

Coroner's Inquests into the London Bombings of 7 July 2005
Pre-Inquest Proceedings - 27 April 2010 - Afternoon session

18 (2.05 pm)

19 LADY JUSTICE HALLETT: Yes, Ms Sheff?

20 Madam, before the luncheon adjournment, I was dealing
21 with questions of the aftermath, specifically the delayed
22 identification of the victims and communication thereof
23 to the bereaved families.

24 Madam, so far as the law is concerned regarding this
25 matter, we say that the judgments in Dallaglio and

1 Takoushis allow for the coroner to look at the chain of
2 causation and to ensure that the chain of causation is
3 not too remote.

4 In the case of Takoushis, which is at volume C2,
5 tab 26, that is explained at paragraph 43 by the Master
6 of the Rolls who said that, in Dallaglio,
7 Simon Brown LJ, as he then was, identified a tension
8 between the apparently narrow definition of "how" in
9 section 11(5)(b)(ii) and the wider provisions of
10 section 8(3)(d) of the 1998 Act, which looks to the
11 future, as does Rule 43 of the 1984 Rules.

12 Over the page at page 47, referring to the case of
13 Jamieson, Simon Brown LJ said that, although that was
14 a death in custody case, he regarded it as applicable to
15 the Dallaglio case where he said the inquiry was almost
16 bound to stretch more widely than strictly required for
17 the purposes of a verdict, although, how much more
18 widely was a matter for the coroner, and the Master of
19 the Rolls in the same case, Sir Thomas Bingham,
20 emphasised the need for a full, fair and fearless
21 investigation, but observed that it was for the coroner
22 to decide on the facts of a given case at what point the
23 chain of causation becomes too remote to form a proper
24 part of the investigation.

25 Madam, we say that the identification issues are

1 clearly a part of the chain of causation, even where the
2 identification takes several days, and indeed
3 particularly where it takes several days.

4 The issue concerning retrieval of items at the scene
5 which may or may not have assisted in identification has
6 been helpfully suggested by Mr Hill to be a matter that
7 the police could deal with informally with the bereaved
8 families and, having spoken to Mr Hill personally over
9 the luncheon adjournment, we have adopted his suggestion
10 on behalf of our clients. To that extent, madam, it may
11 be that this is not a matter upon which you need to rule
12 until such stage as there remain, if there do,
13 outstanding issues concerning these matters which can be
14 brought to the attention of the court at a later stage.
15 But that is certainly something which has not been
16 available to the families previously and which has been
17 a very useful result from at least the preliminary
18 hearings in this matter.

19 With regard to joinder, as my learned friends have
20 already indicated, there are no statutory rules or
21 guidelines from the cases, and it is again another
22 discretionary matter for you, madam, in the individual
23 circumstances of the case.

24 I can only point to the differing views of the
25 Sonn Macmillan Walker clients, and those in favour cite

1 the importance of the bombers being joined to the extent
2 that there is no door which would be closed which could
3 help to understand the full background to what occurred.
4 It touches on the issue of scope and ensures that
5 the scope is kept as widely drawn as necessary to
6 establish the essential facts.
7 Another family suggested that, although they were
8 ultimately undecided about joinder, they said that it
9 does seem logical to have all the matters dealt with at
10 the same time in respect of all 56 inquests.
11 However, those who take the contrary view do so most
12 vehemently, and that is based upon their real and
13 understandable concerns as to the sensitivity of the
14 matters being heard together and the outcome of those
15 matters being heard together, which one client has
16 suggested will encourage the proceedings to become like
17 a media circus.
18 We, similarly to Mr Saunders, would adopt the
19 suggestion made by Counsel to the Inquest that, because
20 there is limited information as to the current views of
21 the bombers' families and they would, in any event, we
22 submit, be entitled to apply to become interested
23 parties in any event, which might then have the same
24 effect, we would suggest that these matters cannot be
25 dealt with at this stage and the argument should be

1 delayed for a limited period of time to allow
2 submissions, if any, to be made and the position of the
3 bombers' families to be clarified.

4 Concerning the matter of jury, we say that
5 Coroners Act 1988, section 8(3)(d) is triggered in these
6 circumstances owing to the likely prejudice to the
7 health and safety of the public.

8 Alternatively, we would submit that it's in your
9 discretion under section 8(4).

10 However, certainly the Al-Fayed case seems to
11 suggest that it's a question that should only be
12 determined once scope has been dealt with.

13 Case law seems to suggest that a jury is required
14 when there is a reasonable suspicion of systemic defect.

15 As far as the views of the bereaved families are
16 relevant to this issue, they are given, it's right to
17 say, in the absence of any understanding of the
18 statutory provisions or the rules that apply. However,
19 the practical aspect of their instructions are that
20 either they believe in the concept of juries and feel
21 that a verdict given by a jury, understanding the
22 principles expounded, which would then have to be dealt
23 with in layman's terms, would assist the families
24 themselves listening in court to follow the evidence and
25 understand the issues.

1 However, other families feel that it may be an
2 unnecessary use of public funds, it may extend the
3 hearing itself and may prove unnecessary, bearing in
4 mind the coroner, and particularly, if I may
5 respectfully say so, madam, this particular coroner's
6 undoubted suitability to deal with these issues.
7 As far as the PII issues are concerned, we say that
8 those could be resolved as in other such cases, and that
9 is not a reason of itself not to summon a jury.
10 Similarly, the possibility of there being graphic
11 images and disturbing evidence, again is not of itself
12 a reason and of course, madam, as has been said, juries
13 are often used in criminal cases to see disturbing
14 evidence and often that is dealt with by presenting it
15 in a more appropriate format, if necessary, by for
16 example pixilated images or the like.
17 Finally on the issue of survivors, again there is no
18 specific agreement within the clients of the firm as to
19 how these issues should be dealt with, and the general
20 view of those who don't believe they should be
21 designated as properly interested persons is that it
22 does derogate from the purpose of the inquest, that
23 being for people who are deceased, and that being aware,
24 as they are -- the families that is -- that the
25 survivors would, in any event, be called to give

1 evidence, they feel that that would be a proper platform
2 for them to deal with any issues which concern them as
3 survivors of the scene and feel that the interests of
4 survivors of a particular scene would be coexistent with
5 those of bereaved families who lost victims at that
6 particular scene.

7 On the other hand, the comment is made that they
8 have also suffered a great deal and that they are
9 entitled, therefore, to put themselves forward as
10 properly interested persons given the right to ask
11 questions of their own in order to ensure that they have
12 the answers that they need and that they require.

13 Madam, the difficulty for both survivors and
14 bereaved families of course is this, that there has
15 been, and is unlikely ever to be, a public inquiry in
16 respect of these matters, and this is the sole tribunal
17 by which questions which are so anxiously sought to the
18 issues which have in many cases kept these families
19 awake at nights, have to be asked and answers hopefully
20 given, and, therefore, that is why we say that the scope
21 of the inquests should be kept wide and the bereaved
22 families and, indeed, should you so rule, madam, the
23 survivors are given every opportunity to ask questions
24 which concern them.

25 Unless I can assist you further, madam?

1 LADY JUSTICE HALLETT: Thank you very much, Ms Sheff.
2 Mr Keith, before turning to you, we have a number of
3 families who remain unrepresented. I know, Mr and
4 Mrs Taylor, you have -- please don't say anything if you
5 don't want to -- you've responded to Mr Smith and you've
6 given him your views. Unless you want to add anything
7 in person, I think Mr Keith was going to outline to me
8 what your views were, but if you wanted to say
9 something, of course I'll hear from you.

10 MR TAYLOR: I think, madam, it's perfectly covered by all
11 the advocates before, most of the questions we want
12 answered here. Thank you.

13 LADY JUSTICE HALLETT: Thank you very much, Mr Taylor.
14 Before we move on, unless there's anything you want
15 to say to stop me doing this, Mr Keith, I'd ask any
16 other unrepresented family.

17 MR KEITH: Thank you very much. I know that Mr Smith has
18 been round the room to see whether or not there are any
19 other unrepresented families who wish to express any
20 views. I don't believe that anyone else has come
21 forward.

22 LADY JUSTICE HALLETT: Right.
23 Is there any other member of a family who doesn't
24 have legal representation who wants to say anything at
25 this stage, or who feels that the questions they wanted

1 raised haven't been raised?

2 It won't be your last opportunity. You can always
3 make a note and tell me if anything else occurs to you,
4 if you'd like to use the services of Mr Smith who sits
5 in front of me.

6 Yes, Mr Keith?

7 Submissions by MR KEITH

8 MR KEITH: Madam, because Mr and Mrs Taylor have taken the
9 care to set out the issues that they would wish you to
10 consider, perhaps I can read them out as you've
11 indicated, both for the record and because those issues
12 will inform the submissions that are to come.

13 In their meeting with Mr Smith, they indicated that
14 these were the issues that they wanted to raise.

15 Firstly, the preventability issue and the role of the
16 Intelligence Service, they say, should be within the
17 scope, but they acknowledge that that issue had already
18 been covered by the other submissions, as you just heard
19 from Mr Taylor.

20 The emergency response, in particular they want you
21 to explore whether there was any delay in getting
22 medical help to the Aldgate scene and, if so, why. Was
23 there any question of first responders being held back
24 from entering the tunnel and, if so, who made this
25 decision, why, and what effect did it have on their

1 daughter, Carrie.
2 They would like to know why it took so long to
3 identify their daughter and they wish to know whether it
4 was the case, as was reported, you will recall, in the
5 press at the time, that a significant number of police
6 officers were out of London policing the G8 summit at
7 Gleneagles.

8 Finally, they would like to know whether the British
9 Government received intelligence of the impending attack
10 from French or Saudi Arabian sources, as was also
11 reported subsequently, and, if so, why no action was
12 taken in that regard.

13 Madam, your batting order shows, in fact, after
14 Sonn Macmillan Walker reference to the application by
15 Mr McDonald supported by the National Union of Teachers
16 Solicitors and also an application by East London
17 Bus & Coach Company and Mr Psaradakis.

18 Both, you are aware, relate to applications under
19 Rule 20(2). For your note, they're contained
20 respectively at tab 11 and tab 4 of the bundle of legal
21 submissions.

22 Could I invite you to put those two applications to
23 the back of the list? Because, in relation to
24 Mr McDonald, he is a survivor and, therefore, his
25 submission will need to be considered alongside the

1 submissions that you will hear in a moment from
2 Mr O'Connor in relation to the survivors whom he
3 represents and, in relation to the application by the
4 East London Bus & Coach Company and Mr Psaradakis, you
5 may feel it's convenient for that issue to be dealt with
6 once you've heard submissions from the organisations who
7 are otherwise claiming properly interested persons
8 status.

9 LADY JUSTICE HALLETT: Thank you, Mr Keith. I've also had
10 some information from Mr Coulson, who's another
11 survivor.

12 MR KEITH: Yes, indeed.

13 LADY JUSTICE HALLETT: So we need to make sure at some stage
14 that we read into the record what he has asked me to
15 consider, because I understand that, although he was
16 here yesterday, he couldn't be here today and tomorrow.

17 MR KEITH: Yes, indeed. Thank you very much. He sent
18 through an email to Mr Smith. Because, madam, you
19 indicated that the most convenient time to deal with
20 unrepresented survivors would be after Mr O'Connor
21 concluded his submissions on behalf of the survivors he
22 represents, perhaps I could read out his email at that
23 point?

24 LADY JUSTICE HALLETT: Thank you very much. That means we
25 now return to Mr O'Connor.

1 MR KEITH: Indeed.

2 LADY JUSTICE HALLETT: Mr O'Connor?

3 Submissions by MR O'CONNOR

4 MR O'CONNOR: Madam, our 15 survivor clients all apply to be

5 recognised as properly interested persons within

6 Rule 20(2)(h) of the rules. They are divided as

7 follows: four of them from Aldgate, five from

8 Edgware Road and six from Kings Cross.

9 What we have set out in our written submission under

10 the heading of each of our clients divided by venue, is

11 but the tip of the iceberg of the contribution that they

12 may well be able to make to the efficacy of this inquest

13 on the subject of aftermath.

14 I say that because the vast majority have suffered

15 from severe psychological symptoms since, and have, as

16 I briefly indicated before, been unable even to read the

17 scene reports. There has, therefore, not been any

18 opportunity yet to tease out from them with sympathetic

19 and expert skills the full accounts and the full

20 contribution that they can make.

21 That is the first -- I'm going to list it later on,

22 but the first practical role of lawyers and legal

23 representation for them is that preparatory stage for

24 the purposes of your task, madam.

25 What they all certainly share is that they lived

1 through the period between the explosions and the time
2 when they, themselves, could escape from those
3 locations. Many were trapped for even in excess of
4 50 minutes, what must have seemed a lifetime, in smoke
5 and debris. Many of them terribly injured and doubting
6 if they, themselves, would survive, surrounded by dead
7 bodies, other injured people, dying victims and body
8 parts.

9 Many of them acted very bravely indeed, and because
10 of the position they were in, and their commitment, were
11 actually able to make the most immediate and effective
12 contribution to saving lives. Many of them suffered
13 terrible injuries themselves, but most importantly of
14 all, they are the eye witnesses providing the best
15 source of evidence for you on the immediate aftermath
16 issue and, indeed, on the how, when and where, no matter
17 how narrowly defined, of the deaths of many of the
18 deceased victims.

19 With the caveat that this is the tip of the iceberg
20 and that if I simply refer -- I'm going to just refer by
21 initials as I go through from page 3 of our
22 submissions -- if I say very little, if anything, about
23 some of the accounts it is simply because, at the
24 moment -- and there is no guarantee that the position
25 won't be very different -- apart from having been close

1 by and suffered injuries, there is nothing more at the
2 moment that we can add. But it so happens that the
3 first, from Aldgate -- I'm going to deal with the four
4 from Aldgate first -- and call him AB.

5 LADY JUSTICE HALLETT: I have read all these submissions in
6 great detail. I am acutely conscious of what they went
7 through.

8 MR O'CONNOR: I'm most grateful. May I just then jump and
9 pick out, madam, EK, at the bottom of page 5 and,
10 really, on page 6, who was awarded an MBE for her
11 bravery and who was actually two carriages away from the
12 explosion but went into the carriage affected and
13 probably saved two lives.

14 She, being a trained first aider, from her officer
15 position, did everything she could without any
16 equipment, makeshift tourniquets to stem the flow of
17 blood from bleeding injuries, and she would be able most
18 certainly to assist you with a highly informed view of
19 what difference could have been made by proper first aid
20 equipment being available to her.

21 She assisted and directed the emergency services
22 when, eventually, they arrived, but that was at least
23 three-quarters of an hour after the explosion.

24 One very positive contribution she can make to one
25 family, whom at the moment we cannot define or identify,

1 is that she is pretty sure that she talked to one
2 victim, deceased victim, who did survive for a short
3 while, and at the moment that is not reflected in any of
4 the scene reports and that is going to be
5 extraordinarily important to whoever that deceased
6 victim is. The identification exercise is, of course,
7 not something that necessarily takes place in the
8 witness-box, but it's something that in the public
9 interests and the inquest's interests and the interests
10 of that family is something which will be worked on with
11 the expert assistance of lawyers in the lead-up
12 to October and then most probably established to
13 everyone's satisfaction.

14 LADY JUSTICE HALLETT: What do you mean by that? I'm not
15 following. Do you mean that, if she has designated
16 status, lawyers representing her will be asking her for
17 more information about her witness statements?

18 MR O'CONNOR: Yes, madam. This is a bit of a theme of our
19 submissions, that if our clients are recognised as
20 properly interested persons, then, as you know --
21 although this isn't necessarily within your jurisdiction
22 at all -- such funding as can be made available by the
23 Legal Services Commission ought to follow. It ought not
24 to be very much, but it ought to be enough for us, in
25 preparation for your inquest, to make sure that each of

1 these clients can assist you, your team before the
2 hearings, and then during the hearings, as to resolving
3 how, when and where each death occurred.

4 LADY JUSTICE HALLETT: That would presuppose that any other
5 witness who wasn't designated a properly interested
6 person wouldn't be sufficiently assisted by those who
7 are assisting me as part of my legal team.

8 MR O'CONNOR: Well --

9 LADY JUSTICE HALLETT: You don't need a witness to be
10 designated a properly interested person for them to
11 provide the best account, do you, or am I not following?

12 MR O'CONNOR: Madam, you are, and indeed you're not just --
13 you're ahead of me.

14 Whether your team consider it properly within their
15 remit to be able to go through this exercise to tease
16 out and draw out from severely damaged witnesses,
17 currently clients of ours, the rest of the iceberg is
18 not something of which I'm aware. If that is
19 definitively within their remit, then certainly that
20 task could be carried out by them, but --

21 LADY JUSTICE HALLETT: If they personally wouldn't do it, it
22 would surely be within their remit to ensure that any
23 witness called before me was asked questions in
24 sufficient detail to ensure that I got the fullest
25 possible account, either before or during the inquest

1 hearing, by means of further statements or by means of
2 questioning in the inquest.

3 MR O'CONNOR: I understand and, therefore, madam, the choice
4 would be between this being a task allocated to your
5 legal team or one carried out by us. May I make that
6 comparative exercise?

7 First of all, we have been acting for these clients
8 for three years or so and we have an ongoing
9 relationship of trust with them and we have a headstart
10 as to the product which can come.

11 So, for example, since reception of the scene
12 reports, and of the coloured diagrams of locations on
13 each of the carriages, the relatively short opportunity
14 we've had between then and now has yielded correcting
15 information and important correcting information.

16 There are, without the slightest reflection on your
17 police investigators, plainly errors and omissions. One
18 reason for that might be, if I may spell it out, that
19 the locations from which the bodies of the deceased were
20 recovered may well not reflect where they died, because
21 in order to effect escape, and also in order to effect
22 access of the emergency responders to those who were
23 injured and surviving, bodies had to be moved.

24 LADY JUSTICE HALLETT: Mr O'Connor, I'm terribly sorry, this
25 kind of detail, I understand it is essential that

1 I obtain this information from the witnesses, but the
2 whole point about having somebody designated a properly
3 interested person, as I understand the legislation, is
4 to enable them to ask questions, and it's that aspect
5 upon which I would ask you to focus, because, as I see
6 it, that is really the only criterion for me to
7 consider: is there something about the case of these
8 survivors, given all the horrors they've been through,
9 which means that they have different interests to serve
10 in asking questions from all the other parties who will
11 be asking questions?

12 It's not about getting from them evidence. I hope
13 they will be prepared to provide that evidence for me,
14 if they can bring themselves to do it. They don't need
15 to be a properly interested person to do that. What
16 I want to know is what questions they would like to ask
17 which won't be covered by other people, that properly
18 come within the remit of an inquest.

19 MR O'CONNOR: Madam, may I just come to that second, without
20 any disrespect? Because still my closing submission on
21 the preparation point is that there is an option here
22 and a choice, and if it is a -- if the resources of your
23 legal team are sufficient to play that role, and if the
24 current relationship that we have with our traumatised
25 clients doesn't give us a sufficient ongoing advantage

1 to save resources, then I agree it's an even choice.

2 Madam, although the critical difference is the right
3 to cross-examine, and I'm going to come to that --

4 LADY JUSTICE HALLETT: Ask questions, not necessarily
5 cross-examine.

6 MR O'CONNOR: Forgive me, that is a misnomer; to ask
7 questions. I couldn't agree more. Ask questions,
8 otherwise than as counsel calling the witness. I do
9 respectfully submit that the law on recognising
10 interested persons is flexible enough for you to take
11 account of this preparatory role, even though it could
12 potentially be carried out by your team.

13 Turning to cross-examination, madam, your correction
14 to me of the word "cross-examination" leads me perhaps
15 to the core of -- perhaps to the answer to this.

16 Is there, I ask rhetorically, a valuable difference
17 between cross-examination coming from a legal team who
18 have acted on behalf of and prepared the evidence of
19 those victims and -- forgive me, questioning -- from
20 your legal team? Your legal team are, madam, in a sense
21 an extension of your good self.

22 LADY JUSTICE HALLETT: My legal team and you and all the
23 other parties.

24 MR O'CONNOR: Yes. We're all here to assist you, but there
25 is a particular relationship, is there not, between

1 counsel to a tribunal or counsel to an inquest and --
2 LADY JUSTICE HALLETT: What I'm asking you to focus on,
3 Mr O'Connor, please, is: what areas and what added
4 questions, if you were representing the survivors as
5 well as the bereaved families, would you be asking or in
6 a better position to ask if they were designated
7 properly interested persons? That's really what you
8 must focus on. It's what I alerted you to focusing on
9 at the last hearing. What is the distinction to be
10 drawn between those who suffered terribly, but have
11 lived, and the other lay clients you have, the families?
12 MR O'CONNOR: Well, in terms of furthering the interests of
13 this inquiry, there is absolutely no distinction at all
14 in interest. These are the critical participants in the
15 inquest, we would respectfully submit, on the aftermath
16 issue and on the issue of lessons to be learnt, and
17 there is absolutely no distinction between the interests
18 of the deceased in exploring the aftermath and lessons
19 to be learnt and the interests of the survivors. The
20 only distinction is that the bereaved have suffered
21 terribly at a distance and the survivors have suffered
22 terribly with the relevant events unfolding before their
23 very senses.
24 That is the only distinction, and it's one which
25 tells in favour of the survivors being the critical

1 participants. They have shown the seriousness of their
2 commitment in the public interest.

3 LADY JUSTICE HALLETT: I don't need persuading of their
4 commitment to helping this inquiry, Mr O'Connor. It's
5 obvious.

6 MR O'CONNOR: If that is so, madam, then they are very well
7 within the flexible Driscoll guidance as to the
8 interpretation of the rule and, if I may say so, they
9 fall within the test for intervenors -- this is an
10 analogy we draw through the Northern Ireland Human
11 Rights Commission case -- where they have -- most
12 particularly, the woman I was referring to earlier, who
13 got the MBE, she has both experience and expertise to
14 assist you and which puts her absolutely at the heart of
15 the category of persons who could and should be
16 designated as interested parties.

17 Madam, really the point that you raise with me about
18 what different role they could play from the role that
19 they could play if effectively assisted by your legal
20 team, would neuter the interested persons rule for all
21 inquests where there was Counsel to the Inquest, and
22 I would ask you not remotely to ignore the potential
23 value of your legal team -- it's absolutely critical --
24 but not to let it distract from the legal test.
25 The test gives you a discretion. Your discretion

1 can be affected by the fact that you have a legal team
2 who can carry out certain functions, but it doesn't
3 entirely swamp your discretion.

4 Madam, I would respectfully suggest that there is an
5 ability, perhaps, where the survivors are represented,
6 to ask more overtly critical questions potentially than
7 maybe your legal team can feel able to, granted their
8 role on your behalf.

9 They are advisers to you with a -- although all with
10 the same end, they do have a different role from counsel
11 representing other interested parties.

12 You were entitled to, and the public interest
13 requires, that you receive objective and independent
14 advice.

15 Now, there may be a tension between you receiving
16 that independent and objective advice and very testing
17 and critical questioning being asked of certain other
18 interested persons and their witnesses. That's to say
19 absolutely nothing at all about ability, experience.

20 It's an angle. It's a different angle from which
21 potentially we may come, and you may be assisted,
22 sometimes, or not, but you may be assisted by that angle
23 of approach.

24 Of course, madam, all of this is a discussion about
25 your statutory discretion under the common law system.

1 What we would like, not, of course, to be ignored, is
2 the legal argument about a right to effective
3 participation and the Article 2 rights of survivors in
4 certain near-miss cases, and we would like you -- along
5 that route, we would invite you not to take a technical
6 or arbitrary view of where near-miss begins and ends,
7 and may I give an example?
8 Remarkably, there are quite a few survivors who were
9 very close to the actual source of the explosion and who
10 survived sometimes with not very -- surprisingly light
11 physical injuries.
12 There are also, by the way, many survivors who,
13 whilst in the same carriage as the bomb, were actually
14 at the other end of the carriage and with maybe 100
15 people in between, and thus insulated, fortunately for
16 them.
17 There are others who were in a different carriage,
18 but literally across the divide with which we're so
19 familiar on the tubes, within feet of the explosion, and
20 who suffered terrible injuries, but were in a different
21 carriage, and thus drawing a boundary about whether
22 you're in the same carriage or not would be arbitrary
23 and irrational, and indeed, even not in the same train,
24 one of our clients, madam, you will have seen suffered
25 a very serious fractured skull requiring two operations

1 and was actually in a train passing opposite the
2 explosion. Such is the random impact, that it went
3 through windows and injured her desperately seriously.
4 The approach -- and by no means critical here at
5 all -- the provisional approach adopted by your legal
6 team in their submission about near-miss is that it is
7 defined by being in the same carriage, and I hope I've
8 demonstrated that's not necessarily appropriate.
9 In addition, may I just point to -- it affects one
10 of our clients -- it's suggested at page 61 of your
11 team's submissions in the footnote that Mr Roskilly was
12 not in the same carriage as the explosion in the
13 footnote there, he's listed. In fact he was. We're
14 instructed, we can tell you that. So there's a danger
15 of error as well, quite naturally, in a complicated
16 factual scenario such as this.
17 So may I just come back to the fact that the most --
18 the discretion only comes into the picture if you rule
19 against the survivors as being the victims of
20 a near-miss life-threatening incident and, thus, with
21 Article 2 investigative -- right to participation in an
22 effective investigation.
23 LADY JUSTICE HALLETT: Does that right, if I'm satisfied it
24 is in play, mean that they have to be designated
25 properly interested persons in these inquests, if

1 resumed, or does that right mean that they are entitled
2 to an inquiry of some other kind?

3 I understand, obviously, the right to an
4 investigation if they are near-miss, but does it
5 necessarily follow that they would be entitled to be
6 designated in these inquests?

7 MR O'CONNOR: With legal representation? The answer to that
8 is: no, it does not necessarily follow, because --

9 LADY JUSTICE HALLETT: You would say this is the only one,
10 by the looks of it, there's going to be?

11 MR O'CONNOR: Exactly, yes.

12 So, madam, you are plainly satisfied, and we are
13 most certainly gratified, by your ready acceptance of
14 the contribution that can be made by the survivors of
15 their sincere and objectively justified ability to
16 contribute to an effective inquiry.

17 They will provide a major source of information for
18 cross-examination -- for questioning and testing the
19 accounts of the emergency services and their responses.

20 Now, madam, if you're against me on the choice
21 between your legal team doing this job or I am doing
22 this job, this doesn't make the difference, but it
23 does -- we submit -- have this practical impact, that
24 the preparation of the accounts, the teasing out of the
25 accounts, of the survivors is going to be quite a major

1 task, and I'm not suggesting that your legal team won't
2 carry it out effectively, but if -- it is critically
3 important to you that it is for the following reasons:
4 that recollection of traumatised victims of an incident
5 such as this is a very unpredictable thing, and unless
6 entirely teased out well in advance of your hearings
7 in October, there are two risks.
8 One is that they attend to give evidence, do give
9 evidence, stay and hear the accounts of other witnesses
10 or see the transcripts and then recollect something more
11 of real importance, thus they have to come back to your
12 legal team and you may be bedevilled with requests,
13 "Does this witness go back into the witness-box to add
14 this extra important recollection?"
15 The second disruptive possibility is that, if the
16 questioning of witnesses is sourced upon their
17 recollection, and that recollection isn't absolutely
18 entirely teased out, that witnesses may have to come
19 back for further questioning if something is belatedly
20 triggered, and that is what happens with traumatised
21 victims, something is heard and triggers a recollection,
22 and an episode comes flooding back to them.
23 Now, whether your legal team would be able easily to
24 cope with that kind of day-to-day, hour-to-hour
25 relationship with these victims, making sure that the

1 moment that witnesses are cross-examined, are
2 questioned, and the moment when these survivors give
3 evidence, is the optimum moment to avoid last-minute
4 rethinking and the disruption to the flow of the
5 hearing.

6 Madam, one matter may I mention at the end. We
7 recognise that some, although by no means the majority,
8 of the clients of the other solicitors for the
9 bereaved -- and we represent bereaved as well, of
10 course -- have a hesitation over these proceedings being
11 distracted if the survivors are designated interested
12 parties.

13 We submit that that cannot arise. There is
14 uniformity of interest in exploring aftermath and
15 lessons to be learnt.

16 One matter was mentioned, madam, which we wish had
17 not been mentioned this morning, and we doubt very much
18 that it's come from any client, and that was the mention
19 of the word "compensation", that in some way distorting
20 the conduct of the inquest by lawyers acting for the
21 survivors.

22 It's very unfortunate that's been raised at all.

23 It's most distasteful. We have not been instructed in
24 any respect to act on behalf of any of our survivor
25 clients in relation to compensation. It's simply not

1 something that's crossed our threshold, entered our
2 minds, could conceivably affect, for one moment, the way
3 in which we conduct ourselves before you, and it may be
4 my learned friend who mentioned it would like to
5 rethink --

6 LADY JUSTICE HALLETT: It may have been to a degree my fault
7 in that I was pressing for some explanation of what was
8 meant by going beyond the scope.

9 MR O'CONNOR: I understand, but, madam, proper questions can
10 be answered without raising something which is so
11 unfortunate and, frankly, hurtful. That is not
12 something that can enter into the arena at all.
13 Certainly not with us.

14 Madam, may I just pause, because I'm conscious my
15 submissions have been a little fragmented? I have
16 a number of sticky notes.

17 LADY JUSTICE HALLETT: Do, please.

18 MR O'CONNOR: Madam, there is this, that there is
19 a recognition, correct, by your legal team in their
20 submissions, that the witness responders, the emergency
21 service responders, have the benefit of legal
22 representation and that that is a good thing and helpful
23 to the inquest. It's at your team's submissions,
24 paragraphs 185 to 191. I dare say, madam, that you will
25 readily be granting interested person status to those

1 responding organisations.
2 That is a recognition of the benefit that we say
3 flows properly to these survivors who give even more
4 critical evidence than they do. It is a chance that
5 they are, as it were, under the umbrella of an
6 organisation which has a stake in this inquest, and,
7 madam, to take the logic -- forgive me for doing this;
8 it's not a reductio ad absurdum -- but to take the
9 logic, madam, of, in a sense, the provisional sentiment
10 you uttered to me about, "Why can't my legal team do
11 that job?", one could expand it and expand it and apply
12 it to those individual witnesses as well. That's not
13 going to happen because of the accident that they are
14 witnesses who fall under the umbrella of legal
15 representation anyway.
16 But there is a recognition that they will more
17 readily be able to help the inquest with the very
18 assistance that we submit our clients are entitled to.
19 Thank you very much.
20 LADY JUSTICE HALLETT: Thank you very much, Mr O'Connor.
21 Mr Keith, I think we're back to you, are we, to deal
22 with Mr Coulson's -- or shall I ask whether there are
23 any other unrepresented survivors perhaps, first?
24 MR KEITH: If you would, then I'll read out what he stated
25 in his email, if I may.

1 LADY JUSTICE HALLETT: Do we have any survivors present who
2 are unrepresented, who would wish to add to the
3 submissions made or who have considered whether they
4 wish to be designated as an interested person and
5 haven't so far said anything? Nobody.

6 Thank you. Yes. If you could now tell us, then,
7 Mr Keith, what Mr Coulson -- who I think also was
8 honoured as a result of what happened, or his efforts to
9 help those injured.

10 Submissions by MR KEITH

11 MR KEITH: He was indeed. He received an MBE in recognition
12 of his conduct. He was a survivor from the Edgware Road
13 explosion and he says in his email to Mr Smith:

14 "No member of the police, fire, ambulance, legal or
15 security services were present at any scene when the
16 explosions occurred on the trains and the bus, at least
17 not in their official capacity. Evidence resides with
18 a small group of survivors who were there at and during
19 the deaths of the 52 innocent lives so unlawfully
20 killed. It is right and proper that these people should
21 be properly interested persons for the purposes of
22 helping to clarify absolute details of death and to
23 assist the inquest to reach clearer evidence in a timely
24 fashion."

25 LADY JUSTICE HALLETT: Thank you very much.

1 I think now it's Mr Garnham, isn't it?

2 Submissions by MR GARNHAM

3 MR GARNHAM: Thank you, madam. I begin with a preliminary
4 observation: namely, to emphasise the expression of
5 sympathy we set out in paragraph 61 of our written
6 submissions.

7 Madam, that passage was included at the express
8 request of the Security Service using words that were
9 approved by Jonathan Evans, Director General of the
10 Service. I say that to make the point that it's not
11 added there for forensic advantage, but as a genuine
12 expression of sympathy.

13 I turn then to outline our submissions on the five
14 questions that are posed for this preliminary hearing.

15 On the first, second, fourth and fifth of the
16 questions, I need add very little to what we said in our
17 skeleton.

18 On resumption, we make no submissions one way or the
19 other beyond saying that, for reasons I'll develop in
20 a moment on the topic of scope, we submit that the
21 conduct of the Security Service does not mandate
22 resumption.

23 On joinder, we go no further than to align ourselves
24 with the submission of others, based, not on law, but on
25 natural sympathy, to the effect that to conduct the

1 inquests into the deaths of the bombers concurrently
2 with those of their victims might be thought
3 unnecessarily to cause distress to the victims, on
4 empanelling a jury, we say nothing more than is our
5 written submission.

6 On properly interested status, as set out in that
7 skeleton argument, we reserve our position pending your
8 decision on scope.

9 Madam, the submissions I propose to develop in
10 detail on scope are summarised in paragraph 8 of our
11 skeleton.

12 It will not be my intention, madam, to read out any
13 parts of my written submissions, save these summary
14 points, which I will read out, if I may, because it sets
15 the context for what I'm going to say.

16 We submit, first, that Article 2 of the European
17 Convention is only engaged if the state or its agents
18 potentially bear some responsibility for loss of life.

19 2. At least as regards the involvement of the
20 Security Service, that cannot be said here with the
21 result that Article 2 is not triggered.

22 3. A decision to adopt a Middleton-type inquest can
23 only be reached if that is necessary to avoid what would
24 otherwise be a breach of the Article 2 investigative
25 obligation by the state. It is not necessary here and,

1 accordingly, this should be a Jamieson inquest.
2 4. The breadth of the investigation required here
3 will reflect the context and facts of the case, the
4 other strands of investigation and the need to avoid
5 matters too remote from the statutory question.
6 The requirements of Article 2 would only apply if,
7 contrary to our primary case, you were to find that
8 Article 2 is engaged.
9 Fifth, if, contrary to that primary submission, the
10 investigative obligation is found to have been
11 triggered, we submit the ISC report is an effective
12 investigation into the conduct of the Security Service.
13 Finally, whatever form of inquest is adopted,
14 Jamieson or Middleton, Article 2-compliant or not, the
15 public interest would, we submit, not be served, in fact
16 would positively be damaged, by an attempt in these
17 inquests to reinvestigate the matters that were before
18 the ISC.
19 It follows from all of that, madam, that we submit
20 you ought to decline to investigate the role of the
21 Security Service in this inquest at all.
22 Before seeking to develop those submissions,
23 I should make it clear first that the Security Service
24 submit that that conclusion, that its conduct should not
25 be investigated, follows as a matter of law from any

1 proper analysis of the jurisprudence, and that, in
2 consequence, you do not have a discretion on that issue.
3 Second, that the Security Service adopt that stance,
4 not because it has anything to hide; it does so because
5 no other course is consistent with protecting national
6 security.

7 It is, madam, the carefully considered judgment of
8 the Security Service that nothing more of the
9 information revealed to the ISC by the Security Service
10 can safely be put into the public domain or disclosed to
11 interested parties than is revealed by that ISC report.

12 Third, that even if that was not the proper
13 conclusion on the law, and even if you did have some
14 discretion on the matter, which we say you do not have,
15 then the public interest and the need to preserve the
16 Security Service's ability properly to respond to the
17 very real threats to national security which this
18 country continues to face would require that you decline
19 to conduct such an investigation.

20 LADY JUSTICE HALLETT: You have repeatedly there said the
21 Security Services, but these are submissions not only
22 from the Security Service, but from the Home Secretary.

23 MR GARNHAM: Yes. Because of the nature of the questions
24 that arise, the focus is the position of the
25 Security Service, but I represent the Secretary of State

1 as well and the two are allied.

2 In that context, I would, if I may, madam, underline
3 what we say in paragraph 56 of the skeleton, because we
4 submit it's critical that this point is borne in mind
5 throughout any consideration of these issues.

6 If you, sitting with or without a jury, were to
7 attempt to analyse the adequacy of the
8 Security Service's response to the threat from MSK and
9 his accomplices, you would have to consider, not just
10 the evidence relating to that threat and the response to
11 it, but also every other threat current at the time.
12 You'd have to do that, madam, because necessarily
13 implicit in any such investigation would be the
14 question: should the Service have diverted resources --
15 financial, management and human -- away from other
16 apparently important tasks on to the job of
17 investigating the two bombers who passed across their
18 radar?

19 That would be a massive task. It would require you
20 and, if you sat with a jury, the jury, to have access to
21 the most sensitive classes of material in respect of all
22 the Security Service's activities over a prolonged
23 period.

24 If you attempted this task, madam, without doing
25 that, you would be reaching a judgment on the adequacy

1 of the Service's response on a false premise. On the
2 basis that it is possible or, for that matter, rational
3 to reach a view on the Security Service's conduct on
4 this case in isolation from all the other demands it
5 faces from other cases, would be irrational.

6 LADY JUSTICE HALLETT: Is that what the Intelligence and
7 Security Committee did?

8 MR GARNHAM: No. They saw a great deal of closed material
9 relating to other activities.

10 LADY JUSTICE HALLETT: But did they see all of it? You're
11 saying the task is huge and that I would have to do it,
12 or somebody would have to do it, to come to a proper
13 judgment. I'm just wondering what was the basis upon
14 which the ISC acted.

15 MR GARNHAM: They spent, I think, 13 months on this task.

16 LADY JUSTICE HALLETT: 13?

17 MR GARNHAM: 13 months.

18 LADY JUSTICE HALLETT: Full-time, or were they doing their
19 other duties as constituency MPs --

20 MR GARNHAM: I'm sure they were doing their other duties,
21 but they had assistance from their Secretariat, and
22 you've heard something about the Secretariat.

23 LADY JUSTICE HALLETT: They reviewed all the material you
24 suggest that any inquiry here would have to review, or
25 part of it?

1 MR GARNHAM: They reviewed that which they wanted to see and
2 which were prompted by their enquiries, and that
3 included a number of the other operations that were
4 current at the time.

5 Your task would have to be at least as thorough as
6 that, if not more so.

7 LADY JUSTICE HALLETT: I just don't follow, if this material
8 hasn't been seen, how they know what they want to see.

9 MR GARNHAM: If they asked the question, "What else was
10 happening on this occasion?", then that material would
11 be revealed, so far as it could be, and the same sort of
12 exercise would have to be done here.

13 LADY JUSTICE HALLETT: You say 13 months. Do we have any
14 idea how many hours, days a week, a month?

15 MR GARNHAM: I don't standing up, madam. I will make
16 enquiries.

17 LADY JUSTICE HALLETT: 13 months could be an awful lot of
18 time, but it could actually be 13 days, if it were a day
19 a month. We don't know.

20 MR GARNHAM: I don't know that. I can make enquiries,
21 perhaps overnight, and come back and answer that
22 question for you, madam.

23 LADY JUSTICE HALLETT: If you could give me some idea. Your
24 argument seems to be that we are talking about a massive
25 task --

1 MR GARNHAM: Yes.

2 LADY JUSTICE HALLETT: -- either for me with or without
3 a jury, and I'd just like to get some better idea of how
4 massive this task is and to what extent the ISC have
5 embarked upon this massive task.

6 MR GARNHAM: If I may, I'll take instructions on that
7 overnight and give you an answer to that in the morning.

8 LADY JUSTICE HALLETT: Thank you.

9 MR GARNHAM: My learned friends acting for the families have
10 understandably emphasised the importance of this inquiry
11 for their clients' respective positions, but in our
12 respectful submission, their analysis fails properly to
13 acknowledge the overwhelming need to ensure that the
14 ability of the Security Service to counter threats like
15 this is not damaged by the exercise of seeking to
16 understand what happened in the run-up to 7/7.
17 Madam, with those words of introduction I turn to
18 the substance of our submissions.

19 First of all, the functions of an inquest. We set
20 out in paragraphs 10 to 19 of our skeleton what we
21 submit are the essential functions of an inquest and the
22 potential significance of a conclusion that Article 2 is
23 engaged for both the scope of the inquest and the
24 possible verdicts of an inquest. Much of that appears,
25 from what we have heard over the last two days, to be

1 uncontroversial and so I hope I can cover that ground
2 very briefly.

3 As Counsel to the Inquest explain in their
4 submission, it's necessary to distinguish between scope
5 and verdict and between inquests where Article 2 is
6 engaged -- Middleton inquests -- and inquests where it's
7 not -- Jamieson.

8 We attempt to summarise the position in
9 paragraphs 12 to 17, and I don't repeat that here.

10 It perhaps suffices, madam, for present purposes, if
11 I underline the point that this distinction between
12 Jamieson and Middleton sounds most obviously in the
13 possible verdicts. Counsel to the Inquests have
14 explained how the word "how" in section 11 and Rule 36
15 was reinterpreted in Middleton to ensure compliance with
16 the Convention when Article 2 was engaged. We agree
17 with that and have nothing more to say about it.

18 On scope, there will be cases where the fact that
19 Article 2 is engaged will not necessitate any change
20 from the usual Jamieson approach. Certainly, depending
21 on the facts, there are cases where broader, systemic
22 and even operational issues can be investigated within
23 the confines of a Jamieson-style inquest.

24 The potentially limiting factors, we submit, are the
25 tests of relevance and remoteness. The critical point,

1 which I will develop a little later, is that, if
2 Article 2 does not apply and Jamieson is the appropriate
3 model, then investigating the conduct of the
4 Security Service will be, we submit, manifestly too
5 remote.

6 Finally, by way of introducing the general
7 principles, we submit at 13.6 that the public interest
8 has a part to play in deciding what should be
9 investigated and that can cut both ways, either widening
10 the scope where that is necessary for a proper full and
11 fair enquiry, or limiting it when other public interest
12 factors are in play.

13 Madam, given the comprehensive analysis by Counsel
14 to the Inquests of the general principles in their
15 written submissions, with which we substantially agree,
16 I need say nothing more about the functions of this
17 inquest.

18 I turn, therefore, to Article 2. Our submission is
19 that, on the facts of this case, Article 2 is not
20 engaged and is manifestly not engaged. Save for one
21 critical issue, we are content to adopt the analysis of
22 Counsel to the Inquest. That issue is the precise
23 nature of the Osman test, and I'll come to that in
24 a moment. But before I do so, it's necessary for me to
25 seek to explain why Mr Keith is right in the remainder

1 of his submissions on Article 2 and why Messrs O'Connor,
2 Coltart, Saunders and Patterson and Mrs Sheff are wrong.
3 The substantive and express obligations created by
4 Article 2 are twofold. First, to protect the right to
5 life by law and not to take life intentionally, save in
6 very limited circumstances. You're concerned with the
7 first of those.

8 It's worth noting at the beginning of any analysis,
9 madam, that Article 2 does not, on its face, create
10 a right to life, nor does it create an obligation to
11 protect life. It creates an obligation to protect by
12 law the right to life, and it is as a result of that
13 that there is not, and cannot ever be, an absolute duty
14 to protect life.

15 The obligation to protect by law the right to life
16 has been interpreted by Strasbourg as requiring member
17 states to:

18 "... establish a framework of laws, precautions,
19 procedures and means of enforcement which will, to the
20 greatest extent reasonably practical, protect life."

21 That's Lord Bingham in paragraph 2 in Middleton.

22 That obligation covers the obligation to put in
23 place effective criminal law provision to deter the
24 commission of crime and that has to be backed up by
25 appropriate law enforcement machinery for the

1 prevention, suppression and punishment of offences. All
2 that, madam, was well-established before Osman.
3 In Osman, however, the court went further and held
4 that in certain limited and well-defined circumstances
5 there may also be implied a positive obligation to take
6 preventative, operational measures to protect someone
7 whose life is at risk from another.
8 What those well-defined circumstances were was the
9 subject of debate and decision in Osman, and I'm afraid
10 I must take you back to Osman for this purpose. It's at
11 D1, tab 10. I shan't read out what has already been
12 read to you, I'll point you in the right direction.
13 Can I remind you of the facts that are at
14 paragraph 10:
15 "The applicants are British citizens resident in
16 London. The first applicant ... born in Cyprus in 1948.
17 She is the widow of Mr Ali Osman who was shot dead by
18 Mr Paul Paget-Lewis on 7 March 1988. The second
19 applicant ... is her son ... former pupil of
20 Paul Paget-Lewis ... Ahmet Osman was wounded in the
21 shooting incident which led to the death of his father.
22 "The applicants' complaints are directed at the
23 failure of the authorities to appreciate and act on what
24 they claim was a series of clear warning signs that
25 Paget-Lewis represented a serious threat to the physical

1 safety of Ahmet Osman and his family. There is
2 disagreement between the applicants and the respondent
3 state on essential aspects of the circumstances leading
4 to the tragedy."

5 There's a dispute about the fact as found by the
6 Commission.

7 Madam, it's worth looking at the Commission's
8 decision, which is at paragraphs 89 to 90.

9 LADY JUSTICE HALLETT: What page, have we got the same copy?

10 MR GARNHAM: Mine is unnumbered.

11 MR KEITH: Page 23.

12 LADY JUSTICE HALLETT: Thank you. 23, I'm told.

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

14 Madam, could I invite to you read 88 and 89?

15 LADY JUSTICE HALLETT: Certainly. (Pause).

16 MR GARNHAM: Then 90, I'll read on:

17 "As a minimum, the Commission considers that
18 a contracting state is under an obligation to provide
19 a framework of law which generally prohibits the taking
20 of life and to ensure the necessary structures to
21 enforce these prohibitions ..."

22

23 MR COLTART: Madam, I'm terribly sorry to interrupt

24 Mr Garnham, but my paragraphs 88, 89 and 90 don't match

25 in the copy I'm looking at at the moment.

1 MR GARNHAM: I wonder if my learned friend is looking at the
2 Commission's decision rather than the court's?

3 MR COLTART: I was invited to look at the Commission's
4 decision, I think. I thought I was, but I have
5 a different paragraph number at the moment. I wouldn't
6 mind an opportunity to catch up so that I can be sure
7 I'm following the right passage.

8 LADY JUSTICE HALLETT: Of course, this is so important to
9 Mr Garnham's submissions, I think, why don't I take the
10 afternoon break now?

11 MR COLTART: Thank you.

12 LADY JUSTICE HALLETT: We'll take five minutes and then make
13 sure that everyone has it.

14 MR COLTART: That's very helpful, thank you.

15 LADY JUSTICE HALLETT: I had this problem this morning,
16 Mr Coltart.

17 (3.17 pm)

18 (A short break)

19 (3.20 pm)

20 LADY JUSTICE HALLETT: Have you managed to --

21 MR GARNHAM: We've managed to align our respective reports.

22 LADY JUSTICE HALLETT: Good.

23 MR GARNHAM: I was taking you to the Commission's decision,
24 paragraph 90. You'll see in the second half of that
25 paragraph it says:

1 "While it cannot be a requirement of Article 2 that
2 a State must necessarily succeed in locating and
3 prosecuting perpetrators of fatal or life-threatening
4 attacks, the case law of the Convention organs has
5 established a requirement of the investigation
6 undertaken be effective."

7 There's then a quote from McCann. Then, if I may,
8 I pick it up in 91:

9 "While effective investigation procedures and
10 enforcement of criminal law prohibitions in respect of
11 events which have occurred provide an indispensable
12 safeguard and the protective effect of deterrence, the
13 Commission is of the opinion that for Article 2 to be
14 given practical force, it must be interpreted also as
15 requiring preventative steps to be taken to protect life
16 from known and avoidable dangers. However, the extent
17 of this obligation will vary inevitably having regard to
18 the source and degree of danger and the means available
19 to combat it. Whether risk to life derives from
20 disease, environmental factors or from the intentional
21 activities of those acting outside the law, there will
22 be a range of policy decisions, relating ... to the use
23 of state resources which it will be for the contracting
24 states to assess on the basis of their aims and
25 priorities, subject to these being compatible with the

1 values of democratic societies and the fundamental
2 rights guaranteed in the Convention. Thus ..."
3 I draw this to your Ladyship's attention
4 particularly.
5 "... where an applicant alleged a risk to her life
6 from the threat of terrorist attack in Northern Ireland,
7 her husband and brother having been killed, the
8 Commission considered that it was not its task to
9 consider in detail the appropriateness or efficiency of
10 the measures taken to counter-terrorism and that the
11 United Kingdom could not be required by the Convention
12 to take measures going beyond those already being taken
13 to protect the lives of the inhabitants in Northern
14 Ireland."
15 92:
16 "The extent of the obligation to take preventive
17 steps may, however, increase in relation to the
18 immediacy of the risk to life. Where there is a real
19 and imminent risk to life to an identified person or
20 group of persons, a failure by the state authorities to
21 take appropriate steps may disclose a violation of the
22 right to protection of life by law. In order to
23 establish such a failure, it will not be sufficient to
24 point to mistakes, oversights or that more effective
25 steps might have been taken. In the Commission's view,

1 there must be an element of gross dereliction or wilful
2 disregard of the duties imposed by law such as to
3 conflict fundamentally with the essence of the
4 guarantee ..."

5 That last clause, madam, was not replicated in the
6 decision of the courts. I say that straightaway so as
7 not to mislead -- the clause about gross dereliction of
8 duty.

9 Can I then take you to the judgment of the court?

10 The argument of the applicants is set out at 103 to
11 106 and I'm not going to read that, because it will take
12 too long and be too tedious, madam, but can I draw your
13 Ladyship's attention to it, because on its face the
14 facts of Osman were fairly stark?

15 The court then dealt with the arguments in the
16 judgment at 115 onwards. Again, I'm not going to read
17 this to you, firstly, because it was set out in Counsel
18 to the Inquests' submissions at paragraph 90 and it was
19 read at length by Mr O'Connor, but I will, if I may,
20 madam, just draw your attention to the critical
21 subparagraph, halfway through 116:

22 "In the opinion of the court, where there is an
23 allegation that the authorities have violated their
24 positive obligation to protect the right to life, in the
25 context of the above-mentioned duty to prevent and

1 suppress offences against the person ..."
2 I underline that context.
3 LADY JUSTICE HALLETT: I'm sorry, I now do not have it.
4 MR GARNHAM: 116, second bit of the paragraph, it's
5 subdivided, and it begins:
6 "In the opinion of the court ..."
7 MR KEITH: Madam, it's page 41 of your report.
8 LADY JUSTICE HALLETT: Thank you.
9 MR GARNHAM: I'm so sorry we have different versions, madam.
10 LADY JUSTICE HALLETT: No, it's because I was still in the
11 Commission's judgment and I couldn't find the page for
12 the -- I now have it, thank you.
13 MR GARNHAM: I'm drawing, madam, your attention to the
14 middle part of 116:
15 "In the opinion of the court, where there is an
16 allegation that the authorities have violated their
17 positive obligation to protect the right to life in the
18 context of their above-mentioned duty to prevent and
19 suppress offences against the person ..."
20 I underline those words because that gives the
21 context of the duty.
22 "... it must be established to its satisfaction that
23 the authorities knew or ought to have known at the time
24 of the existence of a real and immediate risk to the
25 life of an identified individual or individuals

1 [I underline those words] from the criminal acts of
2 a third party and that they failed to take measures
3 within the scope of their powers which, judged
4 reasonably, might have been expected to avoid that
5 risk."

6 There are, we would submit, in consequence of that,
7 four elements to this test. I repeat that the test is
8 the one that applies in the case of offences against the
9 person. The four elements are, first, that at the
10 relevant time the authorities knew, or ought to have
11 known, of the existence of a real and immediate risk.
12 Second, that that risk is to the life of an
13 identified individual or individuals.

14 Third, that it arises from the criminal acts of
15 a third party.

16 Fourth, that it's shown the authorities then failed
17 to take measures within their powers which, judged
18 reasonably, might have been expected to avoid the risk.

19 Against that background of consideration of the text
20 in Osman, I can say we agree with a number of the
21 submissions that you have already heard, madam, about
22 Osman.

23 First, we agree with Mr Coltart that immediate risk
24 means one that is present and continuing, and we agree
25 with what he says in his submissions that the bar is set

1 high in the sense that the duty to act is triggered only
2 where a high and consistent standard is satisfied.

3 I take those words, madam, from In re Officer L, may

4 I take you to that? It's in C3 at tab 32.

5 The facts of In re Officer L probably don't matter
6 for these purposes, madam, although they are set out in
7 the headnote. I can take you straight to paragraph 20
8 in the speech of Lord Carswell on page 2143, if you are
9 in the official report.

10 LADY JUSTICE HALLETT: I have it.

11 MR GARNHAM: After discussing and citing Osman,
12 Lord Carswell says this:

13 "Two matters ..."

14 LADY JUSTICE HALLETT: Wait a minute, does everybody else
15 have the right reference? I thought there was some
16 concern.

17 MR GARNHAM: Paragraph 20:

18 "Two matters have become clear in the subsequent
19 development of the case law. First, this positive
20 obligation arises only where the risk is 'real and
21 immediate'. The wording of this test has been the
22 subject of some critical discussion, but its meaning has
23 been aptly summarised in Northern Ireland by Weatherup J
24 in In re W's Application, where he had said that 'a real
25 risk is one that is objectively verified and an

1 immediate risk is one that is present and continuing'.
2 It is, in my opinion, clear that the criterion is and
3 should be one that is not readily satisfied: in other
4 words, the threshold is high ..."

5 If I can invite you then to drop down five lines,
6 having quoted the Widgery Soldiers case, Lord Carswell
7 says:

8 "In my opinion, the standard is constant and not
9 variable with the type of act in contemplation and is
10 not easily reached. Moreover, the requirement that the
11 fear has to be real means that it must be objectively
12 well-founded."

13 So on those two points, we agree with my learned
14 friend.

15 We also agree that what has to be shown is taking
16 action would have a real prospect of altering the
17 outcome and in that we agree with what your counsel say
18 at paragraph 93 of their submissions, that it's not
19 simply enough to identify missed opportunities, and that
20 flows from the passage I've just read.

21 Fourth and finally, we agree with what Mr Coltart
22 says, that gross negligence is not required. The view
23 of the Commission to the contrary was not followed by
24 the court.

25 What Mr Coltart, Mr O'Connor and others of those

1 acting for the families of the deceased dispute -- and
2 this is the central point, we say -- is that, applying
3 Osman, the risk must be to the life of an identified
4 individual or individuals and Counsel to the Inquest
5 suggests at paragraph 115 of their submissions that in
6 dealing with whether the tests of an arguable breach has
7 been made, we quote, "may have set the test too high",
8 because we have said that it needs to be shown that the
9 state was aware of a real and immediate risk to the
10 lives of identified individuals.

11 But that, with respect, what we have said, is
12 precisely the text taken from Osman.

13 What is more, it's plain from that subparagraph in
14 116 that I read that these four elements of the test
15 must be satisfied -- those are the words used by the
16 court, "must be satisfied" -- in order for Article 2 to
17 be engaged. In those circumstances, it's difficult,
18 with respect, to see how Counsel to the Inquest can say
19 that Strasbourg would not endorse a test, that there
20 must be a risk to the lives of identified individuals,
21 because, frankly, it already has and it has done so in
22 the very case that establishes the jurisdiction.

23 LADY JUSTICE HALLETT: It depends upon how you define
24 "identified", which, as I understand it, MI5 doesn't
25 define in necessarily the way the rest of us do.

1 MR GARNHAM: I don't accept the observation, madam. It's
2 right that Counsel to the Inquest go on to say that, if
3 we were right, there would be no breach in a case where
4 the service knew of a planned attack, say, at a shopping
5 centre and took no steps to avoid it. With respect,
6 that is not correct.

7 LADY JUSTICE HALLETT: How do you say I should approach the
8 use of the word -- can we go to the passage in the
9 judgment where it's referred to, Mr Garnham?

10 MR GARNHAM: Yes, 116, halfway through.

11 LADY JUSTICE HALLETT: I need some help, I would like to
12 press you, please, I tried to press counsel earlier, on
13 what does "identified" mean in these circumstances, in
14 this context.

15 MR GARNHAM: It is the nature of the way the Strasbourg
16 court goes about its task, that it never provides a sort
17 of generalised answer to that sort of question.

18 But in our submission, the context makes it clear
19 that there has to be enough in the facts known to the
20 state to enable it to identify with some precision who
21 is likely to be the object of the attack.

22 Now, how it's identified is a question that is at
23 least left open by Osman itself, but in our submission,
24 it would not have to be identification by name and
25 address. It could be identification by time and

1 location.

2 So to use the example given by Mr Keith in his
3 submissions, if it were the case that the
4 Security Service knew that there was an imminent threat
5 of a bomb being exploded at a shopping centre, likely to
6 injure all those in the vicinity of the bomb, then it
7 may well be that Strasbourg would say that that test is
8 satisfied because the nature of that information would
9 enable the state to identify in a concrete and realistic
10 sense where it was that the threat was likely to
11 eventuate and where the people who were likely to be its
12 victims would be situated.

13 LADY JUSTICE HALLETT: Just a shopping centre?

14 MR GARNHAM: No, an identified shopping centre, so an
15 example would be Bluewater or somewhere.

16 LADY JUSTICE HALLETT: So you wouldn't need a time but
17 a geographical location would be sufficient?

18 MR GARNHAM: It has to still reach the standard of real and
19 immediate. So it couldn't be some time in the next ten
20 years.

21 LADY JUSTICE HALLETT: What about if it were a threat to the
22 travelling population of London?

23 MR GARNHAM: Self-evidently not sufficient. That's not
24 identification.

25 If it were the number 30 bus on 7 July, that would

1 enable the state to identify those who were on that bus
2 who were the likely victims, so that would be enough,
3 potentially.

4 LADY JUSTICE HALLETT: What if the intelligence stops -- as
5 the arguments against you are -- because they say there
6 have been failings, they say, "We didn't have people
7 following Khan and the others when they were on
8 reconnaissance missions", how should I approach the fact
9 that that is the first failing, the failing alleged
10 against MI5 in the first place is that we haven't got it
11 because they didn't follow them?

12 MR GARNHAM: I will come on in a moment, if I may, madam, to
13 develop what it is that's required in order to meet
14 this, because it's a separate question on which there is
15 some learning in the books.

16 LADY JUSTICE HALLETT: In which case, could you then help me
17 on -- well, the travelling population of London wouldn't
18 have been sufficient. Supposing they had followed Khan
19 and realised that he was planning an attack on a Tube
20 train. How far down the line do we have to go?

21 MR GARNHAM: What's got to be identified is the victims.
22 They can be identified by name, as in the case of Osman.
23 They can be identified by location, as in the case of
24 the Bluewater shopping centre imminently.
25 It could also be the number 30 bus on the morning of

1 7 July. What, in our submission, it cannot conceivably
2 extend to, if the word "identification" is to have any
3 meaning at all, is the travelling public of London or,
4 for that matter, the underground system, because the --
5 I need to develop this, madam, and I will. But the
6 purpose of these limits to the Osman obligation is to
7 reflect the competing considerations which must act upon
8 a properly-conducted state agency, and I'll come to that
9 if I may, because that, in our submission, provides the
10 necessary context that enables you to answer the
11 question: what is meant by "identification"?

12 LADY JUSTICE HALLETT: I just wanted to go back to the
13 paragraph where this appears before we move on.

14 (Pause). Thank you.

15 MR GARNHAM: The reason why the duty was imposed in the
16 prescribed way that it was in Osman was because the
17 court was seeking to balance the right to protection by
18 law with these factors: the difficulties in policing
19 a modern society, the unpredictability of human
20 behaviour, the fact that the state has to prioritise its
21 resources, and fourthly and finally, the fact that the
22 state has to respect the rule of law and the rights
23 guaranteed by the other provisions in the Convention.
24 It is from those competing factors that we say you
25 can extract a proper and coherent understanding of what

1 is meant by "identified". Because, once one recognises
2 that the factors that point away from the existence of
3 this duty are those that are necessary to respect the
4 rights and freedoms of others, one has an indication of
5 why it's necessary that the potential victims are
6 identified, because the alternative, frankly, is
7 a police state. It would be possible by surveillance to
8 everybody in the country to be able always, or more or
9 less always, to identify when something like this was
10 going to happen. Because we don't live in a police
11 state, because the Convention guarantees rights for
12 example under Articles 5, 6 and 8 and so on, there is
13 a balance to be struck.

14 Those competing considerations also recognise the
15 unpredictability of human behaviour and the fact that
16 the state has to prioritise its resources. When you
17 reflect on those four factors, it becomes, in our
18 submission, workable to understand why there has to be
19 a really quite precise degree of identification and why
20 it is the European Court did not say there's a duty to
21 protect the lives of everybody.

22 So although I don't pretend, madam, that I can
23 provide you with a precise piece of analysis as to the
24 meaning of the word "identification", one can, looking
25 at the context of the decision, understand its essential

1 characteristics.

2 We say that those competing considerations that I've
3 just enumerated, are far from trivial. They go to the
4 balance that's at the heart of the European Convention
5 on Human Rights, the balance between the interests of
6 the individual and the interests of the community as
7 a collective.

8 All that being so, madam, it is, in our submission,
9 hardly surprising that in not a single case since Osman
10 has it ever been doubted that the requirement to
11 identify the potential victims is necessary in this
12 context.

13 Mr O'Connor suggests that the Osman analysis falls
14 to be reconsidered in the light of the decision in
15 Oneryildiz. With the greatest of respect, that doesn't
16 bear any scrutiny at all.

17 Osman is the seminal case which defines and delimits
18 the Article 2 obligations in the case of the duty to
19 prevent and suppress offences against the person. That
20 is why I invited you to underline those words in
21 paragraph 116 in Osman.

22 Oneryildiz, by contrast, deals with the situation
23 where the use by the state of land it occupies causes
24 a risk to the life of those living in the vicinity. The
25 two are not remotely comparable and, furthermore, do not

1 even describe the same duty.

2 In the former case, Osman, the court is concerned to
3 balance the rights of protection from the threat of
4 offences against the person by third parties. It was,
5 as I've just explained, necessary, in that context, to
6 balance competing rights and considerations, and it was
7 of particular note that, in that context, the court was
8 concerned with circumstances outside the immediate
9 control of the state. The state does not control the
10 underground system or the buses or London.

11 By contrast, in Oneryildiz -- and I, like
12 Mr O'Connor, struggle with the pronunciation, I'm
13 afraid -- none of the competing concerns applied. The
14 source of the threat was both identifiable and
15 identified. It was the rubbish heap beside the
16 squatters' camp. It was caused by the actions of the
17 state. It was their land and it was the local authority
18 who was dumping its rubbish there. It was in the
19 immediate control of the state. They managed it and, in
20 our submission, it is not remotely surprising, in those
21 circumstances, that Oneryildiz says precisely nothing
22 about the application of the Osman principle. It's
23 a completely different case.

24 Madam, in addition to that, English domestic law has
25 consistently followed Osman and made it clear that each

1 element of the Osman test is, firstly, important,
2 secondly, constant and, thirdly, is to be applied in all
3 cases involving offences against the person.

4 May I take you in that context to Van Colle which is
5 also in C3 at tab 37?

6 Do you, madam, have it in the Appeal cases by any
7 chance? No?

8 LADY JUSTICE HALLETT: Well, give me the paragraph and we'll
9 see how we go, Mr Garnham.

10 MR GARNHAM: I can tell you two sentences about what the
11 facts were about, because it's only of marginal
12 relevance to set the scene. It concerned two cases.

13 One concerned the killing of a witness in a theft case
14 and the second the assault of a man who had reported his
15 concerns to the police. One could develop that for some
16 time, but that's essentially what it is.

17 Can I take you first to the speech of Lord Bingham
18 at paragraphs 29 to 30?

19 LADY JUSTICE HALLETT: Beginning:

20 "In Osman ..."

21 MR GARNHAM: Beginning "In Osman", yes. Osman,
22 paragraph 116.

23 "... the court defined [I underline those words] the
24 circumstances in which the obligation arises."

25 Then the passage we've looked at. Then this

1 critical sentence:

2 "Every ingredient of this carefully drafted ruling
3 is, I think, of importance."

4 Can I then take you to the speech of Lord Hope,
5 paragraph 66:

6 "The extent of the positive obligation has been
7 defined by the Strasbourg court in Osman. The relevant
8 part ... has been quoted by Lord Bingham ... It declares
9 that the court must be satisfied that the authorities
10 knew or ought to have known 'at the time' of the
11 existence of 'a real and immediate risk to the life' of
12 an identified individual from the criminal acts of
13 a third party."

14 Then I think we can drop down to In re Officer L to
15 these words:

16 "We are fortunate that, in the case of this vitally
17 important Convention right, the Strasbourg court has
18 expressed itself in such clear terms. It has provided
19 us with an objective test which requires no further
20 explanation."

21 One might raise a question about those last words,
22 but nevertheless the point is clear.

23 "The question in each case will be whether on the
24 facts it has been satisfied."

25 Then Lord Phillips at 85 -- I show you this, madam,

1 not only to underline the point about what -- the
2 importance about Osman, but also about what that test
3 means. 85:

4 "... Lord Bingham ... has set out, at
5 paragraph 29 ... the very precise definition given by
6 the Strasbourg court in Osman ... of the circumstances
7 that give rise to a positive obligation under
8 Article 2 ... to take action to protect an individual
9 whose life is threatened. The only matter that is left
10 unclear by that definition is the test to be applied
11 when deciding whether the relevant authority, in this
12 case the police, 'ought to have known' of the risk to
13 the individual's life.

14 "There are at least two possibilities. The first is
15 that 'ought to have known' means 'ought to have
16 appreciated on the information available to them'. The
17 alternative meaning is 'ought, had they carried out
18 their duties with due diligence, to have acquired
19 information that would have made them aware of the
20 risk'. The reasoning of the court leads me to believe
21 that the former was the meaning intended."

22 I will come back to that, my Lady, because there are
23 others who say other things to that.

24 LADY JUSTICE HALLETT: It's answering, you would say, the
25 point I was asking about earlier?

1 MR GARNHAM: Yes.
2 To finish this, I can just point out that
3 Lord Carswell agrees with Lord Bingham at 105.
4 Then Lord Brown at 115, says this. This, too, we
5 say is important:
6 "The test set by ... Osman ... and repeatedly since
7 applied for establishing a violation of the positive
8 obligation ... to protect someone from a real and
9 immediate risk to his life is clearly a stringent one
10 which will not easily be satisfied. This is hardly
11 surprising, given, as the Osman judgment itself
12 recognises ..."
13 Then the competing consideration:
14 "It is indeed some indication of the stringency of
15 the test that even on the comparatively extreme facts of
16 Osman itself - rehearsed by Lord Bingham at
17 paragraph 56 - the Strasbourg court found it not to be
18 satisfied.
19 "No less clear is it that the Osman test is
20 a constant, to be applied whatever the particular
21 circumstances of the case."
22 While we're in this volume, madam, can I also in the
23 same context show you Gentle, which is at 36? Just one
24 paragraph, paragraph 7:
25 "As the summary in paragraph 2 of Middleton makes

1 clear, Article 2 ..."

2 Then it sets out what Article 2 says:

3 "In either case the question whether the state

4 unjustifiably took life or failed to protect it will

5 arise in respect of a particular deceased person ..."

6 May I underline those words:

7 "There is, in my opinion, no warrant for reading

8 Article 2 as a generalised provision protective of life,

9 irrespective of any specific death or threat."

10 Our submission, madam, is that there could be no

11 warrant for you to adopt any less stringent test in this

12 case. In particular, there would be no warrant for

13 deleting or reading down from the Osman test the

14 requirement that the risk must be to an identified

15 individual or individuals -- identified individual or

16 individuals.

17 We would, in fact, go so far as to submit that you

18 are bound, by Van Colle and the other cases that I've

19 referred you to, so to hold.

20 Can I then consider, as I said I would, the nature

21 of the test when Osman applies? For this, if I may,

22 I'll go back to Van Colle, which is, I think, the next

23 case in this volume.

24 I've already shown you part of what Lord Bingham

25 says. Can I take you to paragraph 32 in his speech:

1 "In its formulation of the 'real and immediate risk'
2 test the Strasbourg court, in paragraph 116 of ...
3 Osman ... laid emphasis on what the authorities knew or
4 ought to have known 'at the time'. This is a crucial
5 part of the test, since where (as here) a tragic killing
6 has occurred, it is all too easy to interpret the events
7 which preceded it in the light of that knowledge and not
8 as they appeared at the time. In the present case, the
9 Court of Appeal expressly warned itself against the
10 dangers of hindsight ... but I don't think that the
11 judge, in the course of her lengthy judgment, did so."
12 I flag that up because it's going to be relevant to
13 a submission I make later about the dangers of
14 hindsight.

15 I drop down in that same paragraph:
16 "But the application of the test depends not only on
17 what the authorities knew, but also on what they ought
18 to have known. Thus, stupidity, lack of imagination and
19 inertia do not afford an excuse to a national authority
20 which reasonably ought, in the light of what it knew or
21 was told, to make further enquiries or investigations:
22 it is then to be treated as knowing what such further
23 enquiries or investigations would have elicited."
24 So the contrast is between reasonable investigation
25 and stupidity, lack of imagination and inertia.

1 I go on, just to complete this part of the exercise,
2 to Lord Phillips in paragraph 85. It may be the passage
3 I've already shown you. Yes, it is. I've already shown
4 you that, my Lady. I'm sorry, I'm repeating myself, but
5 you will see the relevance of that in the context of
6 what ought to have been done.

7 In our submission, aware of the risk at the time
8 means what it says. It does not mean that the state is
9 obliged to carry out additional enquiries to discover
10 things that have yet to happen, but in our respectful
11 submission, that is the effect of the submissions of our
12 learned friends.

13 It may, in this context, be useful to analyse what
14 was known by the Security Service at the time that
15 you're concerned with, at the time of the Crevice
16 inquiry.

17 It's said against us that we, the Security Services,
18 were aware that MSK was in contact with Omar Khyam on
19 a number of occasions in suspicious circumstances, and
20 the point is made against the Security Service that, if
21 only we had just kept an eye on MSK and ST, we could
22 have taken reasonable operational measures to prevent
23 the risk.

24 Crevice concerned a threatened mass attack led by
25 Khyam.

1 The resources to counter that threat were immense
2 and are outlined in the ISC report.
3 They involved surveilling by mobile surveillance, or
4 eavesdropping and other covert means a wider range of
5 suspicious activity, certainly wider than the suspicious
6 meetings involving MSK.
7 The information that was generated by that operation
8 led to numerous arrests in the UK, in Canada and in
9 Pakistan, and led to the trial and conviction of five
10 men in the UK after one of the longest criminal trials
11 in British legal history.
12 It also led to a number of leads, a large number of
13 leads.
14 It's suggested that following up UDM, unidentified
15 males, C, D and E, would have enabled the
16 Security Service to identify MSK and ST and then enable
17 them to keep an eye with -- keep an eye on them with
18 careful surveillance that would have given a real
19 prospect of uncovering more of the planning for 7/7.
20 But even if one were -- and this is unrealistic --
21 but even if one were to take those two individuals in
22 isolation, the scale of the task is grotesquely
23 underestimated in the submissions of my learned friends.
24 The activity which it's suggested the
25 Security Service could have uncovered is the

1 reconnaissance trip to London in late 2004 and the
2 setting up of the bomb factory in May 2005, but based
3 upon the information that the Security Service had in
4 2004, it is simply unrealistic to suggest that there was
5 a real chance that we could have done this, bearing in
6 mind the legal resources, the legal and resource
7 constraints, under which the Security Service was
8 operating, which is referred to in the ISC report.
9 The Security Service could have followed those two
10 men using directed surveillance on foot. That would be
11 possible.
12 To survey one man requires a team of twelve men who
13 work on shifts of eight hours, so that's 36 men a day
14 for each of the two, MSK and ST.
15 36 men a day, throughout the period of surveillance.
16 Even then, that sort of --
17 LADY JUSTICE HALLETT: Sorry, requires 12 men how long
18 a shift?
19 MR GARNHAM: Eight-hour shifts. So you need three shifts,
20 that's 36 men, each and every day.
21 LADY JUSTICE HALLETT: Per suspect?
22 MR GARNHAM: Per suspect, and all that gets you, madam, is
23 visual surveillance.
24 On top of that, the Security Service would have
25 needed to use other powers under RIPA -- under the

1 Regulation of Investigative Powers Act --

2 LADY JUSTICE HALLETT: I'm familiar with it.

3 MR GARNHAM: -- to mount intrusive surveillance attacks.

4 That would involve trespass to property, an operation

5 that is both intrusive and dangerous. They would then

6 have had to listen to the product of any such

7 surveillance. In a house, as you'll appreciate, madam,

8 the volume of conversations can be huge, and may require

9 to be listened to by transcribers to establish the

10 content of the conversation.

11 Of course, people don't just have conversations in

12 their houses.

13 As is demonstrated by the Crevice investigation,

14 there were a number of devices needed to be positioned

15 to cover Khyam's conversations and something similar

16 would have had to be done in respect of these two.

17 In addition, targets also speak on the phone. In

18 order to intercept that, the Security Service would have

19 needed authorisation from the Home Secretary for such

20 highly intrusive activity, and the product of that

21 interception would then have needed to be listened to by

22 transcribers to see whether it disclosed evidence of

23 terrorist activity.

24 In order to deal with what is so simply described by

25 my learned friends, that would have had to go on, all of

1 that, for months and months.

2 The ISC say something about this in their report
3 which we submit is plainly right. It would have needed
4 to be able to do that in respect of all of those with
5 whom Omar Khyam came into suspicious contact, it would
6 have needed the most massive service and the most
7 consistent and intrusive interference in the lives of
8 a large number of people.

9 LADY JUSTICE HALLETT: That was again a matter I was trying
10 to pin down yesterday.

11 I understand what you're saying, obviously. What
12 I can't get a feeling for is to what extent Omar Khyam
13 was meeting lots of other people in suspicious
14 circumstances. I have no sense of the size of it.

15 MR GARNHAM: 4,020 is the figure from the ISC report. 4,020
16 different telephone numbers were identified.

17 LADY JUSTICE HALLETT: How many meetings in suspicious
18 circumstances and how many individuals? Do we know?

19 MR GARNHAM: I don't know. I might be able to find out, but
20 I don't know. I can tell you, because it's in the ISC
21 report, that there were 4,020 -- I'm now not going to be
22 able to find that.

23 LADY JUSTICE HALLETT: Is that the rather strange diagram
24 which has become a blob in my photocopy?

25 MR GARNHAM: It's close to a blob in the best copies,

1 certainly a blob in any photocopy.

2 In the text immediately above that -- I'll try to
3 find it for you now, madam.

4 LADY JUSTICE HALLETT: I don't think it's telephone numbers
5 that is the complaint against you. It's the complaint
6 not to follow the individuals. That's why I was asking
7 whether we had any idea of how busy a person he was
8 meeting individuals in suspicious circumstances.

9 MR GARNHAM: It is worth looking at page 9 in the report.
10 I'll read you the bit. The diagram -- the splurge --
11 shows all the calls related to international
12 counter-terrorism between unique parties in just four
13 months, January, February, March, three months,
14 1 January to 1 April 2004.

15 There were 4,020 unique numbers linked to Crevice,
16 all of which, since -- it speaks for itself. The
17 Security Service don't know which ones are the real
18 troublemakers and don't know how serious they are unless
19 they start to investigate. All of them will have had to
20 have been investigated.

21 Now, I'm sure it can be said it ought to be possible
22 to filter them down, and it may well be, I don't know,
23 it may well be that it can be possible to filter them
24 down. But the scale of the task arising from Crevice
25 was simply enormous, and I return -- because I've said

1 I would -- to the point you asked me about earlier which
2 is, if you were to embark on this sort of investigation,
3 what would have been -- what would be the size of the
4 task?

5 Well, this provides an example. 4,020 unique
6 contacts by telephone with the Crevice plotters.

7 It is said the Security Service should have got the
8 right ones, the ones who ended up being these bombers.

9 But to get there, they'd have had to assess all of them.

10 If you're going to -- sitting with a jury, or on your
11 own, if you, as coroner, are going to reach the judgment
12 that the Security Service got that call wrong, you're
13 going to need to revisit all those decisions, and that
14 provides perhaps a useful illustration of the immensity
15 of the task, both for this court and for the
16 Security Service when they were involved in it at the
17 time.

18 My Lady, you will recall the passage I read to you,
19 I think, from the speech of Lord Bingham about the
20 importance of not looking at these things with the
21 benefit of hindsight. We now know MSK and the others
22 were violent Jihadists planning the most appalling
23 attack on innocent Londoners. We know that now, and it
24 is almost inhumanly possible to look back at this and
25 not have an appreciation of that as being the outcome

1 when you review the events.

2 But that is not a fair or proper way in which to do
3 this analysis, and it is an approach against which you
4 are expressly warned by the House of Lords and the
5 European Court.

6 What we say, my Lady, is that applying the test in
7 Osman, taking on board what is said in Van Colle about
8 the way that test is applied, there is absolutely no
9 evidence that, in the Osman sense, the UK authorities
10 knew, or should have known, of a threat of the requisite
11 type. They did not know and could not have known of the
12 threat to the particular victims of the 7/7 attack.

13 As Mr Coltart submitted, the very nature of this
14 crime was that it was indiscriminate and was not aimed
15 at identified individuals in the way, for example, that
16 Osman's conduct was.

17 But contrary to Mr Coltart's submission, that is no
18 reason for ignoring or disregarding or extending the
19 Osman test. On the contrary, it demonstrates the
20 significance of the tightly-drawn requirements for the
21 application of Osman.

22 Nor is there any evidence whatsoever that the UK
23 authorities knew, or should have known, of a real and
24 immediate threat of an attack on these underground
25 trains or this bus, which, one can see the argument

1 might be made, is the equivalent of an attack on an
2 identified shopping centre. Nor even is there any
3 evidence of a real and immediate threat to attack the
4 London transport system in general on or about 7 July.
5 All that being so, we submit with the greatest of
6 respect, that it is impossible to contend that the
7 protective requirement of Article 2 is engaged or even
8 in contemplation.

9 In our submission, nothing in any of my learned
10 friend's submissions comes remotely close to
11 establishing the critical elements needed to found an
12 Osman obligation.

13 LADY JUSTICE HALLETT: To give an extreme example, you say
14 that Osman is such a tight test that if the state knew
15 that tomorrow a bunch of terrorists were going to blow
16 up a target but they thought it was going to be
17 a shopping centre, when, in fact, it was a transport
18 system in another city altogether, you say the Osman
19 test is so tight that even if they just completely
20 ignored the threat, they wouldn't breach their duty?

21 MR GARNHAM: No, not remotely possible within Osman.
22 I mean, if they knew that there was to be a bomb at
23 Bluewater tomorrow and did nothing, I might be in
24 trouble, because that would be --

25 LADY JUSTICE HALLETT: If they get the target wrong --

1 MR GARNHAM: Absolutely, if they get the target wrong, Osman
2 is not satisfied.

3 LADY JUSTICE HALLETT: Even if they failed miserably in
4 their duty to the target they thought it was --

5 MR GARNHAM: Yes, this isn't a review of competence. This
6 is a review of the ability of the state to protect by
7 law the right to life.

8 LADY JUSTICE HALLETT: Why, in my example, hasn't the state
9 blatantly failed to comply with its duty to protect
10 life? Because, albeit it's got the target wrong, it's
11 completely ignored the fact that there's going to be
12 a bomb tomorrow that might kill a lot of people?

13 MR GARNHAM: Well, there has to be some causal connection
14 between the failure and the death.

15 LADY JUSTICE HALLETT: We come back to the chain of
16 causation.

17 MR GARNHAM: Yes. To test, madam, your theory a little
18 further by taking a more absurd example, say it was
19 possible to identify some failing somewhere in the last
20 five years inside Thames House, inside the
21 Security Service -- and, frankly, it would be difficult
22 to find an organisation in the world for whom that could
23 not be applied -- it only matters if it has an effect on
24 the claimants in the courts in Strasbourg or interested
25 persons in this inquest. It's not just -- it's not an

1 audit of the competence of the state. It is an
2 exploration of whether or not the obligation to protect
3 by law has or has not been breached, and it has to be
4 tied down to a concrete incident where the breach is
5 active.

6 That analysis is, in our submission, conclusive to
7 the question whether or not Article 2 is engaged. It is
8 also consequently conclusive on the question of whether
9 or not this should be a Middleton or a Jamieson inquest
10 and is highly material to the question of scope. But
11 before turning to deal with the alleged investigative
12 obligation which it's said arose here, there's one
13 further basis on which Article 2 can be engaged, which
14 I ought to deal with, because in the submissions you've
15 heard thus far it's proved a distraction.

16 That obligation is this: if there is a failure by
17 the state to secure the right to life by putting in
18 place effective criminal law provisions, in order to
19 deter the commission of offences against the person, or
20 there's a failure to back that up with law enforcement
21 machinery, then there may be a breach of Article 2.

22 So the classic example of that is where the police
23 fail entirely to investigate a case of murder, that may
24 put them in breach of Article 2.

25 Now, that was the case in *Menson v The UK* which is

1 in D2, at divider 17.

2 You've had this case referred to you already in the
3 course of this case and therefore I can refer to it
4 quickly. This is the case in which a black man was set
5 upon by a bunch of white thugs and set alight.

6 If I can summarise the facts in this way, there had
7 been a woeful failure by the police to investigate.
8 They had failed even to take a statement from the
9 victim, despite reports of the attack, despite the fact
10 that for a time he was conscious and lucid, so they
11 hadn't even got to first base in their investigation.
12 The court found in that case, I say -- praying,
13 madam, that you have the same two reports as I have.
14 The bottom of page 12, do you have a paragraph beginning
15 "However"? Predictably not.

16 LADY JUSTICE HALLETT: Let's start at the beginning. How
17 many pages through are you, Mr Garnham?

18 MR GARNHAM: 12.

19 Mr Keith is asking me what paragraph number.
20 I don't have numbered paragraphs.

21 LADY JUSTICE HALLETT: No, nor do I. Right, I have my 12th
22 page.

23 MR GARNHAM: Does it have "Michael Menson" at the top?

24 LADY JUSTICE HALLETT: Remind me how your paragraph begins?

25 MR GARNHAM: "Although there was no state involvement in the

1 death ..."

2 MR KEITH: It is CD230 at the top, madam.

3 MR GARNHAM: I'm very grateful to Mr Keith, especially as
4 I've just given you the wrong paragraph number. One
5 page earlier, you'll see a paragraph that begins at the
6 bottom, "However, the absence ..."

7 MR KEITH: That is CD229 madam.

8 LADY JUSTICE HALLETT: "However, the absence ..."

9 Yes, at the top of our CD229, right.

10 MR GARNHAM: A completely different layout as well, then,
11 madam:

12 "However, the absence of any direct state
13 responsibility for the death of Michael Menson does not
14 exclude the applicability of Article 2. It recalls that
15 by requiring a state to take appropriate steps to
16 safeguard the lives of those within its jurisdiction ...
17 Article 2(1) imposes a duty on that state to secure the
18 right to life by putting in place effective criminal law
19 provisions to deter ... [blah blah blah].

20 "With reference to the facts of the instant case,
21 the court considers that this obligation requires by
22 implication that there should be some form of effective
23 official investigation when there is reason to believe
24 that an individual has sustained life-threatening
25 injuries in suspicious circumstances. The investigation

1 must be capable of establishing the cause of the
2 injuries and the identification of those responsible
3 with a view to their punishment. Where death
4 results ... investigation assumes even greater
5 importance, having regard to the fact that the essential
6 purpose of such an investigation is to secure the
7 effective implementation of the domestic laws which
8 protect the right to life ..."

9 Then there's a reference to the Edwards case.
10 What's important, we submit, to extract from this
11 case is how different its circumstances are from Osman
12 and from the one with which you, madam, are concerned.
13 This case relates to the obligation to carry out
14 a proper police investigation after a fatal assault has
15 occurred.

16 There's no suggestion in the present case that there
17 was any failure properly to investigate the 7/7 bombings
18 after they occurred. The complaint concerns alleged
19 failures to prevent them occurring, and because that's
20 true, we're in Osman territory, not Menson territory.
21 But I show you Menson because it's an example of
22 a case in different circumstances where the obligation
23 can arise, so as to impose a duty on the police to
24 investigate without the state being involved. But the
25 important distinction to draw is that that's an

1 obligation on the police to investigate after it's
2 happened, rather than the protective duty which is
3 governed by Osman.

4 Against that background, madam, I propose turning to
5 the investigative obligation, but I --

6 LADY JUSTICE HALLETT: What is the obligation under the
7 heading "Prevention and Suppression"?

8 MR GARNHAM: The heading? You take that from?

9 LADY JUSTICE HALLETT: Sorry, I don't mean a heading
10 technically. I mean under the classification, the court
11 refers more than once to "prevention and suppression".

12 MR GARNHAM: It depends on the context in which it's using
13 that expression. In cases like this, it's talking about
14 the need to have in place a criminal law that prohibits
15 the action described and a law enforcement machinery
16 that investigates and punishes it and, in that regard,
17 the existence of that legal structure acts as
18 a disincentive on the commission of the offence and,
19 therefore, it relates to prevention in that sense.
20 If one is talking about the prevention of assault
21 against the person, then one is back to the test in
22 Osman.

23 LADY JUSTICE HALLETT: Osman itself used the expression
24 "suppression", I think.

25 MR GARNHAM: Yes, I think it probably did. But the danger

1 is just alighting on those words, because one always
2 has -- in order to understand, I would respectfully
3 submit, what's the effect of the ruling, one has to look
4 at the context. Context is everything, as has been said
5 more than once. In Osman, we have the advantage that
6 the context for the application of the test is precisely
7 defined as being cases involving offences against the
8 person, and is looking at the protective duty in those
9 cases.

10 LADY JUSTICE HALLETT: But you say it doesn't -- in any
11 event, it doesn't go further than having in place the
12 criminal justice system effectively, the laws and the
13 police force?

14 MR GARNHAM: It certainly does go further than that. It
15 goes to Osman. What Osman did, the new ground that
16 Osman broke, was that, in addition to requiring the
17 existence of the criminal law and the enforcement
18 machinery, it required this new duty to be carried out
19 by the states of protecting by law the right to life by
20 intervening in the particular circumstances defined in
21 Osman into the threat to cause injury.

22 LADY JUSTICE HALLETT: It's quite a leap to go from, "You
23 have a duty, state, to produce a criminal justice system
24 with laws and a police force and MI5 and anything else",
25 and then we're going to leap and say, "Then we're going

1 to have a duty here when there's an imminent risk".

2 MR GARNHAM: Absolutely.

3 LADY JUSTICE HALLETT: Then we have this grey area in the
4 middle where you say --

5 MR GARNHAM: I'm not sure there is any grey area. There
6 certainly is a leap, madam, you're right, and I'm sure
7 those who acted for the UK in Osman were not expecting
8 they were going to lose that case, because all the case
9 law up to then was it was criminal law sanctions and
10 machinery, but what Osman did was to extend the duty on
11 the state in carefully defined circumstances to this
12 interventionist obligation where they know of the risk,
13 and there is no grey area in between. It's Osman or
14 it's criminal law machinery in investigation and so on.
15 Nothing else. The only people who want a grey area,
16 with respect, are my learned friends who would like to
17 exploit it, but it ain't there.

18 LADY JUSTICE HALLETT: You say we have this stark contrast
19 between our general duties there, state, and --

20 MR GARNHAM: No, we have two duties. The state has two
21 duties. It has many duties, but in this context, it has
22 two material duties. The one is the criminal law
23 machinery and the other is, in defined circumstances,
24 the protection duty, and for all the reasons I've sought
25 to explain, that development in Osman to impose that

1 protective duty is tightly constrained, because,
2 otherwise, no states could function.

3 LADY JUSTICE HALLETT: I follow, thank you.

4 MR GARNHAM: I'm about to go on to investigative
5 obligations. I don't know whether you want me to go on.
6 I can.

7 LADY JUSTICE HALLETT: Can we go on for a few more minutes?
8 Just because I was thinking about timing generally --
9 and it's no criticism of anyone, because this is too
10 important to rush. How much longer do you think you're
11 going to be, Mr Garnham? I say there's no pressure of
12 time on anyone. A very rough estimate, I won't hold
13 you ...

14 MR GARNHAM: A couple of hours more.

15 LADY JUSTICE HALLETT: Mr Keith, I know we've set aside
16 Thursday and Friday, if we need it. It's looking
17 increasingly as if we are going to need at least one of
18 those days.

19 MR KEITH: Madam, yes, that was our provisional assessment.

20 LADY JUSTICE HALLETT: So do we need to make any provisions
21 for extending the court day, do you think, or shall we
22 merely carry on as we are? Are you confident we can
23 then finish within the week?

24 MR KEITH: Much depends on the submissions that are
25 anticipated from the Metropolitan Police Service, the

1 West Yorkshire Police and, to a lesser extent perhaps,
2 British Transport Police tomorrow, because the
3 organisations thereafter are more narrowly concerned
4 with designation.

5 If, with a fair wind, the submissions from
6 Mr Garnham concluded before lunch tomorrow, there is
7 a realistic prospect of finishing all the other
8 submissions by the close of play tomorrow, but I'm
9 afraid that will still leave over the question of my
10 response and, of course, the ability of all the other
11 parties to respond to any new points that I've raised,
12 or, of course, points raised by the other interested
13 parties.

14 LADY JUSTICE HALLETT: If we completed all the submissions
15 tomorrow, would you then be in a position to present
16 yours on Thursday or are you going to need more time?

17 MR KEITH: No, we are ready to proceed whenever you wish us
18 to make our submissions.

19 LADY JUSTICE HALLETT: In which case, do you want me to ask
20 Mr Hill and Mr Beggs as to -- and who else was it you
21 said you suggested?

22 MR KEITH: Mr Gibbs.

23 LADY JUSTICE HALLETT: Mr Gibbs. Right, Mr Hill first. Can
24 you help us, Mr Hill?

25 MR HILL: Yes, Mr Keith has been approaching me on

1 a half-daily basis to ask how long. I've always given
2 the same response, certainly in the last 24 hours, and
3 that is an hour or less from me. I'm ready, I've been
4 listening to Mr Garnham. He's not going to serve to
5 lengthen my submissions. Probably the opposite.

6 LADY JUSTICE HALLETT: Thank you, Mr Beggs?

7 MR SKELT: Mr Beggs isn't here. I'm representing the West
8 Yorkshire Police. I will not be adding greatly to the
9 written submissions we've submitted already so I would
10 have thought we are 20 minutes at the most.

11 LADY JUSTICE HALLETT: Thank you. Have we got Mr Gibbs
12 here? Yes, we have.

13 MR GIBBS: I have just one topic I wanted to expand upon.
14 I shouldn't be more than 15 minutes, and if you would
15 allow me to -- I've already spoken to those who are
16 actually before me in the order, and it might be that
17 I could conveniently go before the other two who you've
18 just asked.

19 LADY JUSTICE HALLETT: I'll leave that to you all to
20 resolve.

21 Right, well, I think what we'll do then -- we've
22 used up the rest of the time, Mr Garnham, anyway, by my
23 enquiring about timetable, which is often the way. One
24 wastes time asking about time. We'll return tomorrow.
25 I was thinking about sitting at 10.15 to allow for

1 perhaps a little more of a break in the morning rather
2 than rushing everybody. Is that going to cause anybody
3 any problems to sit at 10.15? Are there any families or
4 survivors who find difficulty with transport? Very
5 well, we'll sit tomorrow at 10.15.

6 (4.25 pm)

7 (The inquest adjourned until 10.15 am the following day)

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