

**IN THE INNER WEST LONDON (WESTMINSTER) CORONER'S COURT**  
**IN THE MATTER OF:**

**CORONER'S INQUESTS INTO**  
**THE LONDON BOMBINGS OF 7<sup>th</sup> JULY 2005**

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**SUBMISSIONS OF COUNSEL TO THE INQUESTS**

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**INTRODUCTION**

1. These submissions are served for the purposes of the pre-inquest hearing commencing on Monday 26 April 2010. The submissions are divided into the following sections:

	<u>Paragraphs</u>
A. Case management issues	3 to 13
B. Procedural history of the Inquests	14 to 22
C. Resumption of the Inquests	23 to 39
D. Joinder of the Inquests	40 to 68
E. Scope of the Inquests	69 to 133
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2. These submissions have been drafted by Counsel to the Inquests and are intended to assist the Coroner in analysing and ruling upon the legal issues that arise for determination. In light of our independence of both the Coroner and the parties, we have sought in these submissions (in the main) not to advocate any particular result in the determination of these issues, but rather to identify the central legal and factual arguments that fall to be considered in determining them. We have



## **A. CASE MANAGEMENT ISSUES**

3. This pre-inquest hearing is listed for 3 days commencing 26 April 2010. Should the time prove insufficient, two further days have been reserved on 29 and 30 April 2010.
  
4. The Directions dated 25 February 2010 have been complied with. In particular:
  - (i) The Metropolitan Police Service ('MPS'), acting as independent Coroner's Officers, completed the four scene reports and these have been disclosed to all the potentially interested persons who signed the confidentiality undertaking. In the event that the inquests are resumed, further reports will be prepared addressing (i) the backgrounds of Khan, Tanweer, Hussain and Lindsay, (ii) the movements of Khan, Tanweer, Hussain and Lindsay prior to the explosions and (iii) forensics relating to the explosions
  
  - (ii) Written applications and / or submissions have been filed by those wishing to be recognised as properly interested persons pursuant to rule 20(2) of the Coroners Rules 1984 ('CR 84')<sup>1</sup>.
  
  - (iii) Written submissions have been filed (other than by Imran Khan on behalf of Mrs. Patel and Mr. and Mrs. Hussain) on the issues of resumption, joinder, scope, jury and the designation of properly interested persons. The Solicitor to the Inquests has distributed these submissions.
  
5. There are three annexes appended to these submissions:
  - (i) Annex A is a schedule of legal representation.

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<sup>1</sup> However the Coroner may wish to note that no formal application has been received from the City of London Police under rule 20(2)(a) or (h) of the CR 84 and the Secretary of State for the Home Department and the Security Service have reserved their position on applying for designation as a properly interested person.

- (ii) Annex B is a schedule of individuals and/or organisations that have filed applications to be recognised as properly interested persons and/or filed written submissions on the above issues.
- (iii) Annex C is a copy of a questionnaire sent by Dr. Reid (the previous coroner with jurisdiction over these inquests) to the bereaved families of the 52 individuals and a summary of their responses on the issue of resumption.

***Participation, representation & funding***

- 6. Applications for participation under rule 20(2) have been received concerning 45 of the 56 deceased (see Annex B). In respect of two of the deceased, the families have declined to lodge an application and in respect of 9 deceased, no response has been received from the bereaved families.
- 7. Of those seeking designation under rule 20(2), 27 are not legally represented. The Coroner may wish to note that of these 27 applicants, 18 would appear to have an automatic right to examine witnesses under rule 20(2)(a) of the CR 84.
- 8. There has been some progress on the funding negotiations with the Legal Service Commission ('LSC'). The LSC have approved funding for one Queen's Counsel and four junior Counsel on behalf of some of the bereaved families. However it is understood that negotiations both as to the number of counsel and the appropriate rates of fees are ongoing.
- 9. Given the variety of interest and concerns which the bereaved families may have, it is understood that the Legal Service Commission consider that the appointment of one Queen's Counsel and five junior Counsel (i.e one per firm of solicitors) will ensure that, if there are any conflicts between the bereaved families and/or survivors, there will be sufficient barristers to represent those competing interests.

10. Imran Khan & Partners have also applied for funding from the LSC on behalf of their clients<sup>2</sup>. It is understood that the LSC have made a recommendation to the Ministry of Justice in respect of this application. The Solicitor to the Inquests has received no further information in this regard.

***Conduct of this Pre-Inquest Review***

11. There is much ground to cover. Given the time available and the number of parties who need to address the Court, we would invite the Coroner:
- (i) To set a running order and/or timetable for addressing the Court;
  - (ii) If she considers it appropriate, and in light of the full written submissions received, to suggest that oral submissions should be reasonably confined to amplifying any written submissions and responding to the submissions of other parties; and
  - (iii) To hear compendious submissions from each of the parties in turn, rather than hear each party on each issue sequentially. It is submitted that this approach is particularly appropriate in light of the interconnection of many of the issues. Adopting this course will, however, make it necessary for the parties to address the Court on alternative bases.
12. We are aware that a number of the bereaved families are planning to attend the hearing but do not have legal representation. We would invite the Coroner to canvass their views orally on the issues which arise.
13. It is anticipated that the Coroner will wish to reserve judgment and thereafter formally hand down her ruling at a short hearing in May. Should the Coroner decide to resume any of the inquests, three days have been reserved for a further pre-inquest hearing in the week commencing 21 June 2010.

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<sup>2</sup> Mrs. Hasina Patel and Mr. & Mrs. Hussain.

## **B. PROCEDURAL HISTORY OF THE INQUESTS**

14. The fatalities caused by the explosions on 7 July 2005 occurred in three coronial jurisdictions, that is:
  - (i) Inner North London (for the deaths at King’s Cross / Russell Square and Tavistock Square);
  - (ii) City of London (for the deaths at Aldgate); and
  - (iii) Inner West London (for the deaths at Edgware Road).
  
15. In July 2005, pursuant to section 14 of the Coroners Act 1988 (‘CA 88’), the inquests into the deaths at Aldgate were transferred from the City of London jurisdiction to the Inner North London jurisdiction.
  
16. Since 2007 Dr. Reid, the Inner North London Coroner, has also acted as Assistant Deputy Coroner for Inner West London. In those dual capacities, Dr Reid subsequently held responsibility for all the inquests of those who died on 7 July 2005.
  
17. On 31 July 2007, Dr Reid formally adjourned all 56 inquests. He made this order pursuant to section 16(1)(b) of the CA 88, following a request that the inquests be adjourned made by the Director of Public Prosecutions (“the DPP”). At the time of the adjournment, the identification and registration details of all 56 of the deceased were registered, as were their causes of death<sup>3</sup>.
  
18. The DPP’s request was made as a result of the initiation of criminal proceedings against Waheed Ali, Sadeer Saleem and Mohammed Shakil. The three men were charged with having conspired with Mohammed Siddique Khan, Shezhad Tanweer, Hasib Hussain and Jermaine Lindsay and others unknown to cause an explosion, contrary to section 3(1)(a) of the Explosive Substances Act 1883.

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<sup>3</sup> In respect of the Edgware Road scene, the deaths were registered in Westminster, for the Aldgate scene the deaths were registered in the City of London, for Tavistock Square and the King’s Cross / Russell Square Scene all deaths save for two were registered at Camden. Two deceased passed away at the Royal London Hospital and their deaths were registered at Tower Hamlets.

19. On 1 August 2008 the first trial of Ali, Saleem and Shakil ended in the discharge of the jury as a result of its inability to reach verdicts. In September 2008, the DPP announced that the three men would be retried. The retrial concluded on 28 April 2009. All three defendants were found not guilty of conspiracy to cause an explosion, although Ali and Shakil were convicted of conspiracy to attend a place for terrorist training.
20. Following the completion of the criminal proceedings, the inquests into the deaths arising from the explosions at Aldgate, King's Cross/Russell Square and Tavistock Square were transferred from the Inner North London jurisdiction to the Inner West London jurisdiction. Consequently, by July 2009, the inquests of all 56 deceased were under the jurisdiction of the Inner West London Coroner.
21. On 26 November 2009 Dame Heather Hallett's appointment as the Assistant Deputy Coroner for the Inner West London (Westminster) district with jurisdiction over all 56 inquests was publicly announced.
22. The first pre-inquest review took place on 25 February 2010, at which the Coroner made the directions referred to at paragraph 4 above.

### **C. RESUMPTION OF THE INQUESTS**

23. The conclusion of the criminal proceedings raises the issue of whether or not the inquests should be resumed.
24. There is no statutory obligation to resume any inquests that have been adjourned pursuant to section 16(1) of the CA 88. Rather, resumption is a matter for the Coroner's discretion under section 16(3) of the CA 88. Section 16(3) provides (where relevant):

“(3) After the conclusion of the relevant criminal proceedings, ... , the coroner may, subject to the following provisions of this section, resume the adjourned inquest if in his opinion there is sufficient cause to do so.”

In his judgment in *R v Inner West London Coroner ex parte Dallaglio*, Simon Brown LJ described the decision to be made under section 16(3) as one of “*a highly discretionary character*”<sup>4</sup>. Regarding the question of resumption in that case, he stated at page 155d:

“Although there must inevitably be formidable difficulties in resuming these inquests now, nearly five years after the disaster, and although no one could pretend that such a proceeding would be a satisfactory alternative to the public inquiry so long denied these applicants, I for my part am not prepared to say that a fresh coroner would be bound to refuse a resumption. The decision to be made under s 16(3) is of a highly discretionary character and in no way circumscribed by a need to find exceptional circumstances, only 'sufficient cause'. The coroner states that 'only rarely' are inquests resumed after criminal proceedings but, of course, the section itself expressly envisages, rather than discourages, such a course.

Given that many of the survivors and eye witnesses have still to give their full evidence, and none of the rescue services and those who engaged them; indeed that despite the plethora of other proceedings, some only of the potential witnesses have yet given full evidence and that for the most part directed to issues other than would properly arise at an inquest hearing, it might perhaps still be worth holding one. Many, indeed, were the reasons suggested by the applicants' counsel for allowing resumption.....”

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<sup>4</sup> [1994] 4 All ER 139 at 155

25. None of the written submissions that have been filed contain any opposition to resumption as a matter of principle. All of the submissions filed on behalf of families of the deceased support resumption.
26. The written submissions reveal a broad consensus as to the factors that are relevant to the exercise of the discretion to resume. Those factors, which overlap with each other to a certain degree, may be summarised as follows:
- (i) The likely scope of any resumed inquest.
  - (ii) The interests of the bereaved.
  - (iii) Whether sufficient evidence as to the circumstances of the death has been heard in the preceding criminal proceedings.
  - (iv) Whether those involved in the incidents have already given evidence in other public forums, and the existence of other reports into the events in question.
  - (v) The public interest in the events of 7 July 2005.

These matters are considered, in turn, below.

***The likely scope of any resumed inquest***

27. In his judgment in *Dallaglio* (at p.155c-d), Simon Brown LJ stated:

“... it seems to me that any fresh coroner to whom this case were now remitted would need, for the proper exercise of his 16(3) discretion, to consider first what would be the proper scope of any resumed inquest. Whether or not his views about that would satisfy the action group may be doubted. But the better questions are surely these: would a full inquest now be a practicable proposition and would it satisfy any worthwhile purposes?”

28. Detailed submissions regarding the possible scope of these inquests, if resumed, are set out at Section E below. A number of general points can, however, be made at this stage.
29. First, there is a submission from the families of the deceased to the effect that they wish the inquests to be resumed in order, if for no other purpose, for evidence to be heard regarding the detailed circumstances of the deaths of their loved ones.

<sup>5</sup> and it has been stated that, in some respects, the scene reports are inaccurate<sup>6</sup>. The calling of evidence as to these matters would appear to be a “*worthwhile purpose*” that will be served by resumption; there is no challenge to this proposition in any of the submissions that have been filed.

30. Second, if the Coroner were to conclude that the circumstances of the deaths were such as to trigger an investigative obligation under Article 2 ECHR, and that that obligation remained undischarged, that would be a powerful factor tending in favour of resumption. At paragraph 47 of his judgment in *Middleton*<sup>7</sup>, Lord Bingham stated:

“In the absence of full criminal proceedings, and unless otherwise notified, a coroner should assume that his inquest is the means by which the state will discharge its procedural investigative obligation under article 2.”

The criminal proceedings that have taken place in these cases do not amount to “full criminal proceedings” of the type that would themselves discharge the Article 2 investigative duty (see further below). Nor has any other notification been given. It follows that, if the Coroner were to reach the view that there is an Article 2 investigative obligation to be discharged, it would be necessary to proceed on the assumption that these inquests were the means by which such an obligation was to be discharged. That, clearly, would support resumption<sup>8</sup>.

31. It is argued in some of the written submissions that have been filed (see in particular the Security Service submissions at paragraph 55(ii) and those of the MPS at paragraphs 26-27) that the practical difficulties involved in considering highly sensitive material in inquest proceedings (and, possibly, with a jury) is a

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<sup>5</sup> The Oury Clark submissions, at paragraph 2.10.

<sup>6</sup> The Oury Clark submissions at paragraph 5.2

<sup>7</sup> *R (Middleton) v West Somerset Coroner and anr* [2004] 2 AC 182

<sup>8</sup> See *Moss v HM Coroner for the North and South Districts of Durham and Darlington* [2008] EWHC 2940 (Admin), in which Underhill J quashed the Coroner’s refusal to resume in circumstances where an Article 2 investigative obligation arose.

reason why no investigation should take place of the issue of alleged intelligence failings prior to 7 July 2005. That particular issue is returned to below. For present purposes, it is notable that these matters are not advanced as a factor that counts against resumption itself. It is respectfully submitted that this analysis is correct, for the following reasons:

- (i) If and to the extent that there are other issues that justify resumption (such as the need of the families to inquire into the detailed circumstances of the death of their loved ones), then it would be wrong not to resume merely because there are other issues that may give rise to practical difficulties.
- (ii) It is, in any event, not possible at this stage to reach any detailed conclusions either as to the extent of the practical difficulties that have been raised, or as to the prejudice that they might cause (and little detail on these issues is, understandably, ventured at this stage in the written submissions referred to above).
- (iii) Moreover, the Coroner is entitled to assume that the bodies in question (the Security Service and the relevant police forces) will provide full assistance if the decision is taken both to resume and to explore issues that give rise to the type of practical difficulties that have been raised.
- (iv) Not resuming the inquests will not necessarily lead to the adoption of a more appropriate means of considering the issue of intelligence failings, such as a public inquiry. The Government has refused the request for an independent and public inquiry on 30 May 2007<sup>9</sup>. Further by letter dated 19 June 2007, the Treasury Solicitor's Department, acting on behalf of the Prime Minister, has maintained the refusal to hold a public inquiry.

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<sup>9</sup> That decision is presently subject to stayed Judicial Review proceedings that were issued by the 7/7 Survivors Group represented by Oury Clark Solicitors.

### *The interests of the bereaved*

32. The interests of the bereaved were referred to by Sir Thomas Bingham MR in *Dallaglio* as one of a number of “powerful” factors that were relevant to the exercise of the discretion to resume (at p.164d)<sup>10</sup>.
33. Dr. Reid, the Coroner who previously held jurisdiction over these inquests, canvassed the views of the bereaved on a number of issues including resumption. Dr. Reid sent out 61 questionnaires and received 23 replies. A summary of the responses received by Dr. Reid was compiled by the Inquest Team and distributed to all persons seeking designation as interested persons by letter dated 17 March 2010 (see Annex C). We would invite the Court to have regard to the replies received by Dr. Reid; 16 of which considered there was sufficient cause to resume, 2 of which considered there was insufficient cause to resume and 5 of which were undecided. Those who replied gave a range of general and specific reasons why they considered the inquests should or should not be resumed.
34. By way of illustration, replies in favour of resumption included:
- “We want to know what happened to my wife, why she died, could she have been saved, what was done for her, was everything possible done to prevent the attack?”
  - “My son was in the first carriage but he was found in the second carriage. Why?”
  - “The reasons why the police and security services did not act on intelligence received regarding the possibility of a terrorist attack on London”.
  - “Why was the network not immediately closed after the first explosion...I believe that the actions of both the British Transport police and the TFL staff succinctly failed to protect the life of my son by effectively directing him on to the bus which was bombed in Tavistock Square”

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<sup>10</sup> See also paragraph 44 of *R (on the application of Paul) v Deputy Coroner of the Queen’s Household* [2007] EWHC 408 (Admin), in which the interests of the bereaved are referred to as a factor in exercising the discretion under section 8(4) of the CA 84 regarding the summoning of a jury.

And against resumption:

- “I feel that this has gone on for long enough and I would like my late wife to finally rest in peace and have closure on this terrible ordeal”.
- “I consider that the cause and circumstance of death have already been established”.

***Whether sufficient evidence as to the circumstances of the death has been heard in the preceding criminal proceedings***

35. If an inquest merely duplicates the evidence heard at criminal proceedings, then the test for resumption is unlikely to be satisfied (*R v Home Secretary, ex parte Weatherhead* (1996) 160 JP 627). That is not the case here. The prosecution case against the three men who were the subject of criminal proceedings was not that they had had any direct involvement in the explosions on 7 July 2005. Rather, it was alleged that the three men had assisted Hussain and Lindsay on 16 and 17 December 2004 with reconnaissance in London. Thus, whilst the criminal proceedings inevitably touched upon some relevant background, they were not directly concerned with, and did not hear evidence relating to, the loss of life on 7 July 2005.

***Whether those involved in the incidents have already given evidence in other public forums, and the existence of other reports into the events in question***

36. In *Dallaglio*, Simon Brown LJ referred to the fact that many of those who had been involved in the *Marchioness* disaster (survivors, eye witnesses, rescue services etc) had yet to give “*full evidence*” as a factor that supported resumption<sup>11</sup>. Sir Thomas Bingham MR, on the other hand, referred to the existence of “*other reports*” into the disaster as a factor against resumption<sup>12</sup>.

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<sup>11</sup> At p.155f

<sup>12</sup> At p.164d

37. In this case, as in *Dallaglio*, a number of reports have been prepared by different bodies (an apparently comprehensive list is annexed to the submissions of the Metropolitan Police), but many of those involved on the day have yet to give either any, or at least “full” evidence.
38. The London Assembly heard evidence (in public and in private) from 20 survivors<sup>13</sup> and senior personnel from the emergency services and Transport for London<sup>14</sup>. The Intelligence and Security Committee (“ISC”) considered written and oral evidence (in private) from officials of several organisations including GCHQ and the Security Service, and also from members of the 7/7 Survivors Group represented by Oury Clark<sup>15</sup>. With regard to such evidence, the Court may wish to note the following:
- (i) It would appear that the evidence given has been limited in quantity as compared to the evidence potentially available to this Court. The investigation of the police into the events of 7 July 2005 includes over 12,500 witness statements<sup>16</sup>. Having regard to the potential evidence from survivors alone, the Scene Reports indicate that at Edgware Road there were over 30 survivors in the affected carriage, at Aldgate there were over 35 survivors in the affected carriage, at King’s Cross / Russell Square there were over 100 survivors in the affected carriage and at Tavistock Square there were over 40 survivors who were passengers on the number 30 bus.
  - (ii) The London Assembly and the ISC, due to the focus of the reports (see below), heard or received evidence from senior officials and senior

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<sup>13</sup> London Assembly, Report of the 7 July Review Committee, Volume 3, (June 2006).

<sup>14</sup> London Assembly, Report of the 7 July Review Committee, Volume 2, (June 2006). Evidence was heard from representatives of Transport for London, the Metropolitan Police Service, City of London Police, British Transport Police, London Fire Brigade and London Ambulance Service.

<sup>15</sup> Intelligence and Security Committee, Report into the London Terrorist Attacks on 7 July 2005 (May 2006), page 45 and Review of the Intelligence on the London Terrorist Attacks on 7 July 2005, (May 2009), page 78.

<sup>16</sup> The Report of the Official Account of the Bombings in London on 7<sup>th</sup> July 2005, printed on 11 May 2006, page 26. Further articles on the BBC website suggest that approximately 18,450 statements were taken (<http://news.bbc.co.uk/1/hi/uk/7537552.stm>)

- (iii) Whilst the reports of the London Assembly and the ISC considered important issues, the evidence was not principally directed to the issues that must be considered at any resumed inquest pursuant to section 11(5)(b) of the CA 88 and rule 36 of the CR 84. The London Assembly's Report focused upon the "*communication issues affecting the response of the emergency and others services*" on 7 July 2005<sup>18</sup>. The first report of the Intelligence and Security Committee considered "*whether any intelligence which may have helped prevent the attacks was missed or overlooked*", "*why the threat level to the UK was lowered prior to the attacks and what impact this had*", "*what lessons learned on the back of the attacks and how these are being applied*" and the second report considered whether the explosions could have been prevented<sup>19</sup>.
- (iv) The ISC heard all evidence in private session. No transcripts of the evidence have been published.

***The public interest in the events of 7 July 2005***

39. In *R v South London Coroner ex parte Thompson* (1982) 126 SJ 625, Lord Lane CJ stated:

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<sup>17</sup> See 'Addressing Lessons from the Emergency Response to the 7 July 2005 London Bombings' (22 September 2006) at page 22.

<sup>18</sup> London Assembly, Report of the 7 July Review Committee, Volume 1, June 2006, page 8, paragraph 1.12.

<sup>19</sup> Intelligence and Security Committee, Report into the London Terrorist Attacks on 7 July 2005, (May 2006), page 4 and Review of the Intelligence on the London Terrorist Attacks on 7 July 2005, (May 2009), page 3.

“The function of an inquest is to seek out and record as many of the facts concerning the death as [the] public interest requires.”<sup>20</sup>

In a similar vein, Lord Bingham stated in *Amin*<sup>21</sup>:

“The purpose of such an investigation are clear: to ensure as far as possible that the full facts are brought to light; that culpable and discreditable conduct is exposed and brought to public notice; that suspicion of deliberate wrongdoing (if unjustified) is allayed, that dangerous practices and procedures are rectified; and that those who have lost their relative may at least have the satisfaction of knowing that lessons from his death may save the lives of others”.

The events of 7 July 2005 gave rise to the highest levels of public concern. The written submissions observe that the four bombs have been described as constituting ‘the largest attack on London since World War Two’. Certainly, the events of 7 July 2005 were the first occasion upon which, on the evidence, suicide bombers have operated in the UK. It is submitted that there is a strong public interest in resumption. See further in this regard the Kingsley Napley submissions at paragraphs 21-22, the Lovells submissions at paragraph 139, the Oury Clark submissions at paragraphs 2.10 and 2.11 and the Sonn Macmillan Walker submissions at page 3.

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<sup>20</sup> In her speech in *Hurst*, Baroness Hale observed that this observation reflected the views expressed by the Brodrick Committee in their Report on Death Certification and Coroners (1971) (Cmnd 4810), paragraph 16.40 – see [2007] 2 AC 189 at [21].

<sup>21</sup> *R (Amin) v Secretary of State for the Home Department* [2004] 1 AC 653 at 672

#### **D. JOINDER OF THE INQUESTS**

40. As set out at Section B above, the Coroner has jurisdiction over all 56 deaths that occurred on the London transport system on 7 July 2005.
41. Several of the sets of written submissions that have been received make no observations on the issue of joinder. Amongst the written submissions that do engage substantively with this issue, there appears to be a consensus that it is within the Coroner's powers either to join or not to join (in other words, either to hear consecutively or concurrently) those of the 56 inquests that are resumed. We respectfully agree. Whilst there appears to be no caselaw on this precise issue, it is clear that the Coroner, in addition to exercising a wide discretion under section 16(3), must also have a general discretion as to the procedure to be adopted on resumption.
42. As a matter of history, inquests arising from incidents in which large numbers of people have died have been heard concurrently – examples of this practice include the Zeebrugge ferry disaster (1987), the King's Cross Underground fire (1988), the Marchioness river disaster (1989) and the Clapham Junction rail crash (1990).
43. The important distinction between those cases and the present case is that in this case the Coroner holds jurisdiction over the inquests of the 4 individuals – Khan, Tanweer, Hussain and Lindsay – who are believed to be responsible for the deaths of the other 52. Whilst there are very strong reasons for joining the 52 inquests together, additional considerations are relevant to whether the 52 inquests should be joined to the 4.
44. The submissions that have been served on behalf of the families speak to the undoubted distress that they would suffer were the inquests into the deaths of their loved ones to be heard with those into the deaths of Khan, Tanweer, Hussain and Lindsay<sup>22</sup>. Further, Oury Clark argue that the ability of survivors (whether or not

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<sup>22</sup> See the Kingsley Napley Submissions at page 44, the Lovells Submissions at paragraph 152, the Oury Clark Submissions at paragraphs 3.3-3.6, the Russell Jones & Walker submissions at

they are properly interested persons under rule 20(2)(h)) to give evidence is likely to be adversely affected should they be part of the same inquisitorial process as the four men who caused their injuries. Whilst certain practical arrangements are to be made in an attempt to reduce this distress (by way of separate family rooms etc), such arrangements can only go so far.

45. It is clear that the views of the families are a matter to which the Coroner will wish to have regard in reaching a decision as to what procedure to adopt. The views of the survivors, if they are not designated as properly interested persons, may be of less weight given that, as witnesses, it is possible they may be subject to examination by the legal representatives of Khan, Tanweer, Hussain and Lindsay whether the 52 inquests are joined to the 4 or not.
46. It is important to note also that the families' concerns may not be met simply (for example) by splitting the inquests so that the 52 are heard separately from the 4. That is because it is arguable that the families of Khan, Tanweer, Hussain and Lindsay would be entitled in any event to properly interested person status at the inquests into the 52<sup>23</sup>. If granted such status, they would be entitled to examine witnesses at those inquests.
47. The views of the families of Khan, Tanweer, Hussain and Lindsay are not yet known, although the families of Khan and Hussain are legally represented.

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paragraph 22, and the Sonn Macmillan Walker submissions at page 11 (at 1(b)). Although not all of the families oppose joinder of the 56 inquests: the Russell Jones & Walker submissions at paragraph 22 refer to the "majority" of the families opposing joinder and also see the Sonn Macmillan Walker submissions at page 11, paragraph 1(c).

<sup>23</sup> Although the MPS (in their submissions at paragraph 3(iii) and footnote 3) and WYP (in their submissions at paragraph 8(a)) submit that the 'bombers' could claim an entitlement under Rule 20(2)(d), it is plain that the entitlement under that subsection, arising from the fact that their acts caused the deaths of the deceased, could only have been theoretically claimed by the bombers themselves (who are of course dead), and not their representatives. Accordingly, Rule 20(2)(d) has no application. Instead, it would be open to their families to apply, in their own interests, under Rule 20(2)(h) for the entitlement to examine witnesses in the inquests of the 52 innocent victims.

48. In our submission, the alternative forms of procedure that might be considered (some of which have been suggested in the written submissions that have been received) are as follows:
- (i) Decide now to resume the 52 inquests but not to resume the 4.
  - (ii) Decide now to resume the 52 inquests, but adjourn the decision as to the resumption of the 4 until after the inquests in the 52.
  - (iii) Decide to resume all 56, and hear then together.
  - (iv) Decide to resume all 56 but decline to join the 52 inquests with the 4 inquests.

Those alternative courses are considered further, in turn, below.

***Decide now to resume the 52 inquests but not to resume the 4***

49. This is suggested as a possible course in the Oury Clark<sup>24</sup> submissions at paragraph 3.2:

“They [i.e. the four inquests] may not be resumed as there is uncontroverted and incontrovertible material demonstrating that they died by way of planned suicide.”

50. We respectfully submit that there are difficulties with this approach, for the following reasons.
51. First, the factors set out in Section C above generally militate in favour of resumption of all 56 inquests as it is apparent from the Scene Reports that there are overlapping issues concerning all 56 deaths. In those circumstances, it would be difficult (indeed, it might be thought to be contradictory) to determine that there is sufficient cause to justify resumption in the 52 cases, but no such sufficient cause in the four cases. In our submission, the deaths of the 56 individuals are so closely related that there will either be sufficient cause for the resumption of all, or none, of the inquests.

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<sup>24</sup> Oury Clark also argue that, *if* the inquests into the 4 are to be resumed, they should logically be heard first: paragraph 3.4.

52. Second, the cases of Khan, Tanweer, Hussain and Lindsay raise issues that may not necessarily be addressed at inquests into the 52 deaths – for example, the addressing of the conspiracy theories that are helpfully summarised in the Note attached to the Kingsley Napley submissions. It may be difficult to conclude at this stage (depending on whether submissions are advanced by the families of the 4) that these are issues that are not worthy of consideration, in which case it would be wrong not to resume the inquests into the 4.
53. Finally, it is submitted that, whilst the desire not to cause unnecessary distress to the families *is* an important consideration in taking decisions on joinder, it is not a legitimate factor to take into account in exercise of the discretion to resume.
54. However, it is important at this stage to note that “sufficient cause” is a necessary but not a determinative condition of resumption – in other words, the existence of “sufficient cause” entitles but does not require the Coroner to resume immediately. It is therefore open to the Coroner to conclude that there is sufficient cause to resume the 4, but then to decide that they will not be joined to the 52.

***Decide now to resume the 52 inquests, but adjourn the decision as to the resumption of the 4 until after the inquests in the 52***

55. This is suggested as a possible approach by Kingsley Napley<sup>25</sup>, the Metropolitan Police<sup>26</sup> and by the City of London Police<sup>27</sup>.
56. It is arguable that this would be an appropriate course to take. It is clearly the case that any joint inquest into the 52 deaths would hear a considerable amount of evidence relating to the deaths of Khan, Tanweer, Hussain and Lindsay. It is also true that it would be possible at the conclusion of the inquests into the 52 inquests to consider, in light of those proceedings, whether the test for resumption of the 4 inquests was met.

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<sup>25</sup>

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<sup>26</sup>

Paragraph 3(iii) and footnote 4.

<sup>27</sup>

Paragraph 3.2.

57. We would, however, make two further points in this regard.
58. First, it is arguable that, since the Coroner is in a position to make a ruling at this stage on the resumption of the 4 inquests, she ought to do so. A decision to defer making such a decision would be a decision that might itself be susceptible to challenge.
59. Second, as mentioned above, the families of Khan, Tanweer, Hussain and Lindsay would have an arguable right to interested person status at the inquest into the 52 deaths. Indeed, their arguments in this regard might be enhanced by the uncertainty as to whether the inquests into the deaths of Khan, Tanweer, Hussain and Lindsay would be resumed at all.

***Decide to resume all 56, and hear them together***

60. Absent the wholly understandable concerns of the family members that have been referred to above, this might have been thought, in light of the overlapping issues relating to all 56 deaths, to have been the most obvious procedural course to adopt.
61. There are several factors that still weigh in favour of adopting this course – in particular if the alternative was that two separate inquest hearings were required. These factors relate to the practical disadvantages of holding two inquests, in particular the incurring of considerable extra public expense (on all sides – the Coroner and her team, the institutional parties and the LSC), and also the risk of causing additional distress and/or inconvenience to witnesses who might be required to give evidence twice. These matters are developed in the submissions of the West Yorkshire Police ('WYP') (at paragraph 8(c)) and those of the London Ambulance Service ('LAS') (at paragraph 5).
62. A further factor that might be thought to be of some weight is that this procedure would allow conclusions to be drawn about the deaths of all 56 individuals within

***Decide to resume all 56 but decline to join the 52 inquests with the 4 inquests***

63. The submissions on behalf of Lovells<sup>28</sup>, Russell Jones & Walker<sup>29</sup> and British Transport Police<sup>30</sup> oppose joinder (on the assumption that all inquests are resumed).
64. Adopting a procedure of this nature would meet the concerns of the families (although, again, subject to the point that the families of Khan, Tanweer, Hussain and Lindsay might apply for and be granted interested person status in the inquests into the 52).
65. This course does, however, have the practical disadvantages referred to above.
66. It is worth emphasising in this regard that any separate inquest into the deaths of Khan, Tanweer, Hussain and Lindsay would have to be ‘freestanding’. To the extent that evidence was considered relevant to both the inquest into the 52 and the inquest into the 4, it would need to be called twice. The inquest into the 4 would be likely to last weeks rather than days. It is arguable, even probable, that a jury would be required (on the basis that section 8(3)(d) is engaged) – such a jury would, of course, need to be differently constituted from any jury summoned into the inquests into the 52 deaths.

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<sup>28</sup> Paragraphs 151-153

<sup>29</sup> Paragraph 6(b)

<sup>30</sup> Paragraph 15

67. The Oury Clark submissions, at paragraph 3.4, raise the question of whether, if this course is adopted, the inquest into the deaths of Khan, Tanweer, Hussain and Lindsay should precede, or follow, the inquests into the 52 deaths.

“the determination of the causes of the ‘bombers’ deaths has no moral priority in terms of timing: quite the contrary. However, logically, if their inquests are to be resumed, then it may be right to present the evidence bearing upon their causes of death first: and for the Deputy Coroner or jury to determine that issue first. Any prior determination that the four bombers committed suicide by blowing themselves up in public places would be highly relevant to the most likely primary verdicts in relation to the 52 victims, namely that they were ‘unlawfully killed’.”

It could also be suggested that hearing the inquests into the deaths of Khan, Tanweer, Hussain and Lindsay first might reduce the strength of any application made by their families for properly interested person status in the 52 inquests. On the other hand, other families might not wish to see the inquests into the deaths of their loved ones awaiting the outcome of the other four inquests.

68. It would no doubt be of assistance to the Coroner for further oral submissions to be made on this issue. In particular, she might be assisted by clarification from the legal representatives of Hasina Patel (the wife of Khan) and Mr and Mrs Hussain (the parents of Hussain)<sup>31</sup>, as to (i) the nature and scope of the issues that they are likely to raise at the inquests into the deaths of their own family members and (ii) whether, if the 52 inquests were not to be joined to the 4, they intend, on account of any other wider issues, to apply under rule 20(2) to examine witnesses at the inquests into the 52. The narrower the issues that they intend to raise, the greater the merit of resuming all 56 inquests, but hearing the 4 separately from, and after, the 52.

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<sup>31</sup> Gultasab Khan, (the brother of Khan), is understood not to be attending the hearing.

## **E. SCOPE OF THE INQUESTS**

### **Introductory**

69. The central function of an inquest is to investigate and, if possible, to answer four questions: who the deceased was and “how, when and where he came by his death” – see section 11(5)(b) of the CA 88. The conclusions of the inquest on those four matters are recorded in the document known as the inquisition, all or part of which is also sometimes referred to as the ‘verdict’ of the inquest. Where an inquest is held, the Coroner also has a further relevant function, namely to ascertain and to record the particulars that the Registration Acts require to be registered concerning the death<sup>32</sup> - see section 11(7) of the CA 88.
70. If the present inquests are resumed, the lines of investigation that are pursued (by means of calling evidence) must be directed to the matters referred to above – rule 36 of the CR 84 (albeit that some of the issues have already been determined and there is an issue as to whether or not they would need to be reconsidered – see further paragraphs 76 – 79 below).
71. The written submissions that have been served identify a number of factual inquiries that might be conducted were the inquests to be resumed. These are addressed below. As is the case at most inquests, most of those lines of inquiry relate to the second of the questions referred to above – i.e. that of *how* the deceased came by his death.
72. Two preliminary points may be made.
73. First, the term “*how the deceased came by his death*” bears different meanings depending on whether the inquest is (a) simply playing a part in the discharge of the state’s positive obligation under Article 2 to set up an effective judicial system for determining the cause of death or (b) required in order to discharge a

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<sup>32</sup> These particulars consist of the date and place of death, the name and surname of the deceased, the sex of the deceased, the maiden surname of a woman who has married, the date and place of birth, and the occupation and usual address of the deceased.

freestanding procedural obligation under Article 2. In the latter case, the term is to be read as “*by what means and in what circumstances the deceased came by his death*” - *R (Middleton) v West Somerset Coroner and another* [2004] AC 182. If the inquest is not an ‘enhanced’ inquest (i.e., is not discharging a separate Article 2 investigative function), then the term is to be interpreted in the narrower sense of “*by what means the deceased came by his death*” – *Jamieson*<sup>33</sup>.

74. Second, the term “*how the deceased came by his death*” (whichever meaning it carries) identifies only the issue that is to be inquired into and answered by means of the inquisition. The scope of the factual investigations that are necessary and appropriate in order to conduct that inquiry and, if possible, to reach a verdict, is a separate matter for the Coroner to determine. In *Dallaglio*, Simon Brown LJ stated (at 155b):

“The inquiry is almost bound to stretch wider than strictly required for the purposes of a verdict. How much wider is pre-eminently a matter for the coroner whose rulings upon the question will only exceptionally be susceptible to judicial review.”<sup>34</sup>

In *Jamieson* the Court of Appeal had observed (at [14]) that:

“It is the duty of the coroner ... to ensure that the relevant facts are fully, fairly and fearlessly investigated ... He must ensure that the relevant facts are exposed to public scrutiny ... He fails in his duty if his investigation is superficial, slipshod or perfunctory. But the responsibility is his. He must set the bounds of the inquiry.”

75. Finally, it is to be noted that, where an inquest takes place, the Coroner has a power under rule 43 of the CR 84 to make a report to a relevant person or authority if he believes that action should be taken to prevent the recurrence of fatalities similar to that in respect of which the inquest is being held. The terms of rule 36 prevent any factual inquiries being conducted at an inquest for the purposes of making a rule 43 report that are not directed towards the core issues referred to above. However, in a recent ruling<sup>35</sup> the Court of Appeal has stressed the value and significance of the rule 43 procedure, and has also approved the

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<sup>33</sup> *R v HM Coroner for North Humberside and Scunthorpe, ex parte Jamieson* [1995] QB 1

<sup>34</sup> Baroness Hale made observations to a similar effect at paragraph 21 of her speech in *Hurst*.

<sup>35</sup> *R (Lewis) v Shropshire Coroner* [2009] EWCA Civ 1403

practice of seeking the findings of the jury on facts that may be relevant to a rule 43 report, albeit that such facts do not amount to direct or indirect causes of the deceased's death<sup>36</sup>.

### **The factual issues that may be investigated**

#### ***Reconsideration of issues previously determined***

76. It is convenient to deal first with a discrete point that arises, namely whether or not it would be necessary at any resumed inquests to hear evidence relating to, and to make findings upon, issues that were determined by Dr Reid before these inquests were adjourned.
77. Prior to the adjournments, Dr. Reid had made findings in respect of all 56 deceased on the issues of name, cause of death and the registration particulars<sup>37</sup>. Dr. Reid made these findings having taken evidence on oath from his Coroner's officers, and did so in the absence of a jury.
78. The provisions of section 16(6) of the CA 84 are germane. That section provides as follows:
- Where a coroner resumes an inquest which has been adjourned in compliance with subsection (1) above and for that purpose summons a jury (but not where he resumes without a jury, or with the same jury as before the adjournment) –
- a. he shall proceed in all respects as if the inquest has not previously been begun; and
  - b. subject to subsection (7) below, the provisions of the Act shall apply as if the resumed inquest were a fresh inquest.
79. It follows that, in the event that the Coroner decides to resume any of the inquests and decides to hear the resumed inquests with a jury, the inquests must proceed in all respects as fresh inquests. In such circumstances, it will be necessary to hear fresh evidence, and to make fresh findings, on the issues that have already been

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<sup>36</sup> Ibid, paragraph 27

<sup>37</sup> In respect of the Edgware Road scene, the deaths were registered in Westminster, for the Aldgate scene the deaths were registered in the City of London, for Tavistock Square and the King's Cross scene all deaths save for two were registered at Camden (those two individuals died at the Royal London Hospital and their deaths were registered at Tower Hamlets).

determined (i.e., name, cause of death and registration particulars). However, if and to the extent that any or all of the present inquests are resumed and heard without a jury, it will not be necessary for these issues to be re-examined.

***Other factual issues***

80. The written submissions that have been filed by the parties raise a large number of discrete factual inquiries that it is suggested might be undertaken at these inquests were resumption to be ordered. The parties will no doubt wish to address the Coroner themselves with regard to the desirability of investigating these issues. In our submission, and drawing from the submissions of the other parties, the issues that may potentially be investigated at any resumed inquests are as follows.

- (i) Issues relating to the immediate circumstances of the four explosions and the individual deaths. Evidence relating to these issues is contained in the Scene Reports. Were the inquests to be resumed, it is likely that the Coroner will wish to call evidence from many of the witnesses whose evidence is referred to in those reports. It is likely that further evidence may be required – for example on forensic issues relating to the explosives.
- (ii) Issues relating to the preventability of the explosions on 7 July 2005. The factual inquiries regarding alleged intelligence failings that might be conducted under this head are considered in detail in the submissions filed by both Oury Clark (section 5) and Kingsley Napley (Chapter 3). Note the distinction drawn in the latter submissions between allegations of operational and systemic failure; whilst this may in some instances be a helpful conceptual distinction, the House of Lords has warned that it may also be elusive<sup>38</sup>. See also paragraph 121 of the Lovells submissions, to

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<sup>38</sup> See the opinion of the Appellate Committee in *Middleton*, paragraph 47 – “*There is force in the criticism made by all parties of the distinction drawn between individual and systemic neglect, since the borderline between the two is indistinct and there will often be some overlap between the two: there are some kinds of individual failing which a sound system may be expected to detect*”

the effect that, “[t]he scope of the inquest should include the threat level in place at the time and whether London was under-protected due to the G8 meeting in Scotland due to be held on 7<sup>th</sup> July 2005.”

- (iii) Issues relating to the emergency response. Issues arising under this head include the adequacy of lighting and provision of first aid equipment on the Underground, speed of closure of the bus network, communications between emergency services (both above and below ground), speed of attendance at individual scenes, provision of medical treatment, equipment and resources available and deployed. See in this regard the submissions of Oury Clark<sup>39</sup>, Lovells<sup>40</sup>, Russell Jones & Walker<sup>41</sup>, the City of London Police<sup>42</sup> and the LAS<sup>43</sup>. Ultimately, it will be necessary to address the question of whether any alleged failings under this head were direct causes of any of the deaths. For present purposes, these issues are clearly engaged by the fact that several of the deceased survived the explosions. The Scene Reports indicate that one or more of the deceased at each scene survived for at least a period after the explosions<sup>44</sup>. The Lovells submissions specifically refer in this regard (see paragraph 122) to Mrs Mozakka, who died at King’s Cross / Russell Square.
- (iv) Other ‘aftermath’ issues. Other issues have been raised that relate to events after the explosions, but not to the emergency first response. Such issues include alleged failings regarding the resilience mortuary, the conduct of the post-mortem examinations, alleged delays in identification

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*and remedy before harm is done. There will, moreover, be individual failings which need to be identified even though an individual is not to be named.”*

<sup>39</sup> Paragraphs 5.184-5.185

<sup>40</sup> Paragraph 122

<sup>41</sup> Paragraphs 6(c) and 15

<sup>42</sup> Paragraph 4.3

<sup>43</sup> Paragraphs 12-16

<sup>44</sup> Edgware Road: Michael Brewster and Laura Webb, Aldgate: Richard Ellery, Fiona Stevenson and Carrie Taylor, King’s Cross / Russell Square: Samantha Badham, Philip Beer, Lee Harris, Susan Levy, Shelley Mather, Behnaz Mozakka and Christian Small, Tavistock Square: Marie Hartley, Miriam Hyman, Neetu Jain, Sam Son Ly and Gladys Wundowa.

of the deceased, alleged failings in communication with the families and alleged failings to return property to the bereaved families<sup>45</sup>.

81. In considering whether the matters that have been raised are appropriate for investigation at resumed inquests, the starting point is that, as stated by Simon Brown LJ in the passage from his judgment in *Dallaglio* set out above, the question of which issues to investigate at an inquest – or, put differently, what the scope of the inquiries at the inquest should be – is a matter within the discretion of the Coroner. The contention of the parties is that the Coroner should exercise her discretion in favour of undertaking the particular factual investigations that they have identified at any resumed inquests. Indeed, the parties go further and argue that the desirability of making those factual investigations is in itself a factor that militates in favour of resuming the inquests.
82. The basis upon which the factual issues in (i), (iii) and (iv) above are advanced is that those issues relate (or potentially relate) to the question of ‘by what means’ the deceased came by their deaths, and therefore should be investigated in the exercise of the Coroner’s discretion on a conventional *Jamieson* approach<sup>46</sup>.
83. The only further submission we make at this stage on those issues is that the Coroner will wish to consider the extent to which events occurring after the deaths can properly be investigated at the inquests. While some such issues (for example, alleged failings at the mortuary) might be thought to be sufficiently proximate to the deaths themselves to form the subject of proper inquiry, others (for example, communication with the families) might be thought to be too remote.

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<sup>45</sup> See the Lovells submissions at paragraphs 123-124 and the Sonn Macmillan Walker submissions at page 6, paragraph 1(e). Many of these matters were also raised in the responses to Dr Reid’s questionnaires.

<sup>46</sup> None of the parties appear to suggest that these are such as to trigger an independent Article 2 investigative duty, and, therefore, an enhanced *Middleton* inquest. We respectfully submit that this is not an issue that needs to be determined. It is clear that an adequate inquiry into these matters can be conducted under the *Jamieson* approach.

84. By contrast to the first, third and fourth issues, the submission that the second issue – that is, the ‘preventability’ issue - should be investigated is advanced by the families on a different (or at least an additional) legal basis, namely that it should be investigated at resumed inquests in discharge of an investigative obligation owed by the State pursuant to Article 2 ECHR. In other words, the submission of the families is that this issue should form the subject of a *Middleton*-type inquiry. This submission raises legal issues of some complexity, which are introduced below.

### **The existence / discharge of article 2 investigative obligations**

#### *The substantive obligation to protect life*

85. Article 2(1) ECHR provides:
- “Everyone’s right to life shall be protected by law. No one shall be deprived of his life intentionally save in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law.”
86. In the development of its case-law, the Strasbourg Court has recognised a number of discrete factual situations that raise issues as to a State’s duties under Article 2. The most obvious such cases are those involving the use of lethal force by state agents, or by third parties with the collusion of state agents<sup>47</sup>.
87. However, the Court has also ruled that, in certain factual situations, Article 2 may impose an obligation on the authorities of a State to protect life. Cases in this second category include cases in which the authorities have assumed responsibility for an individual’s welfare (e.g. custody cases – *Edwards v United Kingdom*<sup>48</sup>) and also cases in which the authorities knew or ought to have known that an individual’s life was at risk, but failed to take sufficient steps to meet that risk.

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<sup>47</sup> *McCann v United Kingdom* (1995) 21 EHRR 97; *Shanaghan v United Kingdom* (app. no. 37715/97) 4 May 2001; *Jordan v United Kingdom* (2003) 37 EHRR 2

<sup>48</sup> (2002) 34 EHRR 287

88. We submit that it is this final category that is most closely analogous to the facts of the present cases (and that appears to be common ground amongst the parties).
89. The case in which the Strasbourg Court first described the duty to protect life in these circumstances was that of *Osman v United Kingdom* (1998) 29 EHRR 245. The facts of that case may be of some significance. The claim arose from an incident in which Ali Osman and his son Ahmet Osman were attacked and shot at by a former teacher of Ahmet Osman named Paul Paget-Lewis. Ali Osman was killed in the attack and Ahmet Osman was wounded. The applicants, Ahmet Osman and his mother, alleged that in the weeks and months prior to the attack the authorities had failed to appreciate and act upon what they claimed was a series of clear warning signs that Mr Paget-Lewis represented a serious threat to the physical safety of their family.
90. The Court's ruling as to the extent and content of the State's duty is to be found at paragraphs 115 and 116 of the Court's judgment. The Court's ruling on this issue is of some importance to the present cases, and is set out in full below.

115. The Court notes that the first sentence of Article 2 § 1 enjoins the State not only to refrain from the intentional and unlawful taking of life, but also to take appropriate steps to safeguard the lives of those within its jurisdiction (see the *L.C.B. v. the United Kingdom* judgment of 9 June 1998, *Reports of Judgments and Decisions* 1998-III, p. 1403, § 36). It is common ground that the State's obligation in this respect extends beyond its primary duty to secure the right to life by putting in place effective criminal-law provisions to deter the commission of offences against the person backed up by law-enforcement machinery for the prevention, suppression and sanctioning of breaches of such provisions. It is thus accepted by those appearing before the Court that Article 2 of the Convention may also imply in certain well-defined circumstances a positive obligation on the authorities to take preventive operational measures to protect an individual whose life is at risk from the criminal acts of another individual. The scope of this obligation is a matter of dispute between the parties.

116. For the Court, and bearing in mind the difficulties involved in policing modern societies, the unpredictability of human conduct and the operational choices which must be made in terms of priorities and resources, such an obligation must be interpreted in a way which does not impose an impossible or disproportionate burden on the authorities. Accordingly, not every claimed risk to life can entail for the authorities a Convention requirement to take operational measures to prevent that risk from materialising. Another relevant consideration is the need to ensure that the police exercise their powers to control and prevent crime in a manner which fully

respects the due process and other guarantees which legitimately place restraints on the scope of their action to investigate crime and bring offenders to justice, including the guarantees contained in Articles 5 and 8 of the Convention.

In the opinion of the Court where there is an allegation that the authorities have violated their positive obligation to protect the right to life in the context of their above-mentioned duty to prevent and suppress offences against the person (see paragraph 115 above), it must be established to its satisfaction that the authorities knew or ought to have known at the time of the existence of a real and immediate risk to the life of an identified individual or individuals from the criminal acts of a third party and that they failed to take measures within the scope of their powers which, judged reasonably, might have been expected to avoid that risk. The Court does not accept the Government's view that the failure to perceive the risk to life in the circumstances known at the time or to take preventive measures to avoid that risk must be tantamount to gross negligence or wilful disregard of the duty to protect life (see paragraph 107 above). Such a rigid standard must be considered to be incompatible with the requirements of Article 1 of the Convention and the obligations of Contracting States under that Article to secure the practical and effective protection of the rights and freedoms laid down therein, including Article 2 (see, *mutatis mutandis*, the above-mentioned McCann and Others judgment, p. 45, § 146). For the Court, and having regard to the nature of the right protected by Article 2, a right fundamental in the scheme of the Convention, it is sufficient for an applicant to show that the authorities did not do all that could be reasonably expected of them to avoid a real and immediate risk to life of which they have or ought to have knowledge. This is a question which can only be answered in the light of all the circumstances of any particular case.

On the above understanding the Court will examine the particular circumstances of this case.

91. The Court went on to assess the facts of the case in some detail. Its ultimate conclusion was that those facts did not disclose a breach of the State's substantive duty under Article 2. It expressed this conclusion in the following terms (at paragraphs 121-2):

121. In the view of the Court the applicants have failed to point to any decisive stage in the sequence of the events leading up to the tragic shooting when it could be said that the police **knew or ought to have known that the lives of the Osman family were at real and immediate risk from Paget-Lewis. While the applicants have pointed to a series of missed opportunities which would have enabled the police to neutralise the threat posed by Paget-Lewis, for example by searching his home for evidence to link him with the graffiti incident or by having him detained under the Mental Health Act 1983 or by taking more active investigative steps following his disappearance, it cannot be said that these measures, judged reasonably, would in fact have produced that result or that a domestic court would have convicted him or ordered his detention in a psychiatric hospital on the basis of the evidence adduced before it.** As noted earlier (see paragraph 116 above), the police must discharge their duties in a manner which is compatible with the rights and freedoms of individuals. In the circumstances of the present case, they cannot be criticised for attaching weight to the presumption of innocence or failing to use powers of arrest, search and seizure

having regard to their reasonably held view that they lacked at relevant times the required standard of suspicion to use those powers or that any action taken would in fact have produced concrete results.

122. For the above reasons, the Court concludes that there has been no violation of Article 2 of the Convention in this case.

92. *Van Colle and another v Chief Constable of Hertfordshire* [2009] 1 AC 225 was a recent domestic case in which the same broad issue arose. In that case, as in *Osman*, it was (ultimately) held that a breach of the substantive duty to protect life had not been made out.

93. In summary, it may be seen that the test for a breach of this substantive obligation is a demanding one (although see in this regard the points made at paragraph 11 of page 16 of the Kingsley Napley submissions). In particular, the test will not be satisfied simply by the identification of ‘missed opportunities’ (to employ a term used both by the ECtHR in *Osman* and by the ISC), the taking of which might have led to the threat being neutralized.

***The ‘procedural’ or ‘investigative’ obligation under Article 2***

94. In addition to the substantive duties arising under Article 2 that are discussed above, the Strasbourg Court has also recognised the existence of an implied procedural obligation – sometimes described as an ‘investigative’ obligation - that arises under Article 2 in certain circumstances.

95. The existence of this duty was first referred to in the case of *McCann v United Kingdom* (1995) 21 EHRR 97. At paragraph 161 of the Court’s judgment, the duty was described in the following terms:

“The obligation to protect the right to life under [article 2(1)], read in conjunction with the State’s general duty under article 1 of the Convention to ‘secure to everyone within their jurisdiction the rights and freedoms defined in [the] Convention’, requires by implication that there should be some form of effective official investigation when individuals have been killed as a result of the use of force by, inter alios, agents of the State.”

96. As is apparent from the above extract, *McCann* was a case of deliberate killing by state agents. However, the Strasbourg Court has subsequently applied the same principle to cases of deaths in custody. The Court has also (notably in the case of *Jordan v UK* (2001) 37 EHRR 52) developed a series of criteria that an investigation discharging this procedural duty is required to meet. Both these developments were referred to by Lord Bingham at paragraph 20 of his judgment in *R(Amin) v Home Secretary* [2004] 1 AC 653 (a death in custody case):

"(3) As it was put in *Salman v Turkey* 34 EHRR 425, para 99, 'Persons in custody are in a vulnerable position and the authorities are under a duty to protect them. Consequently, where an individual is taken into police custody in good health and is found to be injured on release, it is incumbent on the state to provide a plausible explanation of how those injuries were caused [footnote omitted]. The obligation on the authorities to account for the treatment of an individual in custody is particularly stringent where that individual dies.' Where the facts are largely or wholly within the knowledge of the state authorities there is an onus on the state to provide a satisfactory and convincing explanation of how the death or injury occurred: *Salman*, para 100; *Jordan* 37 EHRR 52, para 103.

"(4) The obligation to ensure that there is some form of effective official investigation when individuals have been killed as a result of the use of force is not confined to cases where it is apparent that the killing was caused by an agent of the state: *Salman*, para 105.

"(5) The essential purpose of the investigation was defined by the court in *Jordan* , para 105: 'to secure the effective implementation of the domestic laws which protect the right to life and, in those cases involving state agents or bodies, to ensure their accountability for deaths occurring under their responsibility. What form of investigation will achieve those purposes may vary in different circumstances. However, whatever mode is employed, the authorities must act of their own motion, once the matter has come to their attention. They cannot leave it to the initiative of the next of kin either to lodge a formal complaint or to take responsibility for the conduct of any investigative procedures ...'

"(6) The investigation must be effective in the sense that (*Jordan*, para 107) 'it is capable of leading to a determination of whether the force used in such cases was or was not justified in the circumstances ... and to the identification and punishment of those responsible ... This is not an obligation of result, but of means.

"(7) For an investigation into alleged unlawful killing by state agents to be effective, it may generally be regarded as necessary (*Jordan*, para 106) 'for the persons responsible for and carrying out the investigation to be independent from those implicated in the events ... This means not only a lack of hierarchical or institutional connection but also a practical independence.'

"(8) While public scrutiny of police investigations cannot be regarded as an automatic requirement under article 2 (*Jordan*, para 121), there must (*Jordan*, para 109) 'be a sufficient element of public scrutiny of the investigation or its results to secure accountability in practice as well as in theory. The degree of public scrutiny required may well vary from case to case.'

"(9) 'In all cases', as the court stipulated in *Jordan*, para 109: 'the next of kin of the victim must be involved in the procedure to the extent necessary to safeguard his or her legitimate interests.'

"(10) The court has not required that any particular procedure be adopted to examine the circumstances of a killing by state agents, nor is it necessary that there be a single unified procedure: *Jordan*, para 143. But it is 'indispensable' (*Jordan*, para 144) that there be proper procedures for ensuring the accountability of agents of the state so as to maintain public confidence and allay the legitimate concerns that arise from the use of lethal force."

97. It is noteworthy for present purposes that, in *Amin*, the House of Lords rejected the analysis of the Court of Appeal to the effect that in cases, such as that of *Amin*, where the State's potential responsibility for the death arose from systemic failures, the procedural duty under Article 2 could be discharged by an investigation that fell short of the *Jordan* requirements. Rather, the House of Lords held (to quote Lord Bingham at paragraph 32 of his judgment) that whilst, "*there must ... be a measure of flexibility in selecting the means of conducting the investigation*", "*the [Strasbourg] Court, particularly in [Jordan] and Edwards v United Kingdom 35 EHRR 487, has laid down minimum standards which must be met, whatever form the investigation takes.*"
98. As mentioned at paragraph 30 above, in *Middleton*, the Appellate Committee stated (at paragraph 47 of its opinion) that:
- "In the absence of full criminal proceedings, and unless otherwise notified, a coroner should assume that his inquest is the means by which the state will discharge its procedural investigative obligation under article 2."
99. It is respectfully submitted that the criminal proceedings that have taken place in these cases do not amount to "full criminal proceedings" of the type that would themselves discharge any Article 2 investigative duty. Nor has any other notification been given.

100. In those circumstances, it will be necessary for the Coroner to determine both whether an Article 2 investigative duty arises on the facts of these cases and (if so) whether the duty has been discharged.
101. The parties have provided full written submissions on these issues. The principal rival submissions on this issue are those of the Security Service on the one hand (which are to the effect that no investigative duty arises, or, that if it does, it has been discharged by the ISC reports) and, on the other hand, the families (who submit that an Article 2 investigative duty does arise, and that it has not been discharged by the ISC reports).
102. Our further submissions below address the following questions:
- (i) What approach should be adopted to determining whether an investigative duty under Article 2 arises on the facts of these cases?
  - (ii) Is the ‘arguable breach’ test met?
  - (iii) If an insofar as an investigative duty arises, has it already been discharged by other processes?
  - (iv) If an insofar as an investigative duty arises, and has not been discharged, what factual issues are necessary to discharge the duty?

***What approach should be adopted to determining whether an investigative duty under Article 2 arises on the facts of these cases?***

103. The case-law discloses two arguable approaches to determining this issue. They are:
- (i) an Article 2 investigative duty arises if it is established that there has been an ‘arguable’ breach of the substantive duty; and
  - (ii) an investigative duty arises automatically; it is not necessary that even an arguable breach of the substantive duty is established.

104. There is ample authority to be found in support of the first approach (and it appears to be common ground amongst the parties that an investigative duty arises at least when an arguable breach of the substantive duty is established). The starting point is the opinion of the Appellate Committee in *Middleton*. At paragraph 3, Lord Bingham described the procedural obligation as arising:

“in circumstances in which it appears that one or other of the foregoing substantive obligations has been, **or may have been**, violated and it appears that agents of the state are, **or may be, in some way** implicated.” [emphasis added]

It is also notable in this regard that, at paragraph 6 of the same opinion, Lord Bingham phrased the first question arising for determination as:

“What, if anything, does the Convention require (by way of verdict, judgment, findings or recommendations) of a properly conducted official investigation into a death involving, **or possibly involving**, a violation of article 2?” [emphasis added]

Later still in the same opinion, at paragraph 16, Lord Bingham appears to refer to the investigative duty being triggered by a “*plausible allegation*” of a breach of the substantive obligation.

105. In *Amin* (which was decided four months before *Middleton*), the House of Lords had implicitly approved the formulation of Jackson J in *R (Wright) v SSHD* [2001] UKHRR 1399, to the following effect

“Where the victim has died **and it is arguable that there has been a breach of article 2**, the investigation should have the general features identified by the court in *Jordan v United Kingdom*, at paras 106-109” [emphasis added]<sup>49</sup>

106. Similar forms of words have been used in subsequent cases. Thus:

(i) In *Takoushis*<sup>50</sup>, the Court of Appeal stated (at [38]):

“... we are satisfied that article 2 is engaged in the sense that it gives rise to certain obligations on the part of the state whenever a person dies in circumstances which give **reasonable grounds for thinking** that the death may have resulted from a wrongful act of one of its agents.” [emphasis added]

<sup>49</sup> The decision of Jackson J was cited and described as “*succinct and accurate*” by Lord Bingham at [25]. Lord Steyn expressly approved the judgment of Jackson J at [50]. Lord Slynn agreed with Lord Bingham and Lord Hope and Lord Hutton agreed with both Lord Bingham and Lord Steyn.

<sup>50</sup> *R (Takoushis) v Inner North London Coroner* [2006] 1 WLR 461, CA

(ii) In *Lin*<sup>51</sup>, Moses LJ stated (at [25]-[26]):

“25. ... The problem will be resolved if the test propounded by Lord Bingham in *Middleton* is applied, namely (1) **may there have been** a violation of the state’s ... substantive obligation not to take life without justification? Or (2) **may there have been** a violation of the state’s substantive obligation to establish a framework of laws, precautions, procedures or means of enforcement designed to the greatest extent practicable to protect life?”

“26. If the answer to either question is yes, and state agents may be implicated, then the inquest must satisfy the full requirements of a state-instituted investigation as explained by Lord Bingham between paragraphs 35 to 38 of *Middleton*.” [emphasis added]

(iii) In *Moss*<sup>52</sup>, Underhill J stated (at [31]):

“In the absence of authoritative guidance, I return to the underlying principle. A *Middleton*-type investigation is required when there is **a potential case** of a breach by the state of its positive obligation to protect life.” [emphasis added]

(iv) In *R(Gentle) v Prime Minister*<sup>53</sup> (at paragraph 6) per Lord Bingham:

“6 It is the procedural obligation under article 2 that the claimants seek to invoke in this case. But it is clear (see the *Middleton case* [2004] 2 AC 182 , para 3, *Jordan v United Kingdom* (2001) 37 EHRR 52 , para 105; *Edwards v United Kingdom* (2002) 35 EHRR 487 , para 69; *In re McKerr* [2004] 1 WLR 807 , paras 18–22) that the procedural obligation under article 2 is parasitic upon the existence of the substantive right, and cannot exist independently. Thus to make good their procedural right to the inquiry they seek the claimants must show, as they accept, **at least an arguable case** that the substantive right arises on the facts of these cases. Unless they can do that, their claim must fail”

107. The Coroner may conclude that the various forms of words that have been used all describe a single, albeit broadly-stated, threshold-test. The test does require that an evidential burden be discharged in establishing a possible / arguable / potential breach of the state’s substantive obligation, but, as observed by Collins J in *Smith*<sup>54</sup>, “[t]he threshold is low”. Moreover, the test is one that is capable of

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<sup>51</sup> *R (Lin and others) v Secretary of State for Transport* [2006] EWHC 2575 (Admin)

<sup>52</sup> *Alison Moss v Coroner for North and South Districts of Durham and Darlington* [2008] EWHC 2940 (Admin)

<sup>53</sup> [2008] 1 AC 1356; [2008] UKHL 20

<sup>54</sup> *R (Smith) v Assistant Deputy Coroner for Oxfordshire and anr* [2008] EWHC 694 (Admin), at [26]

flexible application in different factual circumstances. As Langstaff J stated in *JL*<sup>55</sup> (at [40(iv)]):

“In many of the Strasbourg authorities (see, for instance, *Taylor, Crampton, Gibson and King v United Kingdom*: application 23412/94) it is said that the procedural element contained in Article 2 of the Convention imposes the minimum requirements it does "...where a State or its agents potentially bear responsibility for loss of life...". This phrase permits of a flexible application depending on the circumstances of a case, to be judged with common sense and common humanity. It both avoids the dangers of a over prescriptive threshold and permits distinctions between those cases where the "the potential responsibility" arises because of failings by the police service to protect potential victims (e.g. *Osman, Van Colle*) and those where it arises out of that direct and effective control of the behaviour of individuals which the State is expected to have (e.g. over those who by exercise of the State's coercive powers are subject to imprisonment). It requires an investigation (of some kind, satisfying Article 2) unless the particular circumstances are such that it is plain that the State can bear no responsibility.”

108. The alternative approach to the threshold issue, as identified above, is that an investigatory obligation arises automatically, without the need to identify any potential breach of the substantive obligation. This argument is pursued by Oury Clark (at paragraphs 5.20 to 5.23) and by Lovells (at paragraphs 115 to 116)
109. As those submissions recognise, the ruling of the House of Lords in *R (L (A Patient)) v Secretary of State for Justice* [2009] 1 AC 588<sup>56</sup> extended the ‘arguable breach’ threshold principle to hold that, on the facts of that case, no such arguable breach had to be shown in order for the investigative duty to arise. *L/JL* was, however, a prison case, arising from an unsuccessful suicide attempt. The essence of the ruling of the House of Lords on this point is to be found at paragraphs 58 and 59 of the speech of Lord Rodger:

58 Precisely because the obligation on the prison authorities to protect a prisoner from himself is not absolute and depends on the particular circumstances, a suicide can occur without there having been any violation of the prison authorities' obligations under article 2 to protect the prisoner. Focusing on that point, Mr Giffin argued on behalf of the Secretary of State that article 2 did not require an independent investigation to be held unless there was some positive reason to believe that the authorities had indeed been in breach of their obligation to protect the prisoner.

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<sup>55</sup> *R (JL) v SSHD* [2006] EWHC 2558 (Admin)

<sup>56</sup> In fact, the same case as that of *JL*, Langstaff J’s judgment in which has already been mentioned.

59 That argument is mistaken. Whenever a prisoner kills himself, it is at least *possible* that the prison authorities, who are responsible for the prisoner, have failed, either in their obligation to take general measures to diminish the opportunities for prisoners to harm themselves, or in their operational obligation to try to prevent the particular prisoner from committing suicide. Given the closed nature of the prison world, without an independent investigation you might never know. So there must be an investigation of that kind to find out whether something did indeed go wrong. In this respect a suicide is like any other violent death in custody. In affirming the need for an effective form of investigation in a case involving the suicide of a man in police custody, the European court held that such an investigation should be held "when a resort to force has resulted in a person's death": *Akdogdu v Turkey* , para 52.

It would appear from the passage of Lord Rodger's speech set out above (and contrary to the penultimate sentence of paragraph 5.20 of the Oury Clark submissions) that the decision made by the House of Lords rested squarely on the very particular nature of the relationship between the State and prisoners, and in particular the vulnerable position of prisoners. See also in this regard Lord Phillips at [38]-[39], Lord Mance at [113] and, in particular, Lord Brown at [97]-[98]:

97 My Lords, the problem of suicides in custody is all too well known. Although fewer such deaths occurred in 2005 and 2006 than in the previous three years, in 2007 numbers were tragically back to where they had been, almost two a week. The number of near-suicides in custody (genuine suicide attempts resulting in lasting serious injury) is greater still. As Lord Bingham of Cornhill pointed out in *R (Middleton) v West Somerset Coroner* [2004] 2 AC 182, 192, para 5: "many of those in prison are vulnerable, inadequate or mentally disturbed; many have drug problems; and imprisonment is inevitably, for some, a very traumatic experience."

98 Unsurprisingly, therefore, the law imposes upon detaining authorities special duties with regard to safeguarding those (whether of sound or unsound mind) in their custody: a common law duty to take reasonable care for their safety ( *Reeves v Comr of Police of the Metropolis* [2000] 1 AC 360 where, at p 369, Lord Hoffmann describes the duty as "a very unusual one, arising from the complete control which the police or prison authorities have over the prisoner, combined with the special danger of people in prison taking their own lives"), and a duty under article 2 of the European Convention on Human Rights "to protect them [and] to account for any injuries suffered in custody, which obligation is particularly stringent when the individual dies" ( *Keenan v United Kingdom* (2001) 33 EHRR 913, para 90 where the court emphasised, as it had in earlier cases, "that persons in custody are in a vulnerable position").

110. The Coroner may therefore conclude, contrary to the Oury Clark submissions that *L/JL* is not authority for the proposition that the Article 2 procedural obligation will generally be triggered in the absence of an arguable breach of the substantive

obligation. What is instead required is the establishment of a ‘special duty’ arising in circumstances in which the deceased was in the special care of the State.

111. There is a respectable argument that such a relationship does not exist on the facts of the present case. Although the victims were, physically, in a vulnerable position and faced difficulties in trying to protect themselves against terrorist threats by virtue of their limited resources (see Lovells submissions at paragraph 115), it is difficult to conclude that they were either under the ‘complete control’ of the State or in an especially dangerous position. For their part, Oury Clark have not sought to advance written reasons why this case is to be equated with, for example, custodial cases. It is also not clear that the other authorities, to which Oury Clark refer in this section of their submissions, assist the argument.

(i) *Menson* was not a case that concerned the duty that is in question here – that is, the investigative duty on a state to hold its own inquiry in circumstances where its substantive obligations under Article 2 may have been breached. Michael Menson was killed by thugs during a racist assault. There was never any question of state responsibility for his death. As Lord Phillips observed in *L*:

“It seems to me that the obligation to have an investigation in circumstances such as these is not so much a secondary procedural obligation but rather part of the positive obligation, also noted by the [Strasbourg] court to have in place

‘effective criminal law provisions to deter the commission of offences against the person, backed up by law enforcement machinery for the prevention, suppression and punishment of breaches of such provisions’.”

See also, for comments to a similar effect, paragraph 23 of Lord Bingham’s speech in *Amin*.

(ii) The passages in *Goodson* and *Takoushis* are problematic since they relate to the extent of Article 2 duties owed in circumstances where death is caused by negligence in state hospitals. The analysis that the courts have undertaken in those cases is different from that in cases such as the

- (iii) the recent decision of Hickinbottom J in *R (Humberstone) v LSC* [2010] EWHC 760 (Admin) establishes no new principles:

“51. Given that wide span of function for an investigation, it is unsurprising - and clear - that the state may have a duty to hold an investigation into a death - or, rather, support a mechanism for investigation into a death - even where there is no reason to believe that state agents have failed to perform the primary duty imposed by Article 2. That runs as a constant theme through the authorities, but the following are particularly clear and helpful expressions: Goodson at [59] per Richards J, Takoushis at [94] and following per Sir Anthony Clarke MR, and L at [21]-[31] especially at [29] per Lord Phillips. The state may be sufficiently implicated in a death to trigger the obligation of investigation even without any likelihood or even possibility of the state having breached its primary duty under Article 2 to preserve life.

52. The obligation on the state to investigate a death may arise in circumstances in which the deceased was not in the particular care of the state: for example, Vo v France suggests that the duty arises whenever a death occurs to a patient under medical supervision, whether that be public or private. Indeed, the trend in these cases is towards recognising that the state has an obligation to ensure that an effective investigation is conducted into *any* death in which there may be doubt as to the circumstances of death (see, e.g., Takoushis).

53. However, it is unnecessary to go as far in this case, because the authorities are clear that the obligation - the secondary duty on the state under Article 2 - particularly arises when the deceased was in the special care of the state, for example when the deceased dies in custody or in a state hospital. Such an investigation will frequently then be required to ascertain whether there was, in fact, a violation of the primary duty (L at [61] per Lord Rodger). In those cases, the state is sufficiently implicated in the death because the deceased was in the care of a state agent at the time of death, and

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death.

76. However, as I have explained, a duty to investigate may arise under Article 2 even where there is no possibility that any state agent breached the primary duty under that Article (see paragraph 51 above). The decision letter is based upon the premise that a duty to investigate can only arise when there is at least the possibility that some agent of the state has breached the primary duty to protect life under Article 2. For the reasons I have given above, that is a false premise.

77. I have no doubt that, in the circumstances of this case, a duty to investigate did arise under Article 2. It is quite clear from Goodson (at [59]) and Takoushis (at [94]-[105]) that, where a patient dies in an NHS hospital, the obligation to investigate the death arises. Leaving aside the possibility that it might arise from other features, it arises from the fact that the patient was in the particular care of the state at the time of death, and because of the possibility of agents of the state (including individual healthcare professionals) being responsible for the death. That is a sufficient basis to found the duty.

78. However, in this case, that is reinforced by the fact that Miss Humberstone faces suggestions by those very state agents that she (rather than they) may be responsible in whole or part for the death. I appreciate that that is different from Khan, in which there was a suggestion of a deliberate cover-up of grossly negligent treatment; but, in my view, it does reinforce the involvement of the state in this case in a similar way.

79. In any event, returning to the wider features of the case, it appears from Vo v France and Takoushis, that any death in the care of any medical professionals triggers the secondary duty under Article 2.”

112. For the reasons set out above, the Coroner is entitled to conclude that an ‘arguable’ breach of the substantive obligation must be established in this case before an investigative duty under Article 2 arises.

***Is the ‘arguable breach’ test met?***

113. If the appropriate test is that of ‘arguable breach’, the question arises as to whether that test is met on the facts of these cases.
114. A preliminary point arises as to exactly what must be established on arguable grounds in order for the investigative duty to be triggered. The Security Service

*to the lives of identified individuals”*

(paragraph 26, emphasis added).

115. It is arguable that this sets the test too high. It would seem to follow from this approach that no breach of the substantive obligation would occur if the Security Service knew of a planned mass casualty attack (due, say, to take place in a shopping centre) and took no steps to avert it, simply because, since the planned attack was to be one of indiscriminate violence, it could not be said that there was “*a real and immediate risk to the lives of identified individuals”*. This approach appears to deny the flexible approach to the threshold test advocated by Langstaff J in *JL* (see paragraph 107 above), and it is perhaps doubtful that the Strasbourg Court would endorse it.
116. Detailed written submissions have been served on the issue of whether an arguable breach of the substantive duty can be established.
- (i) Chapter 3 of the Kingsley Napley submissions raise a series of factual points that are contended to amount to arguable breaches (some of an ‘operational’ nature, and some of a ‘systemic’ nature).
- (ii) Section 5 of the Oury Clark submissions identify arguable breaches of the Article 2 duty under the following headings:
1. failure in risk assessment policy;
  2. flawed investigation and assessments in this case;
  3. flaws in record-keeping / internal information handling systems;
  4. inadequate external co-operation between agencies / inter-agency co-operation;
  5. MI5 having misled the ISC; and
  6. Inadequacies in long-term resource planning.

- (iii) This issue is addressed at paragraphs 112 to 120 of the Lovells submissions.
  - (iv) The Security Service's arguments on this issue are at paragraphs 23 to 29 of the written submissions served on its behalf.
117. The issue of whether the threshold has been met is quintessentially a matter for the Coroner to determine. Counsel to the Inquests express no concluded view at this stage, but will endeavour to summarise the position and to highlight the most significant issues, if that would be of assistance, at the conclusion of the oral submissions from the various parties.
118. The Coroner will nevertheless wish to bear in mind:
- (i) the points made by Lovells at page 17 (paragraph 11) of their submissions in relation to the meaning of 'real and immediate' risk. The test is whether, arguably, different action on the part of State agents would have had a real prospect of altering the outcome, not whether, 'but for' the failure to act, the harm in question would never have occurred: *E v UK*<sup>57</sup>. At the same time, a 'missed opportunity'<sup>58</sup> will not, of itself, necessarily suffice as such a phrase says nothing about the likely consequences.
  - (ii) that the issue of whether the Article 2 substantive threshold is arguably breached is a matter for her to determine on the basis of all the material before her. Whilst she will no doubt pay due deference to the conscientiousness and detail of the ISC reports, they are not determinative of the issue arising here. She is not, in other words, required to 'take as

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<sup>57</sup> (2003) 36 EHRR 31

<sup>58</sup> The phrase is relied upon by Russell Jones & Walker at paragraph 31.

read'<sup>59</sup> the ISC reports in a manner that automatically excludes further coronial investigation.

- (iii) criticisms of the analysis in the ISC reports, even if justified, do not of themselves necessarily lead to the conclusion that different action on the parts of the Security Service and WYP would have had a real prospect of preventing the attacks.
- (iv) The Coroner may conclude that the critical issues are whether, even if it were the case that Khan and Tanweer should reasonably have been identified between February 2004 and 7 July 2005, or between the Crevice arrests (which occurred between 29 March and 1 April 2004) and 7 July 2005, and subject to some form of surveillance or investigation, it does not necessarily follow that their subsequent activities would be likely to have been disrupted. The question is whether, if closer attention had been paid to them, would there have been a real prospect of the bomb factory in Leeds, or the reconnaissance trip to London, coming to light<sup>60</sup>?

***If and insofar as an investigative duty arises, has it already been discharged by other processes?***

- 119. The Security Service contends that if (contrary to its primary contention) Article 2 investigative duty is triggered, it has been discharged by the investigation conducted by the ISC (see written submissions at paragraphs 40 to 55). A related submission is also made that it would not be in the public interest to re-investigate the matters previously considered by the ISC (see paragraphs 56 to 60).
- 120. The families contend that the ISC investigation is not sufficient to discharge the duty – see:
  - (i) the Kingsley Napley submissions at Chapter 4;
  - (ii) the Oury Clark submissions at paragraphs 5.143 to 5.183; and

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<sup>59</sup> This contention is advanced by the MPS at paragraphs 21, 22-24

<sup>60</sup> See Kingsley Napley submissions at paragraph 61.

(iii) the Lovells submissions at paragraphs 140 to 149.

121. The leading domestic case is that of *Amin* (see paragraph 96 above). The procedural criteria identified by the Strasbourg Court in *Jordan* are minimum requirements, albeit that the State is entitled to, “*a measure of flexibility in selecting the means of conducting the investigation*”.
122. It will be seen that some of the criticisms that are made of the ISC are procedural in nature (i.e., lack of independence, insufficient involvement of the families of the deceased) and others are substantive (i.e. defects in the reasoning of the reports, questions remaining unanswered, etc).
123. The essence of the Security Service’s submissions is that, given the highly exceptional circumstances of the events of 7 July 2005, a considerable measure of flexibility is justified in discharging any consequent investigative duty. The submission is that the highly sensitive nature of the underlying material and the need to conduct a comprehensive inquiry (a) necessitated a ‘closed’ inquiry such as that undertaken by the ISC; and (b) renders it contrary to the public interest for an open tribunal such as these inquests (should they be resumed) to attempt to cover the same ground as that covered by the ISC – particularly if a jury is summoned.

***If and insofar as an investigative duty arises, and has not been discharged, what factual investigations are necessary to discharge the duty?***

124. The written submissions that have been filed on behalf of the families identify the issues that they contend should be explored. It is submitted that those submissions will enable the Coroner to make a ruling at the level of principle, as to whether an inquiry of this general nature should be undertaken. If her decision is that such an inquiry should be undertaken, it may be necessary to hear further submissions (possibly once some further disclosure has taken place) as to the precise issues to be investigated.

**If the issue of ‘preventability’ is not to be investigated in discharge of an Article 2 obligation, should it be investigated in any event as part of a *Jamieson* inquest?**

125. Should the Coroner conclude that the issue of ‘preventability’ referred to above does not fall to be explored at a resumed inquest in discharge of an Article 2 investigative obligation, it would nonetheless be open to her, in the exercise of her discretion, to call evidence relating to that issue within the ambit of a conventional *Jamieson* inquest.
126. The Coroner might conclude that adopting such a course would be in accordance with her duty to ensure that the details of the catastrophic events of 7 July 2005 are (to adopt the term employed in *Jamieson*) “*fully, fairly and fearlessly investigated*” - or, put another way (and to adopt the words of Lord Lane CJ in *R v South London Coroner, Ex p Thompson* (1982) 126 SJ 625) in accordance with her duty to “*seek out and record as many of the facts concerning the death as [the] public interest requires*”.
127. Many of the factors relevant to this question (both tending towards and against conducting such an investigation) are identical to those that have been discussed above under the rubric of Article 2, and are not repeated here.
128. The determining factor will be whether the Coroner considers such an inquiry to be necessary and/or appropriate in reaching a conclusion on the narrower issue of ‘by what means’ the deceased met their deaths. In making such a decision, the Coroner would no doubt recall the guidance of the Court of Appeal in *Dallaglio* (referred to above) to the effect that:

“The inquiry is almost bound to stretch wider than strictly required for the purpose of a verdict. How much wider is pre-eminently a matter for the coroner whose rulings upon the question will only exceptionally be susceptible to judicial review.”

Also noteworthy in this context are the speeches of Lady Hale and Lord Mance in *Hurst*, concerning the possible residual value of conducting inquiries in a

*Jamieson* inquest into matters that might otherwise have been subject of Article 2 investigation.

129. In a recent judgment in the Administrative Court, Beatson J has observed that, whilst a Coroner’s powers as to the scope of an inquiry are wide, they are not unlimited (*R (Butler) v HM Coroner for the Black Country District* [2010] EWHC 43 at paragraph 65). However it is respectfully submitted that Beatson J’s judgment should not be considered as in any way undermining the dicta referred to above in *Jamieson*, *Dallaglio* or *Hurst*. In *Butler* the claimants successfully challenged the Coroner’s decision as to the scope of the inquest not because the intended scope was unlawfully wide per se but because the means by which the Coroner reached his decision as to scope:

“65. I have, however, concluded that, in this case, while it might well have been possible for the coroner to reach the conclusions that he did as to the scope of an inquiry and the evidence to be adduced, he fell into error in the approach he used to determine these matters and in his approach to disclosure...”

130. Although in a *Jamieson* inquest the jury’s verdict could not be received on any matters that did not relate to the means by which the deceased came to their deaths, any conclusions that the Coroner draws from a wider investigation could form the basis of a report under rule 43. Beatson J also held in *Butler* that a Coroner could at least have regard to the possibility of making a report under rule 43 in determining the appropriate scope of investigations:

“74...I do not consider that rule 43 enables a coroner to admit evidence that he cannot properly admit having regard to the provisions in the rules and his common law duties. But, in assessing all the factors relevant in determining the scope of an inquest, and bearing in mind the statement of Lord Lane CJ in *R v South London Coroner, ex p. Thompson* (1982) 126 SJ 625...and his reference to the public interest, the coroner was entitled to take into account the possibility of the need to refer the matter to the relevant person or authority under rule 43”.

As mentioned at paragraph 75 above, the Court of Appeal in *Lewis* has also recently approved the practice of obtaining the jury’s findings as to matters of fact that, whilst not causative of the deaths, might form the subject of a rule 43 report.

131. This reasoning is closely allied to the need, where an inquest falls within the scope of section 8(3)(d) of the CA 84 – i.e.:

“it appears to a coroner ... that there is reason to suspect ... that the death occurred in circumstances the continuance or possible recurrence of which is prejudicial to the health or safety of the public or any section of the public”

not to allow a narrow investigation to subvert the purpose of that section – namely, the prevention or reduction of the risk of future injuries in similar circumstances (see the discussion on this issue at [42] to [47] of *Takoushis*).

132. In summary, a notable theme of recent authorities is the emphasis placed on the potential to conduct a wide-ranging investigation even under the rubric of a *Jamieson* inquest. In *Lin*, Moses LJ made the following pertinent observations:

“31. But it was of particular interest to learn, I appreciate not in evidential form, from the Bar what happens when no enhanced investigation takes place. Even absent an obligation on the state to initiate an investigation, the inquest must be full and fair, practical and effective. It must be public and the bereaved must have the opportunity of fully taking part: (see *Takoushis*, paragraphs 44 to 47 and paragraph 106). It is of note that in *Takoushis*...the claimant succeeded in establishing the failure of the coroner to hold a sufficiently full inquest into the failures of the system even though there was no requirement under Article 2 to hold an enhanced inquest....

32...Coroners nowadays are more concerned to conduct full inquiries with ample opportunity for participation, even absent the obligation to conduct enhanced inquests. Many, I was told, seek to conduct a full and fair inquiry and do not believe in offering the bereaved what may be perceived as a second-class inquest. Thus, following *Takoushis*, there will often be little difference in practice between an enhanced *Middleton*-type inquest and other inquests following deaths which give rise to concern both to those immediately involved and to their families”.

133. Having regard to the principles set out above, it is submitted that there is a respectable argument that the ‘preventability’ issue could be investigated within the bounds of a *Jamieson* inquest, although there would still be practical difficulties in relation to the receipt of sensitive intelligence material.

## **F. DESIGNATION OF INTERESTED PERSONS**

134. The following issues concerning the designation of interested persons are addressed below:

- (i) The Relevant Powers
- (ii) Automatic Designation
- (iii) Discretionary Designation

135. At Annex B to these submissions is a list of all persons / organisations seeking designation as interested persons and their relationship with the deceased, if known.

### **The Relevant Powers**

136. It is submitted that the relevant powers for the designation of interested persons are contained within rule 20 of the CR 84 ('Entitlement to Examine Witnesses') and any analysis<sup>61</sup> that section 47 of the Coroners and Justice Act 2009 ('CJA 09') ('Interested Persons') applies is incorrect.

137. The correct analysis is as follows:

- (i) Rule 20 of the CR 84 remains in force<sup>62</sup>. It was amended as recently as 1 January 2010 by the Legal Services Act 2007 (Consequential Amendments) Order 2009<sup>63</sup>.

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<sup>61</sup> The London Fire and Emergency Planning Authority argue, at paragraph 2.2 of its submissions, that sections 47 and 48 of the Coroners and Justice Act 2009 are applicable.

<sup>62</sup> The CR 84 derives authority under section 32 of the CA 88. The CA 88 remains in force and has not yet been repealed by Part 1 of Schedule 23 of the CJA 09. Part 1 of Schedule 23 comes into force on a date to be appointed by the Lord Chancellor pursuant to section 182(4)(g) of the CJA 09.

<sup>63</sup> Pursuant to art. 6(1) of SI 2009/3348 the words 'an authorised person' were substituted and came into force on 1 January 2010, being the day on which section 13 Legal Services Act 2007 came into force.

- (ii) Although section 47 of the CJA 09 is in force<sup>64</sup>, it is an interpretation provision that, pursuant to section 47(1), only applies for the purposes of Part 1 of the CJA 09.
- (iii) The majority of the provisions within Part 1 of the CJA 09 are not yet in force, such that section 47 is inapplicable, as its only function is to interpret provisions that are not yet in force<sup>65</sup>.

138. Rule 20 of the CR 84 provides:

**20 Entitlement to examine witnesses**

- (1) Without prejudice to any enactment with regard to the examination of witnesses at an inquest, any person who satisfies the coroner that he is within paragraph (2) shall be entitled to examine any witness at an inquest either in person or by an authorised person:
- (2) Each of the following persons shall have the rights conferred by paragraph (1):—
  - (a) a parent, child, spouse, civil partner, partner and any personal representative of the deceased;
  - (b) any beneficiary under a policy of insurance issued on the life of the deceased;
  - (c) the insurer who issued such a policy of insurance;
  - (d) any person whose act or omission or that of his agent or servant may in the opinion of the coroner have caused, or contributed to, the death of the deceased;
  - (e) any person appointed by a trade union to which the deceased at the time of his death belonged, if the death of the deceased may have been caused by an injury received in the course of his employment or by an industrial disease;
  - (f) an inspector appointed by, or a representative of, an enforcing authority, or any person appointed by a government department to attend the inquest;
  - (g) the chief officer of police;
  - (h) any other person who, in the opinion of the coroner, is a properly interested person.

139. It should be noted that the benefit conferred by designation pursuant to rule 20 is the entitlement to examine witnesses. The absence of designation does not debar any person from either (i) addressing the Coroner on matters of law or (ii) suggesting lines of inquiry within the determined scope of the inquests.

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<sup>64</sup> Section 47 came into force upon the Act receiving Royal Assent on 12 November 2009 pursuant to section 182(1)(a) of the CJA 09.

<sup>65</sup> Section 182(4) of the CJA 09 provides that Part 1 of the CJA 09 will come into force on a day to be appointed by the Lord Chancellor, save for sections 19 – 21 and 47 – 48.

140. In all cases the entitlement to examine witnesses must be granted by the Coroner, where an applicant ‘satisfies’ the Coroner that he falls within the ambit of one the categories set out in rule 20(2) of the CR 84.

### **Automatic Designation**

141. Subparagraphs (a) – (g) of rule 20(2) identify factual categories of persons (for example family members, office holders, insurers) who have an automatic entitlement to examine witnesses.

#### ***20(2)(a)***

142. The majority of the bereaved who have applied for designation as interested persons fall within category 20(2)(a). Where a partner of the deceased is seeking designation under 20(2)(a) the Coroner must be satisfied that they lived as a partner of the deceased in an enduring family relationship<sup>66</sup>.

143. There are also a number of siblings of the deceased who have applied for designation<sup>67</sup>. These siblings do not have an automatic right and therefore their applications are considered in accordance with rule 20(2)(h) at paragraphs 159 – 163 below.

#### ***20(2)(d)***

144. The Coroner has received two applications under rule 20(2)(d); one from the East London Bus Company (‘ELB’) and the other from the driver of the number 30 bus, Mr. Psaradakis. Both applicants have also applied in the alternative under rule 20(2)(h).

145. The application under rule 20(2)(d) is pursued on the basis that the applicants’ act of allowing Hasib Hussain to board the bus caused or contributed to the deaths.

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<sup>66</sup> See rule 2(1) of the CR 84.

<sup>67</sup> See Appendix B: Chris and Tom Moffat (brothers of Anne Moffat), David and Robert Webb, (brothers of Laura Webb), Louise Badham, (sister of Samantha Badham), Magda Gluck-Pawlik, (sister of Karolina Gluck) and Guktasab Khan (brother of Khan).

146. These applications are not without their difficulties for the following two reasons.

(i) To fall within the subsection, the Coroner must be of the opinion that the applicant holds some ‘responsibility’ by action or omission that may have been causative of the death. Whilst this is a matter for the Coroner, it should be noted that no written submissions have been received which suggest that the ELB or its employee were ‘responsible’.

(ii) The analogy relied upon by the applicants is inapposite. Where a driver is ‘responsible’ for the death of a pedestrian who jumps out in front of his vehicle, there is direct causation between the actions of driving the vehicle and the death. In contrast, the bus driver’s action of allowing Hasib Hussain to board the bus is too remote in the chain of causation to be properly and purposively construed as an act or omission that caused or contributed to the deaths of the deceased.

147. It therefore submitted that both of these applications should be considered under rule 20(2)(h).

**20(2)(f)**

148. No applications for designation pursuant to rule 20(2)(f) have been received. For completeness, the effect of this rule is that any person appointed by a government department to attend the inquest is automatically entitled to examine witnesses. However the Security Service is not a government department but an emanation of the Crown under the authority of the Secretary of State for the Home Department<sup>68</sup> (to the extent, however, that the Secretary of State may have interests over and above those connected with the Security Service, he will be entitled to be examine witnesses under rule 20(2)(f)).

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<sup>68</sup> Section 1 of the Security Service Act 1989.

**20(2)(g)**

149. ‘*The chief officer of police*’ is defined by rule 2(1) of the CR 84 as:  
the chief officer of police for the area in which the coroner’s jurisdiction is comprised.

The chief officers of MPS, the WYP and the British Transport Police (‘BTP’) have each applied for designation under rule 20(2)(g)<sup>69</sup>. However no formal application for designation as an interested person has been received from the City of London Police (‘COLP’)<sup>70</sup>.

150. Given the unique events on 7 July 2005, the three applications under 20(2)(g) raises a discrete legal issue, which it is submitted, is likely to be academic due to the Coroner’s discretion under rule 20(2)(h).
151. First, the provision refers to ‘*the chief officer of police*’ rather than ‘*a chief officer of police*’ and therefore may be properly construed as conferring automatic entitlement on only one holder of this office rather than several.
152. Secondly, different interpretations could properly be applied to ‘*the area in which the coroner’s jurisdiction is comprised*’ as follows:
- (i) ‘*The area*’ may be construed as referring to the Coroner’s district only. If so, as Deputy Assistant Coroner for Inner West London district, it is understood that the Commissioner of the Metropolis would be the appropriate chief officer of police.
  - (ii) ‘*The area*’ may be construed as referring to the district in which the deaths occurred over which the Coroner has assumed jurisdiction to hold the

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<sup>69</sup> The WYP and the BTP have also applied, in the alternative, under rule 20(2)(h).

<sup>70</sup> By letter dated 7 April 2010, the COLP informed the Solicitor to the Inquests that “*it is very difficult for the City of London Police to take a view as to any helpful representations that it may make with regards to Properly Interested Persons without having sight of the written submissions submitted under paragraphs 1 and 2 of the said Order*”.

inquests. If so, it is understood that both the Commissioner of the Metropolis and the Commissioner of the COLP (if he seeks designation) would be the appropriate chief officers of police. Further, depending upon jurisdiction between the police, potentially the Chief Constable of the BTP as well. However the difficulty with this construction is that where a coroner assumes jurisdiction to hold an inquest outside their district pursuant to section 14 of the CA 88, he assumes jurisdiction over the specific inquest rather than the area or district.

153. Having regard to the above, it is submitted that the Commissioner for the Metropolis has an automatic entitlement to examine witnesses but that the Chief Constable of the WYP does not. The position regarding the Chief Constable of BTP is somewhat less clear. The Coroner may wish to seek assistance from the police forces attending the hearing as to how, if this situation has arisen in the past, it has been resolved.
154. In any event it is submitted, for the reasons set out below, that there are cogent grounds for the Coroner to exercise her discretion in favour of the chief officers of the BTP, WYP and the COLP (if he applies) under rule 20(2)(h).

### **Discretionary Designation**

155. For those applicants who do not have an automatic right to examine witnesses, their applications fall to be considered under rule 20(2)(h).
156. Whilst each application should be considered on its merits, the applications made under rule 20(2)(h) broadly fall into four categories. First, relatives of the deceased who do not have an automatic entitlement under rule 20(2)(a) to examine witnesses. Secondly, survivors of 7 July 2005. Thirdly, organisations responsible for planning, preparing, rehearsing and implementing the emergency response to a major incident such as occurred on 7 July 2005. Fourthly, other organisations or government bodies.

### ***Relevant Law***

157. The leading authority on rule 20(2)(h) is *ex parte Driscoll*. Kennedy LJ held at page 9:

“ In the course of the hearing we explored with counsel whether it is possible to define in general terms who for the purposes of r.20(2)(h) should be regarded as ‘properly interested persons’. I doubt if such a definition is possible, because circumstances will vary so much and, as Mr. Cooper pointed out, **‘properly interested persons’ are ordinary English words** to which the coroner must be allowed to give an ordinary meaning....For my part I think that he may be assisted by Mr. Owen’s submission in reply that **a properly interested person must establish more than idle curiosity**. The mere fact of being a witness will rarely be enough. **What must be shown is that a person has a genuine desire to participate more than by the mere giving of evidence in the determination of how, when and where the deceased came by his death**. He or she may well have a view that he wants to put to the witnesses, but there is no harm in that. Properly controlled it should assist the inquisitorial function.” [emphasis added].

and Pill J observed at pages 9 – 10:

“I add a few words only on the question of the meaning of the expression ‘properly interested person in r.20(2)(h)...**The word ‘interested’ should not be given a narrow or technical meaning**. It is not confined to a proprietary right or a financial interest in the estate of the deceased. It can cover a variety of concerns about or resulting from the circumstances in which the death occurred. The word ‘interested’ is not used in the rule to describe or identify the persons in the categories in r 2(a) to (g) but it may be said that they can each have an interest in the sense contemplated...However, all those persons are capable of having an interest in the sense in which, in my judgment, the word is then used in the additional category, category (h), included at the end of the rule. **Categories (a) to (g) do provide a guide to the type of interest envisaged in paragraph (h)**.”

It remains to consider the significance to be attached to the word ‘properly’ in paragraph (h). **In the context it imports not only the notion that the interested must be reasonable and substantial, and not trivial or contrived, but in my judgment also the notion that the Coroner may need to be satisfied that the concern of the person seeking to intervene is one genuinely directed to the scope of an inquest as defined in r. 36.**” [emphasis added].

158. In *Re Northern Ireland Human Rights Commission* [2002] HRLR 35, the Appellate Committee of the House of Lords considered the test to be applied in determining whether a third party should be allowed to intervene in an inquest in

“The practice of allowing third persons to intervene in proceedings brought by and against other persons which do not directly involve the person seeking to intervene has become more common in recent years but is still a relatively rare event. The intervention is always subject to the control of the court and whether the third person is allowed by the court to intervene is usually dependent upon the court’s judgment as to **whether the interests of justice will be promoted by allowing the intervention**. Frequently the answer will depend upon **whether the intervention will assist the court itself to perform the role upon which it is engaged**. The court has always to **balance the benefits which are to be derived from the intervention as against the inconvenience, delay and expense** which an intervention by a third person can cause to the existing parties.” (emphasis added).

### *Relatives of the Deceased*

159. The Coroner has received a number of applications from siblings of the deceased. In some instances, these applications are in addition to other family members who have an automatic entitlement to examine witnesses pursuant to rule 20(2)(a). In other instances, no family members with an automatic entitlement have applied. There are a number of factors to which the Court may wish to have regard in considering these applications.
160. First, although there is a close personal relationship between siblings and the deceased, it should be noted that siblings have been deliberately excluded from those with an automatic entitlement under rule 20(2)(a).
161. Secondly, although section 47 of the CJA 09 expands entitlement to siblings, no amendments have been made to rule 20(2)(a) to include siblings. This is despite the amendments to rule 20(2)(a) including ‘civil partners’ and ‘partners’ and changing ‘appropriate officer’ to ‘appropriate person’<sup>71</sup>. Thus whilst the existence of section 47 of the CJA 09 can be a factor taken into account in the

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<sup>71</sup> ‘Partner’ was inserted by SI 2005/420, r.5 which came into force on 1 June 2005. ‘Civil Partner’ was inserted by SI 2005/2114, art 2(1), Sch 1, paragraph 4 which came into force on 5 December 2005. ‘Appropriate officer’ was changed to ‘authorised person’ by SI 2009/3348 which came into force on 1 January 2010.

exercise of discretion<sup>72</sup>, likewise the lack of any amendment to rule 20(2)(a) should also be taken into account.

162. Thirdly, in those cases where other family members with an automatic entitlement under rule 20(2)(a) have applied for designation, consideration should be given as to whether any siblings will have a view which they wish to put to witnesses which (i) would not be advanced in any event by those family members with an automatic entitlement, (ii) cannot be advanced on their behalf by those with an automatic entitlement and (iii) might cause distress to family members with an automatic entitlement due to any dissension within the family.
163. Fourthly, different considerations may apply where there are no family members with an automatic entitlement to be designation. In those cases there is no person to advance the interest of the family of the deceased<sup>73</sup>. Against the backdrop of the relevant law set out above, the Court may wish to have regard to the particular circumstances of the applications; such as the history of contact prior to death between the siblings and the deceased or any participation by the siblings in the inquisitions before their adjournment (*R v HM Coroner, ex parte Keane* (1989) 153 JP 658 as considered in *ex parte Driscoll* at page 8).

### ***Survivors***

164. The Coroner has received 19 applications from survivors of the explosions on 7 July 2005. 15 of these applicants are represented by Oury Clark Solicitors, as set out in their submissions. The others are Mr. George Psaradakis (the driver of the number 30 bus)<sup>74</sup>, Mr. John McDonald (a passenger in the affected carriage at Edgware Road)<sup>75</sup>, Mr. Tim Coulson (who provided first aid in the affected

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<sup>72</sup> The Kingsley Napley submissions at page 43.

<sup>73</sup> See Practice Notes for Coroners (1998), paragraph 5.1

<sup>74</sup> See Tavistock Square Scene Report at page 121, paragraph 19.3.

<sup>75</sup> See Edgware Road Scene Report at page 77, paragraph 12.33.

carriage)<sup>76</sup> and Ms. Annaik Guitteny (a passenger in the affected carriage at King's Cross/Russell Square)<sup>77</sup>.

165. As was emphasised by Counsel to the Inquests at the hearing on 25 February 2010, each survivor applicant is 'unique, different and distinct' and we would invite the Court to consider each application on its individual merits rather than homogeneously. However there are some common factors that apply to each of the applicants and the submissions below advance these general considerations.
166. The following issues are considered regarding the survivor applicants:
- (i) Application of Article 2 or 3
  - (ii) The exercise of discretion, if the investigative obligation is triggered
  - (iii) Exercise of discretion, irrespective of the investigative obligation.

*Application of Article 2 or 3*

167. The submissions advanced by the Oury Clark survivor applicants for designation as interested persons are, in part, predicated on the ground that the Article 2 or 3 substantive obligation and investigative obligation is triggered as result of their experiences on 7 July 2005<sup>78</sup>.
168. Given that the legal issues regarding the Article 2 substantive and procedural obligation are extensively considered in Section E of these submissions, these are not considered further here in any detail, save to comment that:
- (i) If the Article 2 investigative duty does not apply to the bereaved families, it plainly cannot apply to the survivor applicants.

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<sup>76</sup> See Edgware Road Scene Report, at page 15, paragraph 5.2.3.

<sup>77</sup> See King's Cross/Russell Square Scene Report, at page 211, paragraph 32.49.

<sup>78</sup> The Oury Clark's Survivor Clients Submissions, paragraphs 3.4 – 3.21.

- (ii) Not all the survivor applicants' experiences will necessarily fall within the category of a 'near miss' for the purposes of Article 2. There are distinctions which can reasonably be drawn between those travelling in the carriages on or on the bus in which the explosions occurred<sup>79</sup> and those who were not<sup>80</sup>.

169. Oury Clark raise the question of the Article 3 investigative duty<sup>81</sup> but their submissions do not appear to be advanced by this and therefore it is not addressed here.

*Exercise of Discretion, if the Investigative Obligation is Triggered*

170. If the investigative obligation arises under Articles 2 or 3, it is submitted that whilst this bears upon the exercise of discretion under rule 20(2)(h), it is not determinative. Indeed, it is respectfully submitted that the investigative duty can be properly discharged without such designation.

171. In *L* the Appellate Committee of the House of Lords considered the requirements of the investigative duty under Article 2 in cases of near suicide in custody. A distinction was drawn between the requirements of an Article 2 investigation in cases of suicide and near suicide. Lord Phillips observed at paragraph 20:

“I am not persuaded that it is correct to proceed on the premise that the requirements of article 2 in respect of investigation are identical in the cases of a suicide and near suicide. In this jurisdiction the law had always treated death as a matter of particularly grave concern. There is, I believe, justification for a regime that imposes requirements as to investigation where a death occurs that do not apply automatically in other circumstances”

And Lord Brown held at paragraph 102 - 105:

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<sup>79</sup> Andrew Brown, Annaik Guitteny, Paul Mitchell, Rachel North, John McDonald and George Psaradakis.

<sup>80</sup> The following applicants were not in the same carriage as the explosions: Michael Henning, Elizabeth Kenworthy, John Blundell, Joanne Cole, Jacqueline Putnam, Ellaine Young, Angela Ioannou, Susan Maxwell, Lesley Ratcliff, George Roskilly. Further Tim Coulson and Ross Mallinson were not travelling on the same train as the explosion, although Mr. Coulson entered the affected carriage and provided first aid.

<sup>81</sup> Oury Clark Survivor Clients submissions at paragraph 3.21.

“It by no means follows, however, that the article 2 investigation required in every case of near-suicide must match in all respects that achieved in this country in the case of all actual prisons suicides...There seem to me two very important distinctions between cases of cellmate killings and those of near suicide. One is the difference between death and serious injury. Calamitous though near-suicide cases may be, death adds a further dimension of gravity...”

172. Their Lordships held that in cases of near-death from suicide it would not always be necessary for the state to hold an investigation which complied with a ‘type D inquiry’ (referring to the investigative requirements identified by the Court of Appeal in *R(D) v Secretary of State for the Home Department* [2006] 3 All ER 946). Rather, it was held that the principle hallmark of an Article 2 compliant inquiry was that it should be ‘effective’ (see speech of Lord Rodger [76 – 82], Lord Walker [96], Lord Brown [107] and Lord Mance [114]).

173. The requirements of an effective investigation in a near-suicide case, were summarised by Lord Brown at paragraph 107:

“Elementarily, to satisfy the basic requirements of any article 2 investigation, besides being independent and involving the family, they must in addition be initiated by the state, be promptly and reasonably expeditiously carried out, and provide for a sufficient element of public scrutiny. Beyond this, however, it is impossible to be prescriptive”

174. It should also be noted that in *L*, Lord Brown opined that *D* (also a near suicide case) was wrongly decided in requiring a public inquiry to discharge the state’s Article 2 duty (see paragraph 104). However, the Court may consider it illuminating to note that the Court of Appeal in *D*, (which may have been too extravagant in its requirements to discharge the investigative duty), held at paragraph 42:

“We have reached the conclusion that the judge went too far, in so far as he concluded that D’s representatives must be entitled to cross-examine witnesses.”

175. It is therefore submitted that:

- (i) The requirements of an Article 2 investigation in near death cases may be less stringent than in cases where death has occurred. In this respect the interests of the bereaved families have a ‘further dimension of gravity’ and are distinguishable from survivors.
  - (ii) The requirements of an effective investigation may be even less in respect of survivors who cannot be properly classified as cases of near death.
  - (iii) An effective investigation is one in which the family or victim is ‘involved’. An effective investigation in a near death case does not need to meet the stringent requirements identified in *D*.
  - (iv) Even if an effective investigation in a near death case were required to comply with the stringent requirements identified in *D*, those requirements do not include the right to cross-examine witnesses. This is especially pertinent given that the significance of designation as an interested person is that it confers the right to examine witnesses.
176. There is no doubt that many survivors will have a valuable role to play in any resumed inquests. However the survivor applicants’ involvement in the investigation only needs to be to the extent necessary to safeguard their legitimate interests (*Amin* at page 665). The Court may therefore consider that the appropriate involvement may be satisfied absent designation as properly interested persons for the following reasons:
- (i) It is likely that some of the survivor applicants will be able to valuably participate and assist the inquest as witnesses. This is by no means a passive experience.
  - (ii) Any inquests will be held in public (unless the exception under rule 17 of the CR 84 applies) should the survivor applicants wish to attend.

- (iii) All of the survivor applicants who returned confidentiality undertakings have been provided with the four Scene Reports.
- (iv) The survivor applicants have been able to participate and address the Court on important issues, such as the proper scope of any investigation.
- (v) Absent designation as properly interested persons, the survivor will still be able to address the Court on matters of law or suggest lines of inquiry within the determined scope.
- (vi) For the reasons set out at paragraph 180(i) – (ii) below, it is presumed that the bereaved families who instruct Oury Clark share many of the survivors’ concerns.

*Exercise of Discretion, Irrespective of the Investigative Obligation*

177. Whether or not investigative obligations under Articles 2 or 3 arise in respect of the survivors, it is submitted that there are a number of further factors that are likely to be of relevance to the exercise of the Coroner’s discretion.
178. First the view of any of the bereaved families as to whether they are content or object to the designation of any of the survivor applicants as properly interested persons. With regard to written submissions received:
- (i) Some of the bereaved families represented by Kingsley Napley have expressed reservations about designating the survivors as interested persons<sup>82</sup>.
  - (ii) The bereaved families represented by Lovells are anxious that the inquests are not diverted from their true scope into all the facts relating to the circumstances of the survivors<sup>83</sup>.

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<sup>82</sup> The Kingsley Napley submissions at page 43.

- (iii) The bereaved families represented by Russell Jones & Walker, whilst sympathetic, are equally concerned that there is no diversion from the scope being sought by those who appear on behalf of the deceased, and note that the survivors are able to play an important role as witnesses<sup>84</sup>.
  - (iv) There is no common view amongst families represented by Sonn Macmillan Walker. One family expresses the view that the inquest should focus on those who had perished as a result of the bombings and that the designation of the survivors as PIPs would only detract from issues concerning the deceased. Another client, whilst sympathetic to the issues solely affecting the survivors, felt that the putative resumed inquests were not the forum for the examination of those issues<sup>85</sup>.
  - (v) We would also invite the Coroner to canvass the views at the hearing of the attending bereaved families who are not legally represented.
179. Secondly, whether the concerns of the survivor applicants are genuinely directed to the scope of the inquests as defined in rule 36 of the CR 84. It is submitted that there is a distinction to be drawn between (a) genuine interest into the deaths of the deceased, (b) the wider events of 7 July 2005 or (c) the specific circumstances in which the survivors were exposed, or subject, to harm. Consequently, it may be appropriate to consider whether the survivor applicants' interests relate to any of the deceased rather than their personal concerns.
180. Thirdly, the extent to which the legitimate concerns of the survivor applicants will in any event be satisfied by others who have an automatic right to examine witnesses. In this respect it should be noted that:

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<sup>83</sup> The Lovells submissions at paragraphs 174 – 176.  
<sup>84</sup> Paragraphs 52-54  
<sup>85</sup> Page 13

- (i) The factual issues identified by the claimants in the judicial review proceedings of the Secretary of State for the Home Department's refusal to hold an independent and public inquiry are common to 14 of the survivor applicants as well as, it appears, six family applicants<sup>86</sup> who satisfy designation under rule 20(2)(2)(a).
  - (ii) It is presumed that there is no conflict between the interests of the survivor applicants and the family members represented by Oury Clark.
  - (iii) Other bereaved families wish to pursue issues such as 'adequacy of response' (if this issue is ruled to be within the proper scope of the inquests)<sup>87</sup>.
  - (iv) Counsel to the Inquests will seek to pursue all legitimate lines of inquiry.
181. Fourthly, if the Court determine the scope of the inquests should be narrow, it is unlikely that the 'wider' interests of the survivor applicants regarding the circumstances of 7 July 2005 will fall within the boundaries of the inquests.
182. Fifthly, the likely number of designated interested persons in the inquests. Irrespective of the suggestion that designation of the survivors may open the floodgates<sup>88</sup>, it is appropriate to have some regard to the logistics and practicalities involved (*Re Northern Ireland Human Rights Commission*). The burden of a significant number of persons entitled to examine witnesses may

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<sup>86</sup> Sandra Brewster, Veronica Downey, Ros Morley and Graham Foulkes are all currently represented by Oury Clark. Further the 7/7 Inquiry Group, which Oury Clark also represent, included at one stage Nader Mozakka (now represented by Lovells) and Hazel Webb (now represented by Russell Jones & Walker) according to the Schedule of Clients appended to Oury Clark's Pre-Action Protocol letter of 15 August 2007 to the Secretary of State for the Home Department seeking an independent and public inquiry.

<sup>87</sup> The Lovells submissions at paragraph 122 and the Russell Jones & Walker submissions at paragraph 6(c) and paragraph 15.

<sup>88</sup> The Oury Clark Survivor Clients submissions at paragraph 4.14 – 4.19

result in duplication of questioning, extend the length of the inquests, increase associated (and in particular publicly funded) costs for all involved.

183. Sixthly, the floodgates argument cannot be entirely dismissed. It is submitted that the Coroner can properly have regard to the potential consequences of any decisions for the conduct of the proceedings. Whilst any future applications from survivors must be considered on their merits, granting some or all survivors as interested persons would set a precedent that others may seek to follow. Further, the suggestion that paragraph 1 of the Order of 25 February 2010 renders the argument moot should be treated with caution<sup>89</sup>; acting judicially requires any tribunal to act fairly. The Coroner cannot entirely discount the possibility that late applications may be received once the proceedings gain greater public prominence.
184. Finally, ‘the Pro Bono issue’ advanced by Oury Clark<sup>90</sup> should be considered with a degree of caution. The funding arrangements between Oury Clark and its clients are a matter for them, as are any negotiations between Oury Clark and the Legal Services Commission. The Coroner does not have any power over the granting of funding arrangements. The exercise of discretion should primarily consider the merits of the survivors’ applications having regard to their interest in the proceedings, not the financial consequences for the survivors or their solicitors of not granting their application.

***First Responders and Emergency Responders***

185. The Court has received applications for designation as interested persons under rule 20(2)(h) from the following organisations:
- BTP
  - LAS
  - London Fire and Emergency Planning Authority (‘LFEP’)

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<sup>89</sup> The Oury Clark Survivor Clients submissions at paragraph 4.15.

<sup>90</sup> The Oury Clark Survivor Clients submissions at paragraph 4.20

- Transport for London ('TFL')
- Tube Lines Ltd

As previously stated the COLP has not made a formal application under rule 20(2)(h). Having regard to paragraphs 149 – 154 above, it is envisaged that should the Commissioner of the COLP apply and not acquire designation under rule 20(2)(g), an application is likely to be made in the alternative under 20(2)(h). Accordingly, in anticipation, submissions below also apply to a potential application by COLP.

186. Again, although we would invite the Coroner to consider each application on its own merits, the co-ordination of the first and emergency response to all four explosions necessarily ensures that there are common factors applicable to each organisation. In the premises, the organisations' applications are considered compendiously below.
187. It is submitted that there are cogent arguments for the Coroner exercising her discretion in favour of each of these organisations.
188. First it is clear from four Scene Reports, the London Assembly report and the London Regional Resilience report that each of the organisations had significant operational roles on 7 July 2005 as first / emergency responders in the initial aftermath of the explosion. Each of their interests are comparable with the MPS in so far as the emergency response is concerned.
189. Secondly, if adequacy of the emergency response is within the proper scope of the inquests, the investigation will require scrutiny, amongst other matters, of:
  - (i) The planning, policies, protocols, preparation, resource allocation and command structure for a major incident.

- (ii) The deployment, co-ordination, communication and actions of first responders and emergency services at each scene and between each scene on 7 July 2005.

This will require consideration not only of wider systemic issues but also the decisions of individuals at the scenes. The assistance and specialist knowledge of the organisations is likely to prove invaluable to the Coroner in pursuing these issues.

190. Thirdly, there is material to suggest that some of these organisations may be at risk of criticism due to systemic, managerial, individual or equipment shortcomings. For example:

- (i) Following the explosion at Edgware Road, the first London Fire Brigade vehicle was deployed to Praed Street, arriving at 09:04 am, where there was no incident<sup>91</sup>. The first fire engine did not arrive at Edgware Road station until 09.18am<sup>92</sup>
- (ii) At Aldgate, The London Assembly Report, at page 26, paragraph 2.41 noted:

“The London Ambulance Service does not seem to have been aware of the Fire Brigade’s assessment of the scene (that there had been an explosion) for 11 minutes, and the British Transport Police was still reporting a train accident at 9.08am, eight minutes after the identification of an explosion by the London Fire Brigade. The response of the London Ambulance Service at Aldgate was several minutes later than the response of the London Fire Brigade. Whilst the first fire engine was at Aldgate Station by 9.00 am, the first ambulance did not arrive at Aldgate station until 9.14am, 23 minutes after the first 999 calls was received and nine minutes after the declaration of a major incident by the Fire Brigade.”

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<sup>91</sup> Edgware Road Scene Report, page 88, paragraph 13.31.

<sup>92</sup> London Assembly Report, page 30, paragraph 2.49.

- (iii) At King's Cross / Russell Square, the London Assembly Report, at page 34, paragraph 2.62 noted:

“The initial deployment of ambulances and fire engines to Russell Square was much slower than at other sites, and it took longer to establish what had happened. The first 999 call was not received until 25 minutes after the explosion and a major incident was not declared until 9.38am.”

- (iv) The London Assembly Report, at page 54, paragraph 3.49 noted:

“Even allowing for the difficult circumstances that prevailed on 7 July, those [LAS personnel] on the front line were let down to varying degrees by a significant breakdown of communications within the London Ambulance Service. London Ambulance service personnel at the Tube stations and at Tavistock Square were unable to communicate with the control room. Their requests for further ambulances, supplied and equipment did not get through. They did not know what was happening at the other incidents...This breakdown in communications led to a failure to deploy the right number of ambulances to the right locations...”

- (v) The London Assembly Report, at page 15, paragraph 2.17 noted:

“Communications from the trains to the London Underground Network Control Centre and the emergency services were inadequate or non-existent on 7 July. As a result, transport and emergency service workers had to run from their trains to the platforms and back again to communicate with their colleagues and supervisors”.

191. Fourthly, it is likely that a significant number of employees or agents of each of these organisations may provide valuable assistance to any inquests as witnesses. By way of example, 624 BTP officers made statements in the criminal investigation<sup>93</sup> and 240 firefighters and over 400 LAS personnel were deployed on 7 July 2005<sup>94</sup>. The interests of such witnesses would be fairly served by active representation, in particular given that such witnesses may be at risk of professional criticism by other participants.

### ***Other Organisations / Government Departments***

#### ***ELB***

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<sup>93</sup> The BTP's submissions at paragraph 5.

<sup>94</sup> See 'Addressing Lessons from the Emergency Response to the 7 July 2005 London Bombings' (22 September 2006) at page 22.

192. It is submitted that there are less cogent grounds for granting interested person status to the ELB. Whilst similarities between the ELB and TFL (and Tube Lines Ltd) do exist, there are important distinctions. First, whilst the explosions affected both, TFL had a significant role to play in the operational response whereas ELB did not. Secondly, there has not yet been any suggestion that the ELB may be at risk of criticism. Thirdly, although Mr. Psaradakis may be summoned as a witness, his employer can adequately support him without requiring designation. Finally, absent designation, the ELB will not be in any way precluded from attending the public hearings, making submissions on the law or suggesting lines of inquiry should they wish to.

*WYP*

193. Depending upon the scope of any inquests, it is submitted that there are good reasons for designating the WYP as properly interested persons. In particular:

- (i) Khan, Tanweer and Hussain all resided within the WYP area. The inquests may touch upon their background, their community and the premises at 18 Alexandra Grove. WYP will no doubt be able to assist the Coroner with such matters.
- (ii) Should the Coroner wish to hear evidence from witnesses who resided in Beeston area of Leeds, the interest of community relations may be well served, and the evidence provided to the inquest enhanced, by ensuring that the WYP can participate as an interested person.
- (iii) If prevention of the explosions is within the proper scope of the inquests, the role of WYP in events prior to 7 July 2005 are likely to come under scrutiny and the organisation may be at risk of criticism.

*Secretary of State for the Home Department and the Security Service*

194. The Secretary of State and the Security Service have reserved their position on whether they wish to be designated as properly interested persons until after the determination of scope<sup>95</sup>. Unless and until any applications are made, we do not advance any submissions at this stage.

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<sup>95</sup> See Secretary of State for the Home Department and the Security Service's submissions at paragraph 7.

## **G. JURY**

195. Sections 8(3) and 8(4) of the CA 88 provide:

(3) If it appears to a coroner, either before he proceeds to hold an inquest or in the course of an inquest begun without a jury, that there is reason to suspect—

(a) that the death occurred in prison or in such a place or in such circumstances as to require an inquest under any other Act;

(b) that the death occurred while the deceased was in police custody, or resulted from an injury caused by a police officer in the purported execution of his duty;

(c) that the death was caused by an accident, poisoning or disease notice of which is required to be given under any Act to a government department, to any inspector or other officer of a government department or to an inspector appointed under section 19 of the Health and Safety at Work etc Act 1974; or

(d) that the death occurred in circumstances the continuance or possible recurrence of which is prejudicial to the health or safety of the public or any section of the public,

he shall proceed to summon a jury in the manner required by subsection (2) above.

(4) If it appears to a coroner, before he proceeds to hold an inquest, on resuming an inquest begun with a jury after the inquest has been adjourned and the jury discharged or in the course of an inquest begun without a jury, that there is any reason for summoning a jury, he may proceed to summon a jury in the manner required by subsection (2) above.

196. Section 8(3) identifies four set of circumstances in which a coroner is obliged to conduct an inquest with a jury, if it ‘appears’ to him that there is ‘reason to suspect’ that the criteria set out are met<sup>96</sup>. Section 8(4) provides the coroner with a residual discretion to summons a jury if it ‘appears’ to him that there is ‘any reason’ to do so.

197. Before determining the relevance and applicability of sections 8(3) and 8(4), the Court should first determine the scope of any inquests (*R (Paul) v Deputy Coroner of the Queen’s Household* [2007] 3 WLR 503 at paragraph 42). The submissions below are advanced on the basis that although the nature of the ‘scope’ arguments are clear, they have of course not yet been adjudicated upon.

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<sup>96</sup> Whether it so ‘appears to the coroner’ is question for the coroner and the phrase ‘there is reason to suspect’ does not require positive proof of evidence such that any information which gives rise to such suspicion will suffice (*R v Inner North London Coroner, ex parte Linnane* [1989] 1 WLR 395).

198. The submissions are also predicated upon the assumption that the Coroner decides either to join all 56 inquests together, or to resume and hear jointly the 52 inquests (but not to join the 4 thereto). The issue of whether the 4 inquests, if heard separately, require a jury is not addressed.

***Sections 8(3)(a) and (b)***

199. It is submitted that sections 8(3)(a) and (b) are inapplicable irrespective of the proper scope of the inquests. This assessment is shared by all parties who have advanced written submission on the issue of whether the Coroner should sit with a jury.

***Section 8(3)(c)***

200. It is unlikely that section 8(3)(c) applies. All parties who have considered the provision in their submission also share this assessment<sup>97</sup>.

201. For completeness, the Coroner may wish to note that:

- (i) There is no definition of ‘accident’ in the CA 88 but most accidents which must be officially notified are set out in the Reporting of Injuries, Diseases and Dangerous Occurrences Regulations 1995 (‘RIDDOR’)<sup>98</sup>.
- (ii) The definition of accident in RIDDOR includes ‘an act of non-consensual physical violence done to a person at work’ or ‘an act of suicide which occurs on, or in the course of the operations of, a relevant transport system’<sup>99</sup>.

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<sup>97</sup> See the BTP submissions at paragraphs 6–12, the MPS submissions at paragraph 30, the WYP submissions at paragraph 17 and the TFL submissions at paragraph 19.

<sup>98</sup> Jervis on Coroners, 12<sup>th</sup> Edition at 15-04.

<sup>99</sup> Regulation 2(1) of RIDDOR. ‘Relevant Transport System’ means a railway, a tramway, a trolley vehicle system or any other system using guided transport but does not include a guided bus system or a trolley vehicle system when it operates on a road

(iii) For an ‘accident’ to be notifiable under RIDDOR, any death of injury must be suffered ‘as a result of an accident arising out of or in connection with work’<sup>100</sup>.

(iv) Alternatively a ‘dangerous occurrence’ is notifiable. A dangerous occurrence is an ‘occurrence which arises out of or in connection with work and is of a class specified’ in Schedule 2<sup>101</sup>. The explosions on 7 July 2005 do not fall within Schedule 2.

202. It is submitted that it would not only strain the statutory language but also that it would run contrary to the purpose of this subsection to conclude that the four explosions on 7 July 2005 arose out of or in connection with work. First, the most likely explanation for the explosions is that they were caused by the deliberate suicidal acts of Khan, Tanweer, Hussain and Lindsay, and it is clear those deliberate acts (if those are the facts found) did not arise out of or in connection with work. The circumstances are therefore distinguishable from a suicide on a transport system in which a train being operated in connection with work causes the deceased’s death; (although Jervis on Coroners at 15-11 even considers this construction proves too much). Second, the Coroner may consider that the primary purpose of this section is to ensure that there is public scrutiny of death arising from or in connection with employment and, thereby, to improve the standards of health and safety within an employment context. Such policy issues clearly do not arise here.

***Section 8(3)(d)***

*Relevant Law*

203. As to section 8(3)(d) of the CA 88, the Court may wish to note the following:

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<sup>100</sup> Regulation 3(1) of RIDDOR.

<sup>101</sup> Regulations 3(1)(e) and 2(1) of RIDDOR.

- (i) In *R v HM Coroner, ex parte Peach* [1980] 1 QB 211, consideration was given to the meaning of ‘circumstances’ within this provision. Sir David Cairns held at 228<sup>102</sup>.
- “The reference to ‘continuance or possible recurrence’ indicates to my mind that the provision was intended to apply only to circumstances the continuance or recurrence of which was preventable or to some extent controllable. Moreover, since it is prejudice to the health or safety of the public or a section of the public that is referred to, what is envisaged must I think be something which might be prevented or safeguarded by a public authority or some other person or body whose activities can be said to affect a substantial section of the public”.
- (ii) It is not necessary to establish a causative link between the ‘circumstances’ of which the continuance or possible recurrence is prejudicial to the health and safety of the public and the deceased’s death (*R v Inner London North District Coroner, ex parte Linnane* [1989] 1 WLR 395).
- (iii) The prospect of recurrence required for the section to be applicable is low; it is the possibility of recurrence and not any higher chance (*Paul* at 32).
- (iv) The Court should assess the prejudice to the health and safety of the public at the time of the inquest not the death. If steps have been taken since the death such that there is no prospective risk, the subsection is not invoked (*R (Takoushis) v Inner North London Coroner* [2006] 1 WLR 461 at paragraph 64).
- (v) If the circumstances that are prejudicial to the health and safety of the public suggest a system failure, the subsection is likely to be triggered. If the circumstances suggest an individual failure, the subsection is unlikely

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<sup>102</sup>

It should be noted that this test was considered to be the highest threshold for invoking the subsection and was applied by the Division Court in *Paul* at paragraph 35, save that Smith LJ commented that the Court did not “understand the basis for the statement that the activities must affect ‘a substantial section of the public’ as the statute did not include that requirement”.

to be invoked (*R v HM Coroner, ex parte Wright* (1996) 35 BMLR 57 at 59).

204. In *Paul*, the Divisional Court held that the subsection applied and that jury was required to be summoned. Smith LJ opined at paragraphs 37 - 39:

“It is true that the deaths with which these present inquests are concerned occurred as a result of a collision on a road. However, the circumstances leading up to this collision were very unusual and had additional features to those found in a more usual type of road accident. As appears from the Stevens report, the car carrying the Princess of Wales and Mr. Al Fayed was being pursued by paparazzi moments before the fatal crash...

...It is likely that there will be a recurrence of the type of event in which the paparazzi on wheels pursued the Princess and Dodi Al Fayed. It is not only members of the Royal Family and their friends who receive this unwelcome attention; any celebrity is vulnerable. Not only is the safety of the person potentially put at risk but there may well be a risk to bystanders. In our view, occurrences such as this are prejudicial to the safety of a section of the public. It is possible that this danger could be prevented by legislation or other means”.

205. Having regard to the decision in *Paul*, it is submitted that two additional points may be made. First, even if death occurs in usual circumstances (such as a road traffic accident) the subsection may still apply if there are unusual or additional features that are prejudicial to the safety of a section of the public. Secondly, the relevant circumstances were not just the road traffic accident but also the actions of the paparazzi prior to the accident.

*Does 8(3)(d) Apply?*

206. It is submitted that there is a respectable argument that section 8(3)(d) does apply to the facts of these inquests for the following reasons:

- (i) There is a possibility that events comparable to those of 7 July 2005 may recur. The Security Service website provides that “*threat levels are designed to give a broad indication of the likelihood of a terrorist attack*”. Since 22 January 2010, the threat level in the United Kingdom has been ‘Severe’ (defined as ‘an attack is highly likely’). The Security Service website also states that “*As of September 2007, we are tracking some*

*2,000 individuals, 200 terrorist networks and 30 active plots, plus a significant number of sympathisers” and that “International terrorism poses a very severe national security threat to the UK”*<sup>103</sup>.

- (ii) The circumstances are wider than the incident itself. In *Paul* the circumstances included the conduct of the paparazzi as the Princess departed the Ritz Hotel. If a comparable incident to 7 July 2005 recurs, part of the circumstances concern not only the incident but also the emergency service response to that incident which endeavoured to save lives<sup>104</sup>.
- (iii) Terrorism (the most likely purpose of the explosions) obviously prejudices the health and safety of the public or any section of the public not only by virtue of the attack but also the pressure any attack brings to bear on the emergency services.
- (iv) The requirement that the circumstances must be preventable or to some extent controllable is met by the organisations engaged in counter-terrorism or emergency planning in response to any attack. For example the Security Service website states that between:

“11 September 2001 and 31 March 2007, 41 individuals have been convicted under the Terrorism Act, another 183 have been convicted of terrorism-related offences, including murder, illegal possession of firearms and explosives offences, 1,165 people have been arrested under the Terrorism Act and 114 were awaiting trial as of end of March 2007”<sup>105</sup>.
- (v) If the investigative duty under Article 2 is engaged by these inquests, it is submitted that the suggestion of systemic or operational failure by the Security Service and the police will be considered as part of the circumstance in which the deaths occurred.

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<sup>103</sup> See (i) [www.mi5.gov.uk/output/what-are-threat-levels.html](http://www.mi5.gov.uk/output/what-are-threat-levels.html) (ii) [www.mi5.gov.uk/output/threat-levels.html](http://www.mi5.gov.uk/output/threat-levels.html) and (iii) [www.mi5.gov.uk/output/international-terrorism-and-the-uk.html](http://www.mi5.gov.uk/output/international-terrorism-and-the-uk.html)

<sup>104</sup> This is particularly the case given that at each scene the Scene Reports indicate that some of the deceased survived the explosion, as set out at paragraph 79(iii) above.

<sup>105</sup> See [www.mi5.gov.uk/output/terrorist-plots-in-the-uk.html](http://www.mi5.gov.uk/output/terrorist-plots-in-the-uk.html)

- (vi) Alternatively, if the proper scope of the inquests includes consideration of the adequacy of the emergency service response on 7 July 2005, it is submitted that the inquests will very likely consider systemic issues as part of the circumstances in which the deaths occurred<sup>106</sup>.
207. The Coroner has received submissions that suggest that section 8(3)(d) may not be applicable. The BTP, the MPS and the WYP have suggested (with varying degrees of force) that a nuanced construction of section 8(3)(d) is required which considers the specific factual circumstances beyond the fact of the crime itself<sup>107</sup>. It appears that the particular concern is that any criminal act resulting in death will meet the statutory test under section 8(3)(d), if the specific circumstances are not considered.
208. With respect to this contention, four points may be made.
- (i) It is agreed that it is appropriate to consider the specific circumstances - each and every case must be considered on its own merits. In the present case, examination of the specific factual circumstances does reveal issues that go beyond the fact of the explosions, and the consequent deaths. Such issues include the manner in which terrorist activities are investigated and prevented, and how the emergency services respond to them.
- (ii) Should the Court find that s.8(3)(d) does apply, it is submitted that such a finding does not inevitably lead to a precedent that section 8(3)(d) will apply in all inquests where death may have been caused by a criminal act.

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<sup>106</sup> 'The Report of the 7 July Review Committee' (June 2006) as referred to above indicates that there were some system failures within and between the emergency services.

<sup>107</sup> The BTP's submissions at paragraph 13, the MPS' submissions at paragraphs 30 – 33 and the WYP submissions at paragraph 18.

- (iii) The concerns of the police forces are likely to be met by considering the specific facts. It should not be overlooked that subsection does not require a causative link between the circumstances (whether a criminal act or otherwise) and the death (*ex parte Linnane*). In this instance the circumstances can properly be extended to include the emergency service response to the explosions.
- (iv) Whilst there will always be individuals who have a desire to kill (as there will always be deaths in road traffic accidents), the events of 7 July 2005 were ‘very unusual and had additional features’ (*ex parte Paul*). It has been referred to as “*the single largest terrorist attack on these shores*”<sup>108</sup> and the emergency service response “...*was an enormously complicated and difficult undertaking.*”<sup>109</sup> In the premises it is submitted that 7 July 2005 is therefore sufficiently distinguishable from other deaths which may be caused by criminal acts.

209. If, having concluded that the 52 inquests should not be joined to the 4 (assuming that they are resumed at all), the Coroner concludes that section 8(3)(d) is engaged in respect of the 52, it does not necessarily follow that a jury would also have to be empanelled in the case of the subsequent 4 inquests.. This is because (i) the decision on section 8(3)(d) in respect of the 4 would have to take account of the position at that time, which would necessarily encompass the fact that the inquests into the 52 had already taken place with a jury empowered to examine events that were arguably prejudicial to the health and safety of the public (ii) certain issues, such as the emergency response, would be of no relevance to the inquests into the 4.

### ***Section 8(3)(d)***

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<sup>108</sup> ‘Could 7/7 have been Prevented’, ISC Report, (May 2009), page 4, paragraph 10.

<sup>109</sup> Report of the 7 July Review Committee, London Assembly, (June 2006), page 7, paragraph 1.8.

210. If none of the mandatory criteria for summoning a jury are invoked, section 8(3)(d) provides the Coroner with a discretion to summons a jury if it appears that there is any reason to do so.
211. The MPS, WYP and BTP all submit that, for a variety of reasons, the public interest is better served by the Coroner sitting without a jury. The LAS restricts its submissions to observing that, from a ‘purely practical’ standpoint, the hearing of the inquests without a jury is preferable: paragraph 6.
212. In considering the exercise of discretion, it is submitted that the Coroner may wish to have regard the factors set out below.
213. First, any views expressed by the bereaved families. The views of the bereaved families are relevant but not determinative (*Paul* at paragraph 44). The submissions received on behalf of the bereaved families<sup>110</sup> represented by Oury Clark, Lovells, and Russell Jones & Walker all favour summoning a jury. We would invite the Coroner also to canvass the views of the bereaved families who are not represented.
214. Secondly, whether the issues of the instance case bear any resemblance to the situations covered by the mandatory provisions for summoning a jury (*Paul* at paragraphs 45 and 46). In *Paul* the Divisional Court considered it appropriate to have regard to the policy considerations behind sections 8(3)(a) and (b) – namely, that where the state may have “*some responsibility for the death*”, a jury should be summoned to ensure public confidence in the outcome: paragraph 46. Consequently, if the Article 2 investigative obligation applies to these inquests, it is submitted that might well be determinative in favour of summoning a jury.
215. Thirdly, even if the Article 2 investigative obligation does not apply, public perception remains a relevant factor. The acute public interest in the events of 7

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<sup>110</sup> The submissions filed by Sonn Macmillan Walker indicate a divergence of views on this issue: page 12

July 2005 is such that summoning a jury will provide the requisite levels of public scrutiny. It should not be overlooked that “*this is a field in which appearances are generally thought to matter*”<sup>111</sup>.

216. Fourthly, whether the inquests may be better conducted by a professional judge than by a jury (*R (Collins) v HM Coroner for Inner South District of Greater London* [2004] 1 Inquest LR 106). There are several reasons why it is suggested that it is more appropriate for a professional judge to hear the inquests:

- (i) The inquests are likely to require investigation and consideration of a considerable volume of material placing a heavy burden upon any jury. That said, juries empanelled in terrorism and serious fraud cases are expected to deal with a comparable amount of material, and the Coroner is entitled to proceed on the basis that Counsel to the Inquests and the properly interested persons will endeavour to restrict the evidence before the jury to what it genuinely relevant.
- (ii) The inquests may require the examination of sensitive intelligence material. This is an important consideration, and gives rise to a number of points in relation to which the Coroner may be assisted by submissions from the Secretary of State. First, as stated above at paragraph 31(ii), it is not possible to at this stage to identify the nature of the intelligence material that might be relevant (it cannot, on account of the absolute prohibition under section 17 of the Regulation of Investigatory Powers Act 2000, even be known whether the relevant intelligence material includes intercept material, the introduction of which into coronial proceedings is prohibited), let alone reach any detailed conclusions as to the extent of the practical difficulties that might arise if the inquests were to be heard with a jury. Much will depend on the extent to which the Coroner believes it will be necessary to explore the raw intelligence material, and on the response

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<sup>111</sup> Per Bingham LJ in *R v Chief Constable of the Thames Valley Police, ex parte Cotton* [1990] IRLR 344 at 352 cited with approval in *ex parte Dallaglio*.

of the Secretary of State (and other interested agencies). Second, there is a limit to the practical significance of this point because, if the Coroner were instead to have concluded that a jury was required under section 8(3)(d), practical difficulties would simply have to be overcome with the assistance of all the parties. Third, the absence of a jury would not, in any event, remedy the likely difficulties associated with the disclosure of sensitive material to the properly interested persons (as the Secretary of State implicitly argues: paragraph 55(ii)(b)).

- (iii) A jury would be unable to give a reasoned explanation for its conclusions, but would only provide brief answers to a limited number of questions. In the absence of a jury, the Coroner could publish a full explanation of her conclusions (*Paul* at 43). The latter may more suitably meet the expectations of the bereaved families.
- (iv) The value of a jury's views as a tool for assessing and improving procedures is limited in circumstances where further investigation of policies and procedures, as distinct from facts, is required (*R (Scholes) v Secretary of State for the Home Department* [2006] EWCA Civ 1343 at paragraph 70). However, this is somewhat tempered by the power of the Coroner to leave factual findings to a jury on issues which may inform any report under rule 43 of the CR 84 (*Lewis* at paragraph 29).
- (v) The jury will probably be exposed to distressing evidence and material. However, again, this should be somewhat tempered by the fact that steps will be taken to minimise distress for all involved in the inquests, including the jury.
- (vi) The hearing of the inquests by a jury will increase the length of time and the costs of the inquests.

**HUGO KEITH QC  
ANDREW O'CONNOR  
BENJAMIN HAY**

**22.IV.10**