote the court
12 ultimately held that whilst the shooting of those
13 bombers in Gibraltar was not taken literally as
14 a violation of Article 2, they did find a violation of
15 Article 2 because of the defective planning and
16 intelligence aspect of that operation because
17 insufficient provision was made for the assessments on
18 the ground to be wrong.
19 So there was a violation in terms of policy and
20 planning and the only point of that is that the
21 Commission obtained sufficient information for that to
22 be adjudicated upon, even though that's a highly
23 sensitive issue, and the inquest were examining in
24 a narrower sense the legality of the actual shooting and
25 the nature of the exact threat that they were

1 confronting on the ground.

2 Madam, in 5.4, we give another example and I must
3 confess I can't help you on this. This is from my
4 learned junior. I do remember this a little bit from
5 the newspapers but that's not very helpful to you.

6 There was a very controversial inquest into some
7 multiple deaths in a Hercules aeroplane which was shot
8 down over Iraq. All sorts of national security issues
9 arose in that and they were handled effectively with
10 a jury.

11 Madam, paragraph 5.5 in terms of distraction of
12 resources, MI5 has already researched and obtained all
13 the documents, they would say, for the ISC, and in terms
14 of giving physical evidence only the very senior
15 directors have had the burden of giving evidence to the
16 ISC. So the proposition surely cannot be that it's
17 asking too much of key decision makers and assessors in
18 this case to give evidence once and once only to explain
19 the decisions and the assessments they made. That is
20 scarcely unreasonable or disabling in a case of this
21 enormity or disabling for the agency.

22 Madam, may we beat a shamefaced retreat in relation
23 to my intervention yesterday, which has been established
24 to be quite unnecessary and overelaborate.

25 LADY JUSTICE HALLETT: Say no more, Mr O'Connor.

1 MR O'CONNOR: Yes, I think I'm not going to carry on
2 digging, for the very simple reason that we do not have to
3 have to go into bringing into effect new legislation at
4 all because, under section 17A of the current
5 Coroners Act, by an amendment since 1999, there is
6 exactly this mechanism whereby a coroner can be
7 requested to suspend an inquest upon the setting up of
8 a judicial inquiry, and unless there is exceptional
9 reason to do so, the coroner has to adjourn it pending
10 the result of a judicial inquiry. It's not exactly the
11 same as the new provisions under the 2009 Act but it's
12 very, very similar.

13 What is our point? Our point is this: that
14 Mr Garnham is really suggesting to you, madam, and to
15 the public, on behalf of the Security Services, that
16 they would love to help but regrettably their hands are
17 tied, these are impossible practical difficulties, we
18 have other duties, overriding duties to national
19 security, and we can't possibly see a way in which there
20 can be a mechanism of effective investigation consistent
21 with the necessary confidentiality of national security
22 information.

23 Well, that is hand wringing and it doesn't bear
24 examination. There are mechanisms by which they could
25 facilitate such an examination.

1 Madam, in relation to a jury, may I confirm that on
2 behalf of our clients it is far more important to
3 investigate effectively than to insist upon or request
4 or obtain a jury as a part of that process.

5 LADY JUSTICE HALLETT: You make no positive submissions for
6 a jury?

7 MR O'CONNOR: That's right.

8 Now, madam, on survivors we just make the single
9 point that there seems to have been a drift of
10 information to the effect that the majority of the
11 represented bereaved are hesitant or resistant over
12 this. That's not right. Where figures have been
13 identified by my learned friends -- and they haven't all
14 identified figures -- it is not a majority who are so
15 hesitant and some, a significant number, positively
16 support it.

17 Now, madam, those are all my submissions but may
18 I just ask for an indulgence which I suspect, madam, you
19 may allow to me. It's this: one of our survivor clients
20 is here today -- Ms Rachel North. The slight anomaly is
21 that she's represented by me and the advocate normally
22 obviously conveys to any court what, on behalf of
23 a client, needs to be said.

24 She would like her own words to be conveyed briefly
25 and there are very powerful personal reasons -- actually

1 quite apart from her being a near-miss survivor of these
2 terrible events, quite apart from that her life has been
3 blighted -- why she doesn't feel able to stand up and
4 say these words herself. We have edited them with her
5 consent, so may I just, as it were, be her mouthpiece --

6 LADY JUSTICE HALLETT: Of course.

7 MR O'CONNOR: -- instead of advocate.

8 She says this:

9 "There is a very great difference between being
10 a witness, being asked to stand up and be publicly
11 questioned in excruciating detail about the worst
12 moments of your life in front of the bereaved families,
13 the media and the public, and being an interested person
14 able to ask questions and look at evidence about the
15 events which have blighted your life for years through
16 counsel, away from public gaze. It is absolutely right
17 that the bereaved families, towards whom words cannot
18 express the extent of my sympathy, who have suffered so
19 atrociously, should be treated as interested persons.

20 "It appears to me that if you are a member of the
21 public who is unfortunate enough to survive [well,
22 fortunate or unfortunate enough] to survive a terrorist
23 atrocity, then no matter how much pain your physical
24 and/or mental injuries cause you, no matter how much
25 your life is blighted, no matter how much your health,

1 career, personal life, relationships, family, sense of
2 self is affected, no matter whether you become suicidal,
3 no matter how much your life is changed, reduced and
4 damaged, you still have no right to ask questions about
5 what happened to you and to expect answers to be given.
6 You may be called as a witness for the benefit of others
7 but that is all. You may not see documents or ask
8 questions. You may not expect a public inquiry. You
9 should just be quiet and be grateful that you are alive.
10 "The problem seems to be that the only format the
11 state is allowing for the public investigation of the
12 events of July 7 is an inquest five years on, and that
13 is an imperfect vehicle for survivors to engage with
14 because of the conventions about an inquest being for
15 the dead and not the living, and if that is the case,
16 then the public should know that is the case. They are
17 the ones, after all, who ride the tubes and buses and
18 walk the streets and run the risks. They should know
19 that should they survive a terrorist atrocity, they do
20 not count and the state does not care to know and need
21 not answer their questions."
22 Madam, those are her words and it does seem to me
23 that in one phrase, a factor that I have, through my own
24 fault, not highlighted, which is a significant
25 difference is the access to information, the access to

1 the inquest material that they would not have as of
2 right unless they're so recognised.

3 Madam, thank you very much. I'm sure Ms North is
4 most grateful to you.

5 LADY JUSTICE HALLETT: Not at all. Please thank her for
6 taking the trouble to tell us how she feels. It was
7 very moving.

8 MR O'CONNOR: Thank you.

9 LADY JUSTICE HALLETT: Mr O'Connor, could I ask you to send
10 to Mr Smith your written submissions electronically?

11 MR O'CONNOR: Of course.

12 LADY JUSTICE HALLETT: It's just that I can then receive
13 them electronically. It will be easier for me.

14 MR O'CONNOR: Of course.

15 LADY JUSTICE HALLETT: I'm very grateful.

16 MR O'CONNOR: Thank you.

17 Right, who's next?

18 MR COLTART: Madam, forgive me for rising again but before
19 Mr Garnham is asked to respond, may I seek to clarify
20 one issue that's arisen to an extent this morning, which
21 is in relation to one possible option for you, as placed
22 before you by Mr Keith yesterday, which is no arguable
23 breach found at this stage but extended Jamieson inquest
24 to incorporate the issue of preventability. Can I just
25 clarify what courses of action might follow from that?

1 Is it that we would embark upon a Jamieson inquest
2 with a view to returning ordinary, short form Jamieson
3 verdicts at the end of it, if there was no change in
4 relation to the issue of arguable breach, but if having
5 heard the evidence the court's view does change on that
6 issue, then we would, in effect, convert to a Middleton
7 inquest in the sense that you would be or a jury would
8 be permitted to return an extended verdict at the end,
9 giving your judgment, as it were, on the central issues
10 of fact?

11 LADY JUSTICE HALLETT: Is that a rhetorical question or is
12 that a question you're asking me? I wasn't the one
13 posing the possibility.

14 MR COLTART: Forgive me, it was a question --

15 LADY JUSTICE HALLETT: It was a possibility put before me,
16 I think, Mr Coltart.

17 MR COLTART: Yes, it was. I just wanted to clarify that
18 that was what was proposed. Whether or not it's taken
19 up of course is a different matter.

20 LADY JUSTICE HALLETT: So it's a question for Mr Keith.
21 Mr Keith?

22 MR COLTART: I'm grateful.

23 MR KEITH: Yes, the proposition or the option proceeds on
24 the basis that if Article 2 is not engaged and you are
25 in Jamieson territory, then of course you are bound by

1 the provisions of section 11 of the Coroners Act 1988,
2 which demands that an inquisition shall set out, so far
3 as particulars have been proved, who the deceased was,
4 who, when and where the deceased came by his death and
5 shall be in such form as the Lord Chancellor may, by
6 rules made by statutory instrument, from time to time
7 prescribe.

8 So plainly, because it is a Jamieson, the words are
9 read in the form of the section, "how, when and where
10 came by the death", rather than "came by the death and
11 in which circumstances or in what circumstances", which
12 of course was the answer reached or the conclusion
13 reached by their Lordships in Middleton. That does not
14 mean that because the inquisition must be in that form
15 that in answering those questions you can't, within that
16 form, give a more detailed answer than might be apparent
17 in the general run of inquests.

18 We are endeavouring to try to find out whether or
19 not, of course, in the Diana Princess of Wales inquest,
20 in which there was, of course, a jury but was not an
21 Article 2 inquest because her death occurred prior to
22 the Human Rights Act coming into effect and therefore
23 the principle of McKerr, Article 2, in the convention
24 did not apply, whether notwithstanding therefore that it
25 must in principle have been a Jamieson inquest there was

1 room for expansion of that prescribed form so as to
2 permit the jury to answer the questions which, although
3 in law more narrowly defined than those which would have
4 been permitted under Middleton, on the facts of the
5 inquests in fact allow them to give more detail than, as
6 I say, might have been expected in the general run of
7 cases. I think -- and I see Mr Smith nodding -- that is
8 in fact what occurred. He nods.

9 Therefore, that is the basis for one of my many
10 propositions, which was that there is little practical
11 difference. How much difference there will be will
12 obviously depend on how far you depart or rather how far
13 you allow factual answers to be incorporated into the
14 prescribed form. The prescribed form sets out boxes.
15 It doesn't, of course, prescribe how you fill the boxes.

16 MR COLTART: Can I say that answers part of the question
17 which I raised, but it hasn't answered the second part.
18 During the course of his submissions yesterday, Mr Keith
19 made reference to keeping the question of arguable
20 breach under review, and what I had understood that to
21 mean is that if, as a result of the way in which the
22 evidence came out at the inquest, the court changed its
23 mind as to the question of arguable breach, that it may
24 be possible to return at the end of the inquest what
25 would be a full Middleton verdict.

1 MR KEITH: It is implicit in my answer to the first question
2 that if you were, in the course of the inquest, to
3 revisit the issue of Article 2 in the light of further
4 evidence coming to light and declare that it was an
5 Article 2 Middleton inquest, it may make little
6 difference, although of course the statutory test in
7 section 11(5)(b) would necessarily be wider because it
8 would be "came by his death and in what
9 circumstances". If you were to have taken a generous
10 approach to the Jamieson interpretation of that section,
11 it would make no difference, but for all the reasons
12 I outlined yesterday, it may have a resonance, it may
13 have a declaratory effect, and of course it may have
14 consequences insofar as there may be further legal
15 challenges.

16 LADY JUSTICE HALLETT: Right, now, before I turn to
17 Mr Garnham or Mr Hill, is there anybody else who wish to
18 make any submissions?

19 Right, Mr Garnham, are you going to go before or
20 after Mr Hill?

21 MR GARNHAM: I'm in your hands, madam.

22 LADY JUSTICE HALLETT: It seems as if the burden has been on
23 you -- shall we leave to you, as it were, to come at the
24 very end, would that be helpful?

25 Mr Hill?

1 Submissions by MR HILL

2 MR HILL: I'm particularly content with that, because these
3 are right of reply submissions, as it were, and I'm not
4 seeking to reply directly to the Article 2 scope
5 submissions that Mr Keith made yesterday, although
6 I anticipate Mr Garnham will. I therefore don't think
7 I have any more than five minutes, and I only wish to
8 reply on two discrete matters.

9 The first, which is indirectly relevant to scope,
10 not direct argument of the principles, is to return, if
11 I may strain your patience for a moment, just once more
12 to the prosecution case on the Theseus trials, that
13 being, of course, the prosecution advanced, although in
14 conjunction with the Crown prosecution service, by the
15 Metropolitan Police.

16 The only reason that I return to it, having heard
17 Mr Keith yesterday, is because of the danger, in my
18 submission, that the way the case was put in the Theseus
19 trials may be misapplied. What I mean is this: the
20 conspiracy framed and alleged in count 1 on the Theseus
21 indictment, with which you're entirely familiar, is not,
22 in our submission, to be correctly expressed as the
23 Theseus defendants' conspiracy, albeit that it was the
24 trial of the Theseus defendants. It is the 7/7 bomb
25 plot conspiracy that is framed in count 1. That is

1 clear, we submit, from the words of the indictment.
2 From the words of the opening notes, both of them,
3 2008 and 2009, upon which I submit the prosecution -- it
4 wasn't I but the prosecution -- were consistent, the
5 first evidence that that conspiracy was starting comes
6 in November 2004 at the earliest, and it is against that
7 contention that we, for the Metropolitan Police, are not
8 sure what point was being made by referring to the draft
9 indictment before the commencement of the first Theseus
10 trial but which was not put to any jury in either of
11 those trials. That is why I saw the need for immediate
12 correction to Mr Keith when he was in the middle of his
13 submissions and I'm very grateful that he took that
14 correction.

15 So in our written submissions before you, we have
16 made an unconditional offer of assistance to these
17 proceedings and we repeat it. We, for the
18 Metropolitan Police, offer assistance in these terms.

19 On 7 July 2005, the four killers came to London,
20 came within the operational area for the body that
21 I represent. Their actions that day triggered the
22 Metropolitan Police Service investigation which I submit
23 was exhaustive and was with the benefit of hindsight,
24 and the conclusion was that there was no evidence of the
25 plot before November 2004. So, although of course we

1 have listened to all of the competing submissions, we
2 would not wish any bereaved family or other person,
3 whether statutorily or generally interested in these
4 proceedings, to be misled into thinking that there was
5 earlier evidence.

6 That is simply a restatement of the consistent
7 Metropolitan Police Service position as a result of its
8 investigation after the event. I don't seek to say any
9 more about it and I hope our position is clear, albeit
10 I repeat our unconditional assistance to this procedure,
11 however you define it. That's the first point.

12 The second point is one of information. It is
13 without prejudice to any arguments on matters of
14 principle, which I'm sure Mr Garnham will return to, and
15 it is simply by way of reply, for your information,
16 madam, to the general assertion about the operation of
17 Rule 37 within the Coroners Rules, which Mr Keith has
18 correctly identified is a prohibition on the manner in
19 which hearsay is received into evidence during the
20 inquisitorial process over which you preside, and it
21 just seems to us, if and when one comes to look at
22 practicality rather than principle, that it might assist
23 if I hand to you one of those other occasions on which
24 the case of Paul, the Diana inquest, found its way to
25 the administrative court by way of appeal under judicial

1 review principles.

2 One of those occasions is already contained within
3 our bundles, in fact at C3/31, that being a judicial
4 review of a decision made by Baroness Butler-Sloss. But
5 Lord Justice Baker, who of course ultimately conducted
6 the inquest, found himself subject to an application for
7 judicial review in November of 2007. It is the
8 transcript of the judgment of Lord Justice Thomas which
9 I have in copy form and which I'll hand forward if I
10 may.

11 I'm not seeking to argue this extensively, merely to
12 indicate that it does give not only a very learned
13 discourse on the application of the hearsay principle in
14 this procedure, but also a solution to the practical
15 difficulty that it may be, in due course, certainly in
16 terms of Mr Keith's submission, we face in these
17 proceedings.

18 Very simply this: his Lordship -- that's
19 Lord Justice Thomas -- observed at paragraph 2 in his
20 judgment that the provisions of Rule 37 were very poorly
21 drafted and we don't say any more about it than that.
22 What he was concerned with, and what the court was
23 concerned with, was the susceptibility to introduction
24 at the inquisitorial procedure of statements taken from
25 the paparazzi witnesses in the tunnel in Paris on the

1 night of that sad accident.
2 He recounted the history of the inquisitorial
3 process, the application of the hearsay principle. He
4 lit, in particular, upon the speech of Lord Goff in the
5 case of McKerr v The Armagh Coroner, which dates from
6 1990 and may be the same case -- I'm not sure,
7 I confess, but we think it's the same case that
8 ultimately reached the European Court some eleven years
9 later -- but at first instance stage it goes by that
10 citation -- went to the House of Lords.
11 What is clarified just for your note, madam, at
12 paragraph 31 of Mr Justice Thomas' ruling, is what the
13 rule deals with is the method of the admission of
14 hearsay being adduced in documentary form within the
15 inquisitorial process, not the general rule of
16 substantive law. I'll rephrase that. It doesn't affect
17 the general rule of substantive law that hearsay
18 evidence is admissible.
19 LADY JUSTICE HALLETT: Where you have contentious evidence,
20 a witness has to speak to it, essentially?
21 MR HILL: Yes, and a further elucidation was put on that
22 formulation. I simply draw attention to paragraphs 61
23 to 63 in his Lordship's judgment. Paragraph 63 in
24 particular:
25 "It may well be [his Lordship said] the case that

1 a witness can do no more than to prove the statement and
2 give brief details of the circumstances in which it was
3 made."

4 Further observations were provided culminating in
5 this in paragraph 63:

6 "It will be for the coroner to decide on the scope
7 of questions that can be asked, there being a very large
8 measure of discretion which he [here she] is best placed
9 to exercise in the context of the inquests and in
10 respect of which this court is neither required to give
11 guidance nor should it be asked to hereafter."

12 So I only say that because our general assertion, at
13 our paragraph 3(viii), that the ISC report could be
14 taken as read wasn't an assertion made, as it were, in
15 the ether; it was an assertion that was founded, in
16 particular, in a paragraph of Lord Bingham's judgment in
17 Amin -- the citation is provided -- and that is to be
18 read in conjunction with the specific guidance as to how
19 one goes about the introduction of hearsay evidence in
20 this process, being -- this is the essential feature --
21 inquisitorial in nature, rather than adversarial, in
22 which case different rules apply.

23 We hope that is of some assistance. Madam, that's
24 all I wish to say.

25 LADY JUSTICE HALLETT: Thank you very much, Mr Hill. Just

1 before turning to Mr Garnham, I didn't ask whether
2 anybody who's unrepresented wished to add anything.
3 I don't think we have anybody here. Thank you very
4 much. Mr Garnham?

5 Submissions by MR GARNHAM

6 MR GARNHAM: Thank you, madam. Seven short topics, and I'll
7 give the title of each of them in case it helps.
8 First, Mr Hill and Operation Theseus. We submit
9 that Mr Hill makes a singularly powerful submission as
10 to the earliest dates when the bomb plots began. We
11 adopt that submission, which we submit supports what we
12 say about the argument as to whether Article 2 is
13 engaged. But it also substantially fortifies our
14 argument that if Article 2 is engaged, the investigative
15 obligation has been discharged, at least as regards the
16 preventability issue.
17 We argued, madam, both in writing and orally, that
18 Operation Theseus and the resulting trial was part of
19 the means by which any Article 2 obligation was
20 discharged. What Mr Hill has said yesterday and again
21 today, about the prosecution in Theseus, supports that
22 submission. That operation and the trial formed and
23 substantially discharged the obligation.
24 Second, madam, Osman and Mastramatteo. It's our
25 submission that for you to find that the identification

1 of the victims was not a prerequisite for the
2 application of Article 2 in circumstances such as the
3 present would mean your departing from the Osman line of
4 authority. Both the arguments of Mr Coltart and of
5 Mr O'Connor don't address the question as to what
6 Strasbourg law is. Instead, they seek to say what it
7 ought to be.

8 The European Court in Osman expressly considered the
9 alternative suggestion, the one they now advance, and
10 rejected it. Despite the amount of time we have spent
11 on Osman, madam, it's a passage to which you have not
12 been referred, I think. If I may, I'll take you quickly
13 to it. It's 10 in D1 the paragraph is 120:

14 "The court has also examined carefully the strength
15 of the applicants' arguments that Paget-Lewis [he is the
16 murderer] on three occasions communicated to the police,
17 either directly or indirectly, his murderous intentions.
18 However, in its view, these statements cannot be
19 reasonably considered to imply that the Osman family
20 were the target of his threats and to put the police on
21 notice of this. The applicants rely, in particular, on
22 Paget-Lewis' threat to 'do a sort of Hungerford', which
23 they allege he uttered at the meeting with the ILEA
24 officers on 15 December 1987. The government has
25 disputed that ... but even taking them at their most

1 favourable to the applicants' case, it would appear more
2 likely that they were uttered with respect to Mr Perkins
3 whom he regarded as principally to blame for being
4 forced to leave his teaching post ... Furthermore, the
5 fact that Paget-Lewis is reported to have intimated to
6 the driver of the car with which he collided could not
7 reasonably be taken at the time to be a veiled reference
8 to a planned attack on the lives of the Osman family."
9 The rest of the paragraph is to similar effect,
10 madam. The essence of the submission is that the court
11 in Osman was being asked to consider whether the threat
12 to "do a Hungerford" -- in other words, to attack the
13 occupants of a village, unidentified previously -- would
14 engage Article 2 and the court said it would not. That
15 is why, whatever the intrinsic merits of Mr Coltart's
16 attractively presented submission about PC Smith might
17 be, an argument to similar effect has been advanced and
18 rejected by the European Court.
19 In any event, I remind you, madam, that each of the
20 ingredients of paragraph 116 formulation of the Osman
21 test was expressly adopted by Lord Bingham in Van Colle,
22 and that, we respectfully submit, ought to be an end of
23 that submission.
24 I said in my earlier arguments that there had been
25 no case on facts such as these where Osman had not been

1 followed. Mr Keith suggests that can no longer be said
2 but I maintain that submission. Mr Keith says that
3 Mastramatteo was such a case, but with respect, that
4 submission not correct. Mastramatteo did not undermine
5 Osman. On the contrary, it expressly approved it and
6 underlined its application as the governing central
7 principle.

8 Again, I'm afraid I'm going to have to trouble you,
9 madam, just to look again at it, at Mastramatteo. The
10 general principles upon which the court declared it was
11 considering the case are set out at paragraph 67 in the
12 judgment. In the second indented paragraph of
13 paragraph 67, the court in Mastramatteo sets out the
14 whole of the -- forgive me, it's 68. In the second
15 indented paragraph in 68, the court in Mastramatteo says
16 this:

17 "Accordingly, not every claimed risk to life can
18 entail for the authorities a convention requirement ...
19 A positive obligation will arise, the court has held,
20 where it has been established that the authorities knew
21 or ought to have known at the time of the existence of
22 a real and immediate risk to the life of an identified
23 individual or individuals ..."

24 They are there expressly citing and approving, as
25 the statement of general principle, the whole of the

1 Osman test.

2 The court then turns, in paragraph (b) or subheading
3 (b) in paragraph 69, to apply that to the facts of the
4 particular case and they say:

5 "The situation examined in Osman concerned the
6 requirement of personal protection of one or more
7 individuals identifiable in advance as the potential
8 targets of a lethal act.

9 "The instant case differs from those cases ..."

10 That's the passage that Mr Keith read to you.

11 In other words, in our submission, the court is
12 exploring here the extent to which Article 2 is engaged
13 on particular facts, namely where the state chooses to
14 release from its custody dangerous criminals.

15 Common law, madam, as you're very well aware,
16 develops incrementally. Given that the European Court
17 of Human Rights jurisprudence is founded on a convention
18 drafted in the 1950s and signed by sovereign states and
19 expressed in a single short document, it is, at first
20 blush, surprising that it develops at all, but it does,
21 as Mr O'Connor rightly says, because it's treated as
22 a living document. The way in which that happens is
23 that basic general principles are repeated from case to
24 case but then developments are made on the facts of
25 particular individual cases.

1 In Mastramatteo, it's critical to note that having
2 repeat the general Osman principle, the court firstly
3 had to determine whether alternatives to prison engaged
4 Article 2 -- that's paragraph 70 -- then the
5 consequences of the fact that one purpose of prison is
6 to protect society -- paragraph 72 -- and the ultimate
7 question -- paragraph 74 -- of whether the grant of
8 prison leave or semi-custodial treatment disclosed the
9 breach.

10 The conclusion on the facts -- paragraph 76 -- was
11 that there was no real and immediate threat, but then in
12 78 the court goes on, in the second indented
13 subparagraph, to say:

14 "Even supposing that the authorities could have
15 taken more effective measures to find the fugitives
16 [they having been released one week and two weeks
17 earlier] the court does not see any reason to hold them
18 liable for any breach ..."

19 So even if the police were negligent and do nothing
20 about dangerous absconders being at large, there's no
21 reason to find the state liable for breach of Article 2.

22 I respectfully agree with Mr Keith that Mastramatteo
23 is an example of a case for which the state has assumed
24 responsibility by imprisoning these dangerous people and
25 then is taken to have responsibility when it releases

1 them. That Mastramatteo does not, in any way, undermine
2 the general rule in Osman is, in our submission, made
3 crystal clear by the fact that the general rule in Osman
4 is repeated time and time again by the highest courts in
5 this country even after they have been referred to
6 Mastramatteo.

7 Just for your note, madam, Mastramatteo was referred
8 to in the following leading cases: Van Colle, Khan, L
9 and Middleton, and in not one was the general principle
10 in Osman doubted. In our respectful submission, that
11 ought to be an end of the point.

12 Third topic. Mr Keith and the investigative
13 obligation. We differ from what we, at least,
14 understand to have been Mr Keith's finishing position,
15 if I can put it like that, about investigative
16 obligation.

17 First, in response to you, Mr Keith said, as
18 I understood him, that whether or not there was a real
19 and immediate risk calls for resolution after your
20 decision on the application of the Article 2 point. In
21 other words, as we understand him -- I might well have
22 got it wrong -- he suggested to you that that matter
23 goes to whether the duty has been breached, not to
24 whether the duty exists.

25 LADY JUSTICE HALLETT: I see he's shaking his head. It's

1 not how I understood the argument.

2 MR GARNHAM: In that case, I don't need to pursue the point.

3 LADY JUSTICE HALLETT: Mr Keith, does the point need
4 pursuing? It wasn't how I understood you put it.

5 MR KEITH: I can't claim always to be clear, but it's not
6 the way that I understood it either.

7 MR GARNHAM: I'm certainly not going to be tilting at
8 windmills if I misunderstood Mr Keith. All that I need
9 to say about it is that you are not deciding now whether
10 there has been a breach of Article 2 but whether the
11 Article 2 adjectival procedural obligation arises. It
12 arises when there's a potential or arguable breach of
13 the substantive Osman obligation, and to be able to say
14 that there is such a potential or arguable case, you
15 need to be able to say that there's an arguable case
16 that there's a real and immediate risk. That's the
17 point.

18 LADY JUSTICE HALLETT: Yes. Unless Mr Keith says anything
19 different, that's how I understood everybody to be
20 arguing.

21 MR KEITH: I'm certainly appalled that that hadn't been made
22 clear. That is absolutely what my submission was.

23 I think I made it on more than one occasion.

24 MR GARNHAM: Then it's a failure by me, not by Mr Keith.

25 LADY JUSTICE HALLETT: The only added ramification we have

1 is that Mr O'Connor says that there is a freestanding
2 right.

3 MR GARNHAM: Yes, absolutely, which I'll come to in just one
4 moment.

5 The second point on which, with even greater caution
6 and differential, I advance the proposition is that
7 Mr Keith, as I understood it, said that there was
8 a minimum requirement under Article 2 in respect of any
9 death "where there is some involvement of the state".

10 That was a matter you raised with him during his
11 submissions. All I need to submit is that that, of
12 course, is not the test. Article 2 does not impose an
13 investigative obligation except (a) where there's
14 a potential or arguable breach or (b) whether there are
15 some other special circumstances, such as custody, where
16 the relationship between state and deceased places some
17 protective duties on the state.

18 Fourth topic: width of Jamieson inquest. I say
19 this, madam -- although I'm attempting to avoid
20 repeating any initials I've already made -- for the
21 avoidance of doubt. It remains our submission that
22 using your common law powers, it would not be lawful for
23 you to investigate the Security Service's role in
24 prevention. We invite you to look again at the terms of
25 Rule 36 and to look at Butler. If this is a Jamieson

1 inquest, the evidence -- not just the verdict, the
2 evidence -- can only be directed to the means by which
3 the deceased met their death and we would submit in
4 consequence cannot go to preventability. All I think
5 I need to say to flag up the previous argument is to say
6 this is my back door and front door argument.

7 Fifth topic, jury. We have stayed neutral on jury
8 and we remain neutral on jury. The Security Service
9 took the view that it would not be seemly for it to be
10 making submissions on the discretionary exercise of your
11 powers about jury. That is eminently a matter for you.
12 We do in one important respect urge caution. To
13 summarise it, the tail must not be allowed to wag the
14 dog. On a proper analysis, if section 8(3)(d) applies,
15 there is no discretion and it would be unlawful for you
16 to act otherwise than with a jury. It might, in those
17 circumstances, be asked how it can be said that
18 preventability is a proper issue if the deaths did not
19 occur in circumstances the possible continuation of
20 which is prejudicial to health and safety.

21 LADY JUSTICE HALLETT: One argument to that is it might be
22 said: don't forget it's the present tense.

23 MR GARNHAM: Absolutely. Correct, but if you were looking
24 at preventability, it's present tense as regards the
25 section 8(3)(d) point, but it can, in our respectful

1 submission, be said that if that is what you're looking
2 at then the two are too obviously intimately linked to
3 enable to you make one conclusion in favour of no jury
4 or the other conclusion in favour of saying you can look
5 at preventability.

6 LADY JUSTICE HALLETT: People seem to be going full circle.
7 Do I take it that you are now arguing that
8 section 8(3)(d) is mandatory?

9 MR GARNHAM: I don't think there's any doubt that
10 section 8(3)(d) is mandatory. The question is whether
11 or not the case falls into it.

12 LADY JUSTICE HALLETT: In these circumstances?

13 MR GARNHAM: No, I'm not, because I'm saying that
14 preventability isn't something that's open to you.

15 LADY JUSTICE HALLETT: But if I decide it is, or if I decide
16 the background of the bombers is open to exploration?

17 MR GARNHAM: If you decide that preventability -- I wouldn't
18 make a submission about background of the bombers, no.
19 I'm content to adopt what Mr Hill says about that. But
20 I do say if you are going to say that preventability is
21 an issue, then as part of the analysis that leads you to
22 that conclusion, at the very least, it is open to very
23 obvious doubt whether you can then say this is not an
24 8(3)(d) case. We respectfully say they would be
25 mutually inconsistent.

1 Sixth and penultimately, the suggested practical
2 solutions to the national security problem. The real
3 and substantial problems which I sought to identify in
4 my earlier submissions are to be answered, says Mr Keith
5 and counsel for the families, by -- and I paraphrase --
6 goodwill and endeavour on all sides and I think, to
7 quote Mr Keith, it is to be hoped that there will not be
8 so fundamental a problem that means we can't proceed.
9 We submit that the initial answer to questions of
10 the sort Mr Keith identified is very likely to require
11 reference to highly sensitive material. More than that,
12 it is bound to provoke further questions which will
13 require yet further reference to yet more sensitive
14 material.
15 Mr Keith suggested that the unfairness I complained
16 about lay in the fact that Security Service officers
17 would have to repeat their explanations. That was
18 a characterisation of my case which was repeated by
19 Mr O'Connor. But that's not the point of unfairness
20 I complain about. That goes to resources and diversion
21 of resources, about which I have made my submissions and
22 I say nothing more.
23 The unfairness is this: that if you, madam, embark
24 upon the process which begins with addressing the
25 question that Mr Keith has identified, the

1 Security Service may well be unable to provide a proper
2 response or defence -- depending on your point of
3 view -- to their actions because of the interests of
4 national security.

5 That has two consequences. One, unfairness to the
6 Security Service because they can't deploy the material
7 that, in a perfect world, they would want to. Two, you
8 don't get the full answer because national security
9 prevents, if I can put it colloquially, us defending
10 ourselves.

11 LADY JUSTICE HALLETT: If that were true, then the
12 Security Services could never be held to account.

13 MR GARNHAM: The circumstances in which the Security Service
14 may be held to account have to be examined with
15 considerable care on the facts of every case. I'm not
16 making --

17 LADY JUSTICE HALLETT: At the moment, what you're saying is
18 may, may, may. That must be in every case where the
19 Security Service's activities are being examined. In
20 every case, it may be that they can't defend themselves
21 because of the interests of national security. That
22 can't be a reason not for at least embarking upon the
23 process.

24 MR GARNHAM: No, madam. There may be cases in which
25 somebody in my shoes can stand up and say, "We can

1 answer this. With properly guarded material, we can
2 answer this." The caution I urge on you is because of
3 the way in which the chain of questioning would be
4 likely to turn once Mr Keith's questions start to be
5 investigated.

6 LADY JUSTICE HALLETT: Always controlled by me.

7 MR GARNHAM: Well, madam, yes, although that brings me to
8 the problem that I attempted to deal with in my earlier
9 submissions, which is that in every other form of
10 proceeding, the ultimate decision on whether or not to
11 allow material prejudicial to national security lies
12 with the Security Service. If the court rules that
13 material has to be disclosed if the Security Service are
14 to maintain the position, the Security Service can
15 always say, "We won't maintain our position."

16 As I submitted to you before, it is not obvious how
17 that can be done, which would mean that if there was
18 a piece of paper, let us say, in respect of which my
19 clients said, "This cannot be released because of
20 national security", and you said, "Well, I think the
21 interests of open and fair justice trump that", we would
22 not be in a position to pull the plug. That raises --

23 LADY JUSTICE HALLETT: So what happens in law there, in this
24 situation? In an inquest, if the coroner decides that
25 they disagree in an assessment -- and I accept that the

1 Security Services may say, "You're not experts; we are."

2 So let's say there's a disagreement. The coroner says,

3 "I think that material should be disclosed", and the

4 Secret Service say, "No, it's against the interests of

5 national security." What happens in law?

6 MR GARNHAM: May I, without being impertinent, just make it

7 clear that it's not the Secret Service. There is an

8 organisation called the Secret Intelligence Service,

9 which is MI6, and I act for the Security Service.

10 LADY JUSTICE HALLETT: Security Service, thank you.

11 MR GARNHAM: Madam, in that situation, ultimately the

12 Security Service, like every other government body, is

13 subject to the rule of law. If you made that ruling

14 then we would have to consider whether or not to

15 challenge you but ultimately the courts would direct

16 what happens. I don't, for one moment, suggest that the

17 Security Service are outside the rule of law.

18 LADY JUSTICE HALLETT: What about powers in relation to

19 intelligence material?

20 MR GARNHAM: I'm sorry?

21 LADY JUSTICE HALLETT: What about RIPA material, for

22 example?

23 MR GARNHAM: Madam, I've studiously avoided any reference to

24 RIPA material during the course of my submissions.

25 I think I ought to say nothing more than I agree with

1 what Mr Keith has said about RIPA, that in the case of
2 RIPA material there would be an absolute statutory bar
3 on the court seeing the material. I hope I paraphrase
4 him correctly.

5 LADY JUSTICE HALLETT: He also referred to the powers of the
6 CPR in civil proceedings, which I'm afraid I haven't
7 gone back to the White Book to check.

8 MR KEITH: I may not have expressed myself clearly enough.
9 I said criminal procedure rules. It was a reference to
10 criminal because of the reference to (h) and the ...

11 LADY JUSTICE HALLETT: Thank you.

12 MR GARNHAM: The truth is, madam -- I hope I will be
13 forgiven for expressing thoughts, rather than
14 submissions on this but I think it is right that this
15 point has never been ventilated before and beyond the
16 baldest assertion that the Security Service regard
17 themselves as bound by the rule of law and accordingly
18 if the highest court of the land directs that material
19 must be released it will be released, I don't think
20 I can go beyond that.

21 But I do say that there is a risk, if you ordered
22 this material, if you went for an open style of inquest,
23 whether it be Article 2 or whether it be expanded
24 Jamieson, and if you required the release of sensitive
25 material, the point may well come where you say, "I'm

1 proposing to release this", and we say that damages
2 national security, and that point will have to be
3 tested. It's inevitable, I think, that that would be
4 tested in the High Court.

5 I think it is technically the position that you,
6 sitting as a coroner, don't have power to compel the
7 production of documents. It has to be done by way of an
8 application by you to the High Court for an order of
9 subpoena duces tecum. So technically, the battle would
10 probably take place before a judge of the High Court,
11 and subject to all appeals and challenges. Mr Keith
12 nods, so I'm glad I've got something right.

13 LADY JUSTICE HALLETT: I wish I hadn't asked the question
14 now, actually, Mr Garnham.

15 MR GARNHAM: That, I think, is the position and ultimately
16 when it has gone to the Supreme Court we'd do as we're
17 told. I'm not sure that I have precise instructions to
18 put it like that, but I think it comes to that effect.

19 LADY JUSTICE HALLETT: We won't hold you to it because I did
20 ask you. Right.

21 MR GARNHAM: Madam, finally this. The July 7 bombing was
22 the result not of a natural disaster or an act of God,
23 nor was it an industrial accident, the product of human
24 error. It was the deliberate action of evil and callous
25 killers. The appalling truth is, however, that there

1 are people out there who don't view this tragedy in that
2 way. There are people out there who applauded and
3 celebrated this appalling act and there are others who
4 would like to repeat it, to emulate the action of these
5 murderers and to see to it that there are other innocent
6 people bereaved like the families here.
7 Madam, as you will be well aware, not all such
8 people are stupid. Some of them are both evil and
9 intelligent. If you were to direct, because of the way
10 this inquest were to be structured, that sensitive
11 material were to be released, and if one of the
12 questions it is suggested might be explored in a public
13 court is what was it about MSK and the circumstances in
14 which he came to the attention of the Security Service
15 which meant he was not followed up, I ask rhetorically:
16 can there be much doubt that potentially the
17 Security Service's answer to that question would be of
18 the greatest interest to an intelligent planner of the
19 next terrorist outrage? To explore it in a public
20 court, to permit a cross-examiner as skilled and dogged
21 as Mr Saunders or Mr O'Connor or Mr Coltart or any of
22 the others who represent the families, acting entirely
23 properly in the interests of their clients, as they
24 would be, what it is about MSK and the circumstances in
25 which he found himself that meant the Security Service

1 didn't follow the information would, we would submit, be
2 to provide the next Al-Qaeda plotters with an invaluable
3 weapon, intimate knowledge --

4 LADY JUSTICE HALLETT: Haven't they already answered the
5 question to the ISC and it has been published?

6 MR GARNHAM: Only in a manner which is consistent with
7 national security. You contemplate exploring beneath
8 that. As I said in my earlier submissions, madam, the
9 Security Service ensured that of the material that was
10 made available to the Intelligence and Security
11 Committee, all that could possibly be made public was
12 made public in that report.

13 Now, what is contemplated is that we should lift
14 that lid and look further and test further, and it is in
15 that regard, if that were to be the proposal, that
16 I make this submission: that that has the potential to
17 provide intelligence to those planning the next outrage,
18 and there can be nothing further from the ambition of
19 anybody in this room.

20 LADY JUSTICE HALLETT: I understand the point you're making
21 but I'm not sure that I follow the basis for it and I'm
22 just wondering whether I am in a position to make any
23 finding on the submission you're making in the light of
24 the information I have.

25 I mean, your response to my question, "Haven't they

1 already answered it?", was so delphic that I'm not
2 really sure where I've got to now.

3 MR GARNHAM: I can't remember the last time I was accused of
4 being delphic. The allegation is normally rather the
5 opposite. But on this occasion I have no choice but to
6 be delphic.

7 LADY JUSTICE HALLETT: Well, I understand that because
8 you're acting in accordance with your instructions and
9 I'm not criticising you for not helping me, but I'm just
10 explaining I now find myself in this rather difficult
11 position that you've given an answer that raises in my
12 head a number of questions which, by the sounds of it,
13 I can't ask.

14 MR GARNHAM: Madam, perhaps I could have another go in this
15 way.

16 Let's assume for the moment that you were to rule
17 that there were to be a Middleton inquest or you were to
18 rule that there should be a very wide Jamieson inquest,
19 contrary to our submissions. Let's assume that that
20 prompted a request by the inquest for sensitive material
21 and let's assume that the Security Service provide as
22 much of that as they think they can. Let's assume that
23 the first question that is pursued in this inquest is
24 what is it about MSK that meant the Security Service
25 didn't do as we all, to my left, say should have been

1 done.

2 If that question, in those circumstances, were to be
3 answered, it would result -- if proper answers were to
4 be given to that -- in there being revealed what it was
5 about MSK which meant he was not followed up, what it
6 was about his circumstances, his characteristics, the
7 way in which he presented himself to the world, that
8 meant it didn't trigger what my learned friends say it
9 should have triggered.

10 Those planning the next outrage then know that the
11 difficulty the Security Service has in all those
12 circumstances is this, whatever it is, and that provides
13 them with intelligence that enables them better to avoid
14 the attention of the Security Service in the future.

15 LADY JUSTICE HALLETT: That seems to me a perfectly sensible
16 proposition, save that if you then ask the questions in
17 this case about what it was about him, I'm not sure that
18 it would withstand examination of the material or close
19 scrutiny. It sounds a very simple and acceptable
20 proposition but I'm questioning in my own mind whether
21 examination of the circumstances of this case would
22 necessarily result in what you're asserting.

23 MR GARNHAM: I don't need to show that it necessarily would
24 have that effect, madam, if there's a risk it would have
25 that effect.

1 LADY JUSTICE HALLETT: Or even that there's a risk that it
2 would because given all that has been revealed about MSK
3 and all that has been published in the ISC report,
4 I think if I were cross-examining you as to that
5 statement and had the time to do so in detail, I would
6 say, "What on earth is it in this case that we know that
7 could possibly, if pursued, help another terrorist?"
8 I'm puzzled.

9 MR GARNHAM: Let's say that that question -- this is
10 entirely hypothetical and I can tell you, madam, that
11 I know nothing about this secret. I've deliberately
12 kept my instructions into open, not closed. I know
13 nothing of the secret material. But let's say that that
14 line of questioning resulted in answers being given
15 about the way different threats arising out of Crevice
16 were prioritised. Say the explanation for why MSK
17 wasn't followed up lay in the relative importance of him
18 amongst a list of a number of others mentioned in the
19 Crevice investigation. Let's say that in order to
20 explain why it was he was ranked in the third division
21 south, rather than in the premiership in that exercise.
22 It would be necessary or it might be necessary to
23 explain how that ranking is done.

24 LADY JUSTICE HALLETT: They've already gone down that path
25 to a certain extent. How it was done as in targets, for

1 example.

2 MR GARNHAM: Yes, they have so far as they can, consistent
3 with national security. But that's not enough. That's
4 the whole premise of this inquiry.

5 LADY JUSTICE HALLETT: So far what we have been told as to
6 why MSK wasn't followed up -- we have been told it was
7 because he wasn't considered to be the appropriate level
8 of target. It was because resources had to be
9 prioritised and if and when he became a threat it was
10 thought he was a threat in Afghanistan, not in the UK.

11 MR GARNHAM: Pakistan, yes.

12 LADY JUSTICE HALLETT: Sorry. Well --

13 MR GARNHAM: One or the other. Just say that had to be
14 explored and somebody said to a Security Service
15 witness: "Why was he ranked like that? Wasn't it
16 obvious he was more important than all the others?", to
17 which the answer would be, "No, he was not as important
18 as the others." "Why wasn't he?" "Because he was more
19 important." "In what way were they more important?"
20 "They were more important because they had the following
21 characteristics." "Why is that more important? How do
22 you rank that?" "Well, I need to explain why it was
23 that all those other people were thought to be of higher
24 risk." "How do you do that?" "Well, we apply these
25 criteria." "Well, let's test that. Why do you say

1 that's a more important criteria than the one applied to
2 MSK? What documents did you have to make good that
3 assertion?"

4 The result is the revealing of information about
5 priorities and the revealing of information about
6 another operation which are not consistent with national
7 security.

8 LADY JUSTICE HALLETT: If the questioning were not
9 controlled but if the questioning were controlled
10 because I set specific limits on it, then why can't the
11 answers to these questions, in general terms, rather
12 than specific -- nobody is asking to know who exactly
13 the other targets were, how many, how many staff MI5
14 have, but why can't the general questions be asked and
15 answered in a way that doesn't threaten national
16 security, given all that we know already?

17 MR GARNHAM: I'm sure they can, but they can't then be
18 tested in the way that would be the natural inclination
19 of all of my learned friends.

20 LADY JUSTICE HALLETT: So they can be asked and answered?

21 MR GARNHAM: I'm sure that answers can be provided, and I'm
22 speaking at the moment without instructions, but yes, I
23 can't believe -- the Security Service, if we had lost
24 all those arguments, would, of course, be cooperating
25 and on that basis I'm sure that answers could be

1 provided. But the danger would come as soon as there
2 was an attempt to explore behind that.

3 LADY JUSTICE HALLETT: Yes, but what that means is, if you
4 are accepting -- and you haven't got instructions --
5 they could be asked and answered, that means that the
6 process could involve a certain amount of material being
7 considered by those who are appropriately security
8 cleared.

9 MR GARNHAM: Yes.

10 LADY JUSTICE HALLETT: Then, in a public forum, questions of
11 concern to families and survivors, and to the public as
12 a whole, being asked and answered.

13 MR GARNHAM: With appropriate use of screens and anonymity.

14 LADY JUSTICE HALLETT: I'm used to all of that, Mr Garnham.
15 Fear not. So what you're saying, though, is there is
16 a limit to how far down that path any cross-examiner
17 could go?

18 MR GARNHAM: Yes.

19 LADY JUSTICE HALLETT: Right. But what you are doing in
20 that process is you are satisfying those who have
21 legitimate interests and concerns that somebody has at
22 least looked at some of the material, somebody has been
23 able to ask the questions in public and they have at
24 least heard the answer for themselves. Would that not
25 serve a useful purpose to the people who have suffered

1 so much in the explosion?

2 MR GARNHAM: I think it would be impertinent of me to answer
3 that question. It would be for them to say that.

4 LADY JUSTICE HALLETT: I appreciate the families and
5 survivors may not be able to get all they want out of
6 this process but from your submissions it's not clear to
7 me why they can't get something.

8 MR GARNHAM: I understand, if I may say so, madam, the way
9 you put it, and you know my immediate answer to that is
10 that as a matter of law the inquest can't go there, but
11 all this is being conducted on the premise that you're
12 against me on the law. I explain how, I think, in those
13 circumstances, the process would have to operate because
14 it would then be operating, we can assure you, with the
15 cooperation of the Security Service and in careful
16 contact with your team, and in those circumstances
17 doubtless some form of questioning or some form of the
18 provision of statements or some such device could be
19 worked out.

20 If I didn't say that, madam, I wouldn't be true to
21 the submission that I did make on instructions which is
22 that if we lost this on the law, the Security Service
23 will cooperate.

24 LADY JUSTICE HALLETT: I interrupted your concluding
25 submissions, Mr Garnham. I don't know if you'd finished

1 them. So please take what time you need.

2 MR GARNHAM: I intended, madam, to end by indicating
3 willingness of the Security Service to cooperate. I've
4 already, in the last few moments, expressed that view.
5 It's a genuine expression and there's no need for me to
6 repeat it.

7 LADY JUSTICE HALLETT: I'm grateful for that, thank you.

8 MR GARNHAM: Unless I can help you further, madam --

9 LADY JUSTICE HALLETT: No, thank you very much, Mr Garnham.
10 Right, Mr Keith -- or has Mr Smith got something to
11 tell me? Yes, Mr Keith?

12 Submissions by MR KEITH

13 MR KEITH: Madam, I wasn't proposing that I should exercise
14 any ability to reply to any of the points. I didn't
15 propose to invite you to go down that path.

16 Could I simply raise one matter, which was that in
17 the course of my submissions, I proposed for your
18 consideration whether or not you'd allow the parties
19 seven days to provide written submissions on the detail
20 of 8(3)(d) given the paucity of the submissions in
21 relation to the issue of whether or not the proposed
22 scope of the inquest could be accommodated with their
23 reading of 8(3)(d) that avoided the mandatory
24 requirements, the point that my learned friend has
25 addressed you on and which I addressed you on at great

1 length. I suggested that the parties might be able to
2 assist you by advancing written submissions as to
3 whether or not -- and this applies particularly to the
4 families, of course -- the issues that they seek to
5 raise are said by them to be continuing or possibly
6 recurring -- and I say "said" because I must acknowledge
7 that there is, of course, as yet no evidence -- or
8 whether they would accept that on the basis of the
9 material presently available, it is at least arguable
10 that they raise individual alleged failings, the point,
11 madam, that you made in the course of argument, because
12 although almost all the parties have agreed that they
13 would be prepared to permit a reading of 8(3)(d) that
14 allowed you to avoid its mandatory requirements, very
15 few of the parties have actually addressed in detail in
16 terms the nature of the issues and whether they do, in
17 reality, go into the issue of systemic failings, and
18 also, lastly, whether or not, if properly analysed, the
19 issues that they wish to raise are to be said as to be
20 raising continuing or possibly recurring matters,
21 whether or not those matters have since been addressed.
22 By way of one example, the emergency response, whether
23 or not difficulties concerning communication between the
24 emergency services, which may in particular cases be
25 said to have led to a failure to take adequate steps to

1 prevent death, may in fact have been met by changes
2 concerning, for example, the purchase of
3 telecommunications systems, the TETRA system by the
4 police and British Transport Police.

5 These are issues which you have not been addressed
6 on in detail, and you may be assisted by written
7 submissions on that point. If that submission were to
8 find favour with you, it would also allow Mr Saunders
9 seven days to take the further instructions in relation
10 to whether or not those whom he represents have views in
11 relation to the general desirability of a jury, the
12 question that you posed of him but which he was unable
13 to answer because he had not been able to take
14 instructions from some of his clients.

15 LADY JUSTICE HALLETT: To put it bluntly, Mr Keith, what
16 you're suggesting is I invite further written
17 submissions on Mr Garnham's assertion that if I were to
18 find preventability is a legitimate issue and I was to
19 find that a jury isn't mandatory I would be acting
20 irrationally. That's essentially what he's arguing.

21 MR KEITH: Yes. He is putting the factual issue in a way
22 which can only be described as in terrorem, because
23 certain legal consequences might follow from such
24 a ruling.

25 LADY JUSTICE HALLETT: Exactly. I did notice that.

1 MR KEITH: Madam, you did. I brought to your attention
2 yesterday the decision in ex parte Wright in which the
3 division between systemic and individual failings was
4 noted by the Divisional Court and I reiterate what
5 I said, that properly analysed, it may be, for example,
6 that the assessment of C, D and E was, in fact, an
7 individual failing but there is very little sight as to
8 whether or not those representing the families take the
9 indubitable view or the inevitable view that the matters
10 raised in the ISC report are properly systemic issues as
11 opposed to individual issues. But it's a difficult
12 issue and one which, with respect to the parties --
13 I made this observation yesterday -- may not have found
14 adequate reflection in the written submissions.

15 MR GARNHAM: Madam, may I just say this: it was not intended
16 in terrorem. It was intended to reflect what I regarded
17 as a duty on me to flag up what might be an error of law
18 if it were not properly addressed, and that is all.

19 LADY JUSTICE HALLETT: It wasn't meant pejoratively that you
20 were saying that, Mr Garnham.

21 I have plainly been given a great deal to think
22 about and I will have to reserve all the issues. I'm
23 sorry about that. I hope to be in a position to make
24 some announcements because I'm very conscious of how the
25 bereaved families and survivors like Ms North have

1 waited so long for a decision, but what I will promise
2 is that they will have a decision as soon as I possibly
3 can. It will not be next week, especially given that we
4 have this other issue to resolve, but I would hope to be
5 in a position to give my ruling within the next two to
6 three weeks.

7 MR KEITH: Madam, in relation to any direction, if you deem
8 it appropriate, for written submissions on 8(3)(d)?

9 LADY JUSTICE HALLETT: Given the way the submissions have
10 developed during the course of this week, unless I hear
11 any opposition from any of your colleagues, I will
12 direct that written submissions on 8(3)(d) should be
13 with me within seven days. I think it has to be a limit
14 of seven days because otherwise my ruling is then
15 delayed and the survivors and the families have to wait
16 even longer.

17 MR KEITH: Yes, madam.

18 LADY JUSTICE HALLETT: I am satisfied that the issues you
19 raised are sensible issues and issues upon which I would
20 like help. Are those who represent the families and
21 survivors arguing that the issues they raise may be
22 invoking the possibly recurring words of the section?

23 MR KEITH: Thank you.

24 LADY JUSTICE HALLETT: I don't think that there's anything
25 else that we can do today. My ruling -- when it's

1 available, obviously the parties will be notified.

2 Do you have any submissions, Mr Keith, as to what
3 form matters then take? Are the parties content that
4 I hand it down in the way that one normally does with
5 a court case?

6 MR KEITH: Madam, it's entirely a matter for you, of course.
7 We envisage that everyone would need time to reflect and
8 therefore there can be no question of any consequential
9 directions upon your ruling, whatever it is. The
10 circumstances of this case merit a public handing down
11 of your ruling on all the issues that have been raised,
12 but that there may be a need for you subsequently to
13 call for a directions hearing to make further directions
14 for the June hearings, but the date on which you give
15 your ruling following this week's legal arguments would
16 not be that occasion.

17 Your order, madam, in relation to the seven days,
18 could we be permitted to reduce your order into writing
19 for circulation to the parties?

20 LADY JUSTICE HALLETT: If you would, please, and if you
21 could use, essentially, the words you used in your
22 submissions to me, which I'm afraid I was, at the end of
23 a long morning, scrabbling to replicate.

24 MR KEITH: Yes, of course.

25 LADY JUSTICE HALLETT: Right, anything else that needs to be

1 dealt with today?

2 MR KEITH: No, and madam, on behalf of everybody, thank you
3 very much.

4 LADY JUSTICE HALLETT: May I thank everybody for their
5 assistance. It has been considerable and I am very
6 grateful and, as I have indicated, I will give my
7 decision as soon as I possibly can.

8 (1.30 pm)

9 (The case adjourned)

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1	INDEX	
2	PAGE	
3	Submissions by MR COLTART	1
4	Submissions by MR PATTERSON	25
5	Submissions by MR SAUNDERS	31
6	Submissions by MS SHEFF	34
7	Submissions by MR O'CONNOR	41
8	Submissions by MR HILL	67
9	Submissions by MR GARNHAM	73
10	Submissions by MR KEITH	99
11		