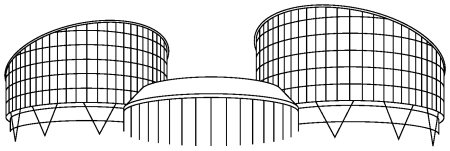

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

GRAND CHAMBER

CASE OF IBRAHIM AND OTHERS v. THE UNITED KINGDOM

(Applications nos. 50541/08, 50571/08, 50573/08 and 40351/09)

JUDGMENT

STRASBOURG

13 September 2016

This judgment is final but it may be subject to editorial revision.

Contents

In the case of Ibrahim and Others v. the United Kingdom,

The European Court of Human Rights, sitting as a Grand Chamber composed of:

Guido Raimondi, *President*,
András Sajó,
Işıl Karakaş,
Luis López Guerra,
Mirjana Lazarova Trajkovska,
Ganna Yudkivska,
Khanlar Hajiyev,
Nona Tsotsoria,
Vincent A. De Gaetano,
Julia Laffranque,
Paul Lemmens,
Paul Mahoney,
Johannes Silvis,
Dmitry Dedov,
Robert Spano,
Iulia Motoc,
Síofra O'Leary, *judges,*

and Lawrence Early, *Jurisconsult,*

Having deliberated in private on 25 November 2015 and 2 June 2016,

Delivers the following judgment, which was adopted on the last-mentioned date:

PROCEDURE

1. The case originated in four applications (nos. 50541/08, 50571/08, 50573/08 and 40351/09) against the United Kingdom of Great Britain and Northern Ireland lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention").

2. The first three applications were lodged by Mr Muktar Said Ibrahim ("the first applicant"), Mr Ramzi Mohammed ("the second applicant") and Mr Yassin Omar ("the third applicant"), all three Somali nationals, on 22 October 2008. The fourth application was lodged on 29 July 2009 by Mr Ismail Abdurahman, a British national who was born in Somalia ("the fourth applicant").

3. The applicants were represented as follows:

- Mr Ibrahim and Mr Mohammed were represented by Irvine Thanvi Natas, a firm of solicitors based in London, assisted by Mr J. Bennathan QC, counsel.

- Mr Omar was represented by Arani Solicitors, a firm of solicitors based in Middlesex, assisted by Mr S. Vullo, counsel.

- Mr Abdurahman was represented by Mr J. King and Ms A. Faul, counsel.

4. The United Kingdom Government ("the Government") were represented by their Agent, Mr P. McKell, of the Foreign and Commonwealth Office.

5. The applicants alleged a violation of Article 6 §§ 1 and 3 (c) in that they had been interviewed by the police without access to a lawyer and that statements made in those interviews had been used at their trials.

6. The applications were allocated to the Fourth Section of the Court (Rule 52 § 1 of the Rules of Court). On 14 September 2010 the Court decided to give notice of Mr Abdurahman's application to the Government.

7. On 22 May 2012 the applications lodged by the first three applicants were joined and declared partly inadmissible by a Chamber of the Fourth Section of the Court. On the same date, the Chamber decided to give notice of their complaints concerning their lack of access to a lawyer and the admission of the statements at their trial to the Government.

8. On 16 December 2014 a Chamber of the Fourth Section, composed of Ineta Ziemele, Päivi Hirvelä, George Nicolaou, Ledi Bianku, Zdravka Kalaydjieva, Paul Mahoney and Krzysztof Wojtyczek, judges, and Françoise Elens-Passos, Section Registrar, gave judgment. They unanimously declared admissible the applicants' complaints under Article 6 §§ 1 and 3 (c) concerning their lack of access to a lawyer and the admission of the statements at trial. They held by a majority that there had been no violation of Article 6 §§ 1 and 3 (c) of the Convention. The dissenting opinion of Judge Kalaydjieva was annexed to the judgment.

9. In letters of 5 and 16 March 2015 Mr Omar and Mr Abdurahman respectively requested the referral of the case to the Grand Chamber in accordance with Article 43 of the Convention. The panel of the Grand Chamber granted the requests on 1 June 2015.

10. The composition of the Grand Chamber was determined according to the provisions of Article 26 §§ 4 and 5 of the Convention and Rule 24 of the Rules of Court.

11. The applicants and the Government each filed further written observations on the merits (Rule 59 § 1). In addition, third-party comments were received from Fair Trials International, which had been given leave by the President to intervene in the written procedure (Article 36 § 2 of the Convention and Rule 44 § 3).

12. A hearing took place in public in the Human Rights Building, Strasbourg, on 25 November 2015 (Rule 59 § 3).

There appeared before the Court:
(a) *for the Government*
Mr P. MCKELL, *Agent,*
LORD KEEN OF ELIE QC, ADVOCATE GENERAL OF SCOTLAND,
Mr D. PERRY QC,
Mr L. MABLY, *Counsel,*
Mr R. MACNIVEN, *Adviser*;

(b) *for the first three applicants*
Mr J. BENNATHAN QC,
Mr J. BUNTING, *Counsel;*

(c) *for the fourth applicant*
Mr J. KING,
Ms A. FAUL, *Counsel*.

The Court heard addresses by Lord Keen, Mr Bennathan and Mr King and their answers in reply to questions put by the Court.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

13. The applicants were born in 1978 (Mr Ibrahim), 1981 (Mr Mohammed and Mr Omar) and 1982 (Mr Abdurahman). The first three applicants are in detention. The fourth applicant lives in London.

A. Introduction

14. On 7 July 2005 four suicide bombs exploded on three underground trains and a bus in central London, killing fifty-two people and injuring hundreds more.

15. Two weeks later, on 21 July 2005, the first three applicants and a fourth man, Mr Hussain Osman, detonated four bombs on three underground trains and a bus in central London. On 23 July 2005 a fifth bomb was discovered abandoned and undetonated in a London park. Mr Manfo Asiedu was later identified as the fifth conspirator.

16. Although the four bombs were detonated, in each case the main charge, liquid hydrogen peroxide, failed to explode. Subsequent testing revealed that this was most likely the result of an inadequate concentration of the hydrogen peroxide necessary for it to explode given the amount of TATP (acetone peroxide, a primary explosive) used as a detonator. The

evidence showed that had the concentration of the hydrogen peroxide been higher or the TATP stronger, the bombs would have been viable.

17. The first three applicants and Mr Osman all fled the scenes of their attempted explosions. Images of the four men were, however, captured by closed-circuit television ("CCTV") cameras. A nationwide police manhunt began and photographs and the CCTV images of the men were broadcast on national television and published in national newspapers. On 22 July 2005 a young man was shot and killed on the London underground by police after being mistaken for Mr Osman (see *Armani Da Silva v. the United Kingdom* [GC], no. 5878/08, 30 March 2016). In the days that followed, the four men were arrested, the first three applicants in England between 27 and 29 July and Mr Osman in Rome, Italy, on 30 July. They were tried and convicted for conspiracy to murder.

18. The fourth applicant gave Mr Osman shelter at his home in London during the period when Mr Osman was on the run from the police and before he fled to Rome. The police interviewed the fourth applicant in England on 27 and 28 July 2005 and arrested him on the latter date. In separate proceedings, he was tried and convicted of assisting Mr Osman and failing to disclose information after the event.

19. The details of the applicants' arrests and initial police questioning are set out more fully below.

B. The first three applicants

1. The arrests and interviews

(a) Mr Omar

20. The first of the bombers to be arrested was Mr Omar. He was arrested on 27 July 2005 at 5.15 a.m. at a house in Birmingham. A number of police officers entered the house and found Mr Omar standing in the bathtub, fully clothed and screaming, with a rucksack on his back. The police believed that the rucksack, which was of similar dimensions to those used in the failed bomb attacks, contained a bomb. They shouted warnings before overpowering Mr Omar with the help of a TAZER device and removing the rucksack. The rucksack proved to contain an empty bucket.

21. Upon arrest, Mr Omar was cautioned by the police using the "new-style" caution (see paragraph 184 below), namely that he did not have to answer questions but that anything he did say might be given in evidence, and that adverse inferences might be drawn from his silence if he failed to mention matters later relied on by him at trial. He was asked if there was anything that he knew of anywhere that could hurt anyone. He answered, "No". The police officers who accompanied him to the police station in London later gave evidence of a brief interview that took place in the car. According to them, they had asked again about whether there was material

anywhere that could harm someone and whether officers needed to worry about anything at his home address, to which he had replied that there was not. Later in the journey, Mr Omar volunteered the following statement:

> "I was on that tube at the time of the explosions. I did not know it was going to go off, I did not want to hurt anyone ... I did not make the explosives. I was told to collect it. I went to an alleyway near a shop and collected the rucksack."

22. Mr Omar arrived at Paddington Green Police Station, London, at 7.20 a.m. At 7.50 a.m. he requested the attendance of the duty solicitor. He was told that he was entitled to consult a solicitor but that this right could be delayed for up to forty-eight hours if authorised by a police officer of the rank of superintendent or above. At 7.55 a.m. Superintendent MacBrayne ordered that Mr Omar be held incommunicado under Schedule 8 of the Terrorism Act 2000 (see paragraphs 187 and 189 below).

23. Shortly afterwards, Superintendent McKenna directed that a "safety interview" be conducted with Mr Omar. "Safety interview" is the shorthand expression used to describe an interview conducted urgently for the purpose of protecting life and preventing serious damage to property. The detainee is questioned in order to secure information that may help avert harm to the public, by preventing a further terrorist attack, for example. The interview may occur in the absence of a solicitor and before the detainee has had the opportunity to seek legal advice (see paragraphs 188-190 and 193-198 below).

24. At around 8.50 a.m. a doctor was called to examine Mr Omar and the doctor certified him as fit to be interviewed.

25. At 9 a.m. a brief safety interview took place. It lasted three minutes and focused on whether there was anything unsafe in a bag which Mr Omar had discarded when he was arrested.

26. At 9.15 a.m. the custody officer at Paddington Green contacted the duty solicitor on behalf of Mr Omar. The duty solicitor was told that he would be contacted again once the booking-in procedure had been completed.

27. At 10.06 a.m. and 10.14 a.m. Mr Omar again requested access to a solicitor. He was told that this would be arranged as soon as the booking-in process had been completed. The booking-in process finished shortly afterwards.

28. At 10.24 a.m. the custody officer was told that a further safety interview had been authorised by Superintendent McKenna. It was recorded in writing that Mr Omar had not been given access to legal advice on the grounds that delaying the interview would involve an immediate risk of harm to persons or damage to property and that legal advice would lead to the alerting of other people suspected of having committed offences but not yet arrested, which would in turn make it more difficult to prevent an act of terrorism or to secure the arrest, prosecution or conviction of persons in connection with terrorism offences. The reasons continued:

> "Omar is suspected of detonating an improvised explosive device on a ... train on Thursday 21 July 2005; this was part of an organised simultaneous attack that involved at least three other persons yet to be arrested. The identity of one of these persons has yet to be established and the whereabouts of three is yet to be established.
>
> Omar's premises at 58 Curtis House are believed to have been used to manufacture the improvised explosive material. My suspicion is that Omar and his three (at least) accomplices were attempting to carry out a 'suicide attack', killing themselves and any other persons in their immediate vicinity. The other parties to this attack are yet to be apprehended and it is imperative to preserve and secure public safety that they are identified, located and detained prior to attempting to repeat the events of 21 July. The immediate whereabouts of these other persons, the presence of other improvised explosive devices and the identities and whereabouts of ANY other persons involved in the commission, preparation or instigation of acts of terrorism connected to Omar MUST be established to prevent any loss of life or serious damage to property. Awaiting the arrival of a solicitor and permitting any pre-interview consultation before any attempt to establish the above facts WILL cause unnecessary delay to this interview process. I have considered the requirements of PACE [the Police and Criminal Evidence Act 1984] and the associated Codes of Practice and I believe that this course of action is necessary and proportionate. ANY interview with Omar under this authorisation must cease when the risk to life and public safety is averted.
>
> In granting this authorisation I have considered Omar's rights under Article 6 [of the Convention] and believe that this authorisation is both proportionate and necessary for ensuring the Article 2 rights of the public in general."

29. There then followed four safety interviews of around forty-five minutes each, with a break of around fifteen to twenty minutes between each one.

30. Safety interview A commenced at 10.25 a.m. and concluded at 11.11 a.m. At the beginning of the interview, Mr Omar was given the old-style caution (see paragraph 182 below), namely that he did not need to say anything but that anything he did say might be given in evidence.

31. Safety interview B commenced at 11.26 a.m. and concluded at 12.11 p.m. Again, Mr Omar was given the old-style caution at the start of the interview.

32. At around 12.15 p.m. a doctor was called to examine Mr Omar and certified him as fit to be interviewed.

33. At 12.19 p.m. the duty solicitor was contacted and was told that safety interviews were taking place.

34. At 12.31 p.m. safety interview C commenced. This time, Mr Omar was given the new-style caution (see paragraph 184 below). It finished at 1.17 p.m. and Mr Omar was given a hot meal.

35. At 1.35 p.m. safety interview D commenced, following the administration of the old-style caution. It was completed at 2.20 p.m.

36. During the safety interviews, Mr Omar either claimed that he did not recognise the other suspects from the photos in the media or he gave an incorrect account of how he knew some of them. He deliberately incorrectly described their involvement in the events of 21 July.

37. Meanwhile, at 2.15 p.m., the custody officer contacted the duty solicitor, who indicated that he would arrive at the police station at 3.30 p.m. At 3.40 p.m. the duty solicitor arrived at the custody suite and was allowed to read the custody record.

38. At 4.08 p.m. Mr Omar was placed in a room for consultation with the duty solicitor. That consultation was interrupted at 4.15 p.m. for a further brief safety interview, which began at 4.19 p.m. and concluded at 4.21 p.m. and was conducted in the presence of the solicitor.

(b) Mr Ibrahim

39. The next suspect to be arrested was Mr Ibrahim. He was arrested two days later, on 29 July 2005, at 1.45 p.m. in a flat in West London. Mr Mohammed was also present at the flat.

40. Mr Ibrahim was given the new-style caution (see paragraphs 21 above and 184 below) and put into a forensic suit. He was asked whether there was any material on the premises which might cause danger to any person. He replied that there was not. He was also asked whether there was any material anywhere which the police should know about and he replied that the police already knew about "58 Curtis House" because they had been there already. He identified the other man at the West London flat as Mr Mohammed and was asked whether Mr Mohammed had control of any materials likely to cause danger. He replied, "No, listen, I've seen my photo and I was on the bus but I didn't do anything, I was just on the bus". He was told that he would be interviewed about that later and that all the police wanted to know was whether there was anything at another location that was likely to cause danger. Mr Ibrahim said, "Look, I know you're trying to link us with 7/7. I've seen it on the television. That's nothing to do with us. I don't know these people. I'm a Muslim. I can't tell lies. Okay I did do the bus, but I had nothing to do with 7/7." The officer replied, "Look, we're not interviewing you about any of those matters at this stage".

41. Mr Ibrahim arrived at Paddington Green Police Station at 2.20 p.m. He requested the assistance of the duty solicitor.

42. At 4.20 p.m. he was reminded of his right to free legal advice and replied that he understood what had been said to him. The duty solicitor was contacted at 4.42 p.m. At 5 p.m. the duty solicitor called the police station and asked to speak to Mr Ibrahim. She was told that Mr Ibrahim was unavailable for a consultation. The solicitor called again at 5.40 p.m. and was told that her details would be passed to the officer in charge of the investigation, but that telephone contact was impractical because the appropriate consultation rooms were unavailable.

43. At 6.10 p.m. Superintendent MacBrayne ordered an urgent safety interview and directed that Mr Ibrahim be held incommunicado. The custody record explained that his right to access to legal advice had been delayed because there were reasonable grounds for believing that delaying

an interview would involve immediate risk of harm to persons or serious loss of, or damage to, property; and that it would lead to the alerting of other persons suspected of committing a terrorist offence but not yet arrested, which would make it more difficult to prevent an act of terrorism or secure the apprehension, prosecution or conviction of a person in connection with terrorism offences. The record gave detailed reasons, as follows:

> "IBRAHIM is suspected of detonating an improvised explosive device on the London transport system on Thursday the 21st July 2005, this was part of an organised simultaneous attack that involved at least three other persons and I believe was a 'suicide attack' and those concerned were intent on killing themselves and inflicting mass casualties on the public. The total extent of those involved is not yet established and other suspects may remain at large ... [I]t is not known at this stage how much explosive was manufactured; where any may still be; or if it is under the control of an individual or individuals who may still conduct a similar attack.
>
> It is imperative to preserve and secure public safety that all appropriate measures are taken to identify, locate and detain any other suspects prior to attempting to repeat the events of 21st July. It is necessary to take all proportionate steps to detain any persons engaged in the commission, preparation or instigation of acts of terrorism related to this matter to protect the public, prevent loss of life and substantial damage to property. Awaiting the arrival of a solicitor and permitting any pre-interview consultation before any attempt to establish the above facts WILL cause unnecessary delay to this interview process. I have considered the requirements of PACE and the associated Codes of Practice and I believe that this course of action is necessary and proportionate. ANY interview with Ibrahim under this authorisation must cease when the risk to life and public safety is averted.
>
> In granting this authorisation I have considered Ibrahim's rights under Article 6 ... and believe that this authorisation is both proportionate and necessary for ensuring the Article 2 rights of the public in general."

44. At 7 p.m. a different solicitor called the police station and asked to speak to "Ibrahim Muktar Said". She was told that no-one of that name was held at the police station. At 7.45 p.m., when it was established that a Mr Ibrahim was at the police station, she was contacted and told that he was already represented by the duty solicitor. Meanwhile, Mr Ibrahim was seen by the forensic medical examiner and given a hot vegetarian meal.

45. At 7.58 p.m. Mr Ibrahim was taken from his cell for a safety interview. At the beginning of the safety interview he was given the new-style caution (see paragraphs 21 above and 184 below). During the interview, he was read the notes of the police officers concerning what he had said during his arrest but he declined to make any comment or to sign them. He was asked whether he had any materials such as explosives or chemicals stored anywhere. He denied knowing where any such materials might be stored or having any knowledge of planned attacks which might endanger the public. He told the police that he did not know anything about explosives and that he had no links with any terrorist groups. When pressed on whether he knew about other people, other devices and other plans, he said that he did not deal with explosives and did not know anyone who did.

When further pressed about whether there was "something out there" that could hurt someone, he said that if he knew anything he would tell the police. He repeated that he knew nothing about explosives and that he did not know anyone planning to carry out suicide attacks. He added that he did not know anyone who dealt with explosives, was a danger to society or was planning terrorist activities. He accepted that he knew Mr Omar, but denied knowing the other two men connected with the events of 21 July whose pictures had been shown on television. He was unaware of anyone he knew having been involved in these events. He said that Mr Mohammed was not someone who would be prepared to do anything like that. The safety interview ended at 8.35 p.m.

46. Meanwhile, at 8 p.m. the second solicitor contacted the custody officer and a note was made in the custody record that there was an issue of two solicitors wishing to represent Mr Ibrahim. At 8.15 p.m., the second solicitor called again seeking to speak to him.

47. At 8.45 p.m. the duty solicitor arrived at the police station. Mr Ibrahim was sleeping and saw the solicitor at 10.05 p.m. Around an hour later, Mr Ibrahim said that he did not want the services, at that stage, of the second solicitor.

48. During subsequent interviews while Mr Ibrahim was in detention, which were conducted in the presence of a solicitor, he made no comment.

(c) Mr Mohammed

49. The last of the three suspects to be arrested was Mr Mohammed. He was arrested and cautioned, using the new-style caution (see paragraphs 21 above and 184 below), on 29 July 2005 at 3.22 p.m. at the same West London flat as Mr Ibrahim. He was asked whether there was anything inside the flat that could cause harm to police officers or members of the public. He replied, "No".

50. He arrived at Paddington Green Police Station at 4.29 p.m. At 4.39 p.m. he requested the assistance of the duty solicitor, and the forensic procedure commenced. At 5.05 p.m. the custody officer asked the relevant officers to inform him whether Mr Mohammed was to be held incommunicado and at 5.48 p.m. this was authorised.

51. Simultaneously, Superintendent MacBrayne authorised a safety interview. The reasons for delaying access to legal advice were recorded. The superintendent indicated that he believed that delaying an interview would involve immediate risk of harm to persons or serious loss of, or damage to, property; that it would lead to others suspected of having committed offences but not yet arrested being alerted; and that by alerting any other person it would be more difficult to prevent an act of terrorism or to secure the apprehension, prosecution or conviction of a person in connection with the commission, preparation or instigation of an act of

terrorism. The detailed reasons were essentially identical to those given as regards Mr Ibrahim (see paragraph 43 above).

52. At 6.59 p.m. the custody officer called the duty solicitor scheme. At 7.16 p.m. the forensic procedure was completed and at 7.19 p.m. Mr Mohammed signed the custody record indicating that he wished to speak to a solicitor as soon as practicable. At 7.34 p.m. he was told that he was being held incommunicado and shortly thereafter was permitted to return to his cell to pray.

53. At about 8 p.m. duty solicitors arrived at the front desk of Paddington Green Police Station.

54. At 8.14 p.m. the safety interview of Mr Mohammed commenced without the presence of a solicitor. He was given the new-style caution (see paragraphs 21 above and 184 below). He was told that he was suspected of involvement in the attacks of 21 July and that the police were concerned for the safety of officers and the public. They therefore needed information about any further explosives, and the people who had them, that could cause harm to the public in the near future. He replied that he had nothing to do with the events of 21 July and that he knew nothing about them. He did not recognise the photographs of the alleged perpetrators which he had seen in the media and he did not know how to make the explosive devices found. The safety interview finished eight minutes later, at 8.22 p.m.

55. The duty solicitors arrived at the custody suite at 8.40 p.m. and saw Mr Mohammed at 9.45 p.m. The delay was partly caused by Mr Mohammed's request for time to pray and the provision of a meal.

56. Two days later, on 31 July 2005, Mr Mohammed was interviewed for the second time, this time in the presence of a solicitor. Early in the interview, the solicitor read out the following statement by Mr Mohammed:

> "I am not a terrorist and I'm not in any way connected to any acts of terrorism and have not been connected to any acts of terrorism particularly on 21st July or the 7th July 2005."

57. Thereafter Mr Mohammed exercised his right to silence.

2. The trial of the first three applicants

58. The first three applicants were charged with conspiracy to murder. In September 2006, the defence statements were served. In his defence statement, Mr Omar explained that together with Mr Ibrahim he had devised a plan of constructing a device with the outward appearance of a realistic-looking explosive device but which had been specifically designed only to make a noise. He accepted that he had been involved in constructing the devices detonated on 21 July 2005 and that he was one of the underground bombers.

59. In his defence statement, Mr Ibrahim accepted that he had detailed knowledge of how to make TATP and concentrated peroxide. He admitted

that he had bought most of the ingredients for the bombs, which he said had been designed to make a noise but not to explode because there was insufficient TATP to activate the main charge. He described a meeting at 58 Curtis House with Mr Omar, Mr Mohammed and Mr Osman on 19 July 2005 and explained that Mr Mohammed and Mr Osman had been given the components that were to be used to make the devices. He maintained that his activating the device on the bus had been a mistake; he had not been able to set it off on the underground because there had been too many people and his escape might have been impeded.

60. In his defence statement, Mr Mohammed accepted that he had been one of the underground bombers. He admitted that he had carried the device but maintained that he had been given it by Mr Ibrahim so that it would make a noise and that it was to have been left on the underground train to attract maximum publicity. He said that he had helped move some of the hydrogen peroxide used to manufacture the devices and that, on 21 July 2005, he had mixed the hydrogen peroxide and flour and placed it in a container, thereafter attaching metal washers and screws to the device.

61. The trial of the first three applicants for conspiracy to murder commenced in the Crown Court at Woolwich on 15 January 2007 before Mr Justice Fulford and a jury. The applicants stood trial alongside Mr Osman, Mr Asiedu (see paragraph 15 above) and Mr Adel Yahya (accused of taking part in the essential preparation for the attacks). The trial lasted seven months.

62. The applicants' defence at trial, as indicated in their defence statements, was that although they had been involved in the events of 21 July 2005 and had detonated the explosive devices, their actions had not been intended to kill but had been merely an elaborate hoax designed as a protest against the war in Iraq. The bombs had been designed to look realistic and to cause a bang when they went off but had deliberately been constructed with flaws to ensure that the main charge would not detonate.

63. The main issue at trial was whether the failure of the devices to explode was an intentional design flaw (in which case the applicants could not be guilty of conspiracy to murder) or a mistake in the construction of the devices as contended by the prosecution. The prosecution sought to rely on the applicants' answers in their safety interviews to undermine their defence that the events of 21 July were intended as a hoax.

(a) The admissibility of the safety interviews

64. The first three applicants argued that the admission of the statements they had made during their safety interviews at the police station would have such an adverse effect on the fairness of the proceedings that they ought to be excluded pursuant to section 78 of the Police and Criminal Evidence Act 1984 ("PACE" – see paragraph 201 below). Counsel for Mr Omar accepted that the police had had good grounds for conducting the

interviews as they did. Counsel for Mr Ibrahim claimed that the new-style caution included an element of coercion and that his safety interview had gone beyond its safety purpose. Counsel for Mr Mohammed said that the reasons for the decision to hold a safety interview in his case were incapable of constituting reasonable grounds given the fundamental nature of the right to a lawyer. He questioned whether Mr Mohammed's safety interview had been an urgent interview at all and argued that the subject matter of the interview had exceeded questioning necessary for securing public safety.

65. A *voir dire* (a "trial within a trial" to determine the admissibility of evidence) was conducted. As Mr Omar did not challenge the lawfulness of the safety interviews or the manner in which they were conducted, the prosecution was not required to call evidence in this respect. His entire interview process, and in particular the content of his safety interviews, were taken as read. So, too, was the evidence of Superintendent McKenna, the senior officer in charge of the investigation, and the relevant evidence from the custody records. Evidence was heard from, *inter alios*, Superintendent MacBrayne, the interviewing officers and the jailer at Paddington Green police station. The judge also heard submissions from counsel.

66. Superintendent McKenna's evidence was provided in a statement of 5 October 2006 and was as follows:

> "Within hours of the incident on 21 July the investigation had discovered possible identities of three of the four principal suspects. The investigation became more complicated over these first few days due to a number of complicating factors. Some of these were as follows: on Saturday 23 July a further improvised explosive device ('IED') was discovered by a member of the public apparently abandoned ..., suggesting a potential fifth hitherto unknown suspect attacker. A premises in Enfield was discovered linked to two of the known suspects at that time. A large quantity of precursor chemicals was discovered in the vicinity of these premises. The quantity of chemicals appeared to be far in excess of what would have been required to construct the IEDs used during the attacks on 21 July. It appeared that the suspects from 21 July were in receipt of considerable post-event assistance from other unidentified persons.
>
> The net effect of the issues mentioned above was that the need to identify and locate all those involved in the events of 21st was the overriding priority of the investigation. There existed a very real fear that another attack could be mounted, either by those who had carried out the attacks on 21st, or by others, acting separately, but under the same control, or in concert with the suspects from the 21st July."

67. Superintendent MacBrayne gave evidence that he had been aware when granting permission to delay legal advice in the case of Mr Ibrahim that solicitors had been in touch with the custody suite. In his decision to delay legal advice, he had considered the period that a consultation might take but had not necessarily addressed the possibility of a telephone conference. As to the delay between the authorisation to conduct a safety interview and the start of Mr Ibrahim's interview, Superintendent MacBrayne explained that the start time of an interview was a matter for the

discretion of the officers. Once he had authorised an urgent interview, it was not realistic in these circumstances to expect him constantly to revisit the issue and determine when the interview was to occur: some decisions were left to the officers at the police station. Superintendent MacBrayne accepted that before the beginning of the safety interview of Mr Ibrahim it might have been possible for solicitors to see him but said that in his experience such conferences could be extremely protracted. He accepted that a meeting with a lawyer could be interrupted or made the subject of time-limits. In respect of Mr Mohammed's safety interview, Superintendent MacBrayne gave evidence that the need to ask questions was just as great when the interview began as it had been when the interview had been authorised. He explained that he had given the police officers at the station the tools to make the decision as to the precise time the interview should occur.

68. In his lengthy ruling on the *voir dire*, the trial judge held that the statements made during the safety interviews could be admitted. The judge referred at the outset to the explanation given by Superintendent McKenna of the situation which he had faced (see paragraph 66 above). The judge also considered the facilities available in the custody area at Paddington Green Police Station, where the applicants had been taken after their arrest and where the safety interviews had taken place. He noted that the entire custody facilities had been given over to the investigation into the attempted bombings. There were twenty-two cells, rooms for medical and forensic testing purposes and four rooms for consultations between suspects and their solicitors. However, at the time of Mr Ibrahim and Mr Mohammed's safety interviews, eighteen individuals suspected of terrorism offences were being detained at the police station.

69. The judge examined carefully the circumstances surrounding each of the applicants' arrests and safety interviews. Reviewing, first, Mr Omar's case, he noted that counsel for Mr Omar did not allege that the interviews had been oppressive. On the contrary, he said, counsel had accepted that the interviews had been necessary and fairly conducted. The judge noted:

> "30. On all significant issues, it is admitted Omar, from the outset, did not tell the truth in these interviews and, in the result, he did not in any sense assist the police in their attempt to secure the safety of the public. Indeed, the position is quite the opposite ..."

70. The judge observed that, in answering the questions designed to protect the public, Mr Omar had volunteered a very large amount of misleading information. He had not incriminated himself at any stage but had instead told extensive exculpatory lies. The police officers had concentrated on issues that might have revealed information relevant to assisting them to locate people or items that could pose a danger to the public. Although the interviews had been long, it had not been suggested by counsel that the police had exceeded the requirements of what was

necessary and it had been acknowledged that the lines of questioning were relevant to public safety issues.

71. As regards Mr Ibrahim, the judge again reviewed in detail the circumstances of his arrest and questioning and noted:

> "48. ... There were 18 detainees, all arrested for suspected involvement in the events of 21 July ... [T]he overall picture is of an extremely busy police station, and I accept unhesitatingly that it was impractical to enable a telephone conversation to take place between [the duty solicitor] and Ibrahim at the time of her two calls ... The custody sergeants understandably gave priority to 'face-to-face' conferences ... and it was not a realistic option to leave a room free with a telephone socket for telephone conversations with lawyers. [The custody sergeant] accepted, however, that there had been a breakdown in communication in telling the interviewing officers that [the duty solicitor] was trying to get through to Ibrahim on the telephone."

72. The judge noted that the police had approached the issue of undiscovered items from a number of different directions but that at all times Mr Ibrahim had maintained that he did not know of any planned attacks for the future or hidden explosives.

73. The judge then examined the circumstances of Mr Mohammed's arrest and questioning by the police. As regards the gap between his arrival at the police station and the start of his safety interview, the judge referred to Superintendent MacBrayne's evidence (see paragraph 67 above).

74. The trial judge next referred to the statutory framework governing access to legal advice for those held under terrorism legislation (see paragraphs 188-190 and 193-198 below), which made it clear that where a suspect was interviewed without legal assistance, the old-style caution had to be administered because section 34(2A) of the Criminal Justice and Public Order Act 1994 prohibited the drawing of adverse inferences from silence where the suspect had not had access to legal advice (see 195 below). However, the judge considered that this did not extend to preventing the court from admitting evidence of things said by a suspect during questioning, including any lies that he told. The judge indicated that the jury would be told, first, that, contrary to the terms of the new-style caution that had been, on occasion, administered, no adverse inferences could be drawn from the applicants' failure to mention during questioning facts later relied on at trial; and, second, that they should take on board that incorrect cautions had been given.

75. The judge turned to review domestic and Strasbourg case-law on access to legal advice and the right to silence, referring to *John Murray v. the United Kingdom*, 8 February 1996, *Reports of Judgments and Decisions* 1996-I, *Condron v. the United Kingdom*, no. 35718/97, § 60, ECHR 2000-V, *Magee v. the United Kingdom*, no. 28135/95, ECHR 2000-VI, and *Averill v. the United Kingdom*, no. 36408/97, ECHR 2000-VI. He continued:

> "129. In my view, the following conclusions are to be drawn from those decisions of the ECHR. First, legal advice can be withheld for good cause during the early stages

> of interviews, so long as the conditions in which the interviews occur are not significantly coercive (*Magee*) and so long as access is not delayed for an excessive period (*Murray*). Moreover, interviewing a suspect having withheld legal advice and following a new-style caution is not decisive in the assessment of whether there has been a breach of Article 6 [of the Convention] (*Averill*). Rather, the court must look at the circumstances overall and the use to which evidence is put (and including whether adverse inferences are drawn). Accordingly, so long as the overall circumstances have not caused irretrievable prejudice to the rights of the defendant, much will depend on the directions a jury receives as to how they should approach the silence or the statement of a suspect in these circumstances. As the Court made clear in *Averill*, considerable caution is required when attaching weight to the fact that a person arrested in connection with a serious criminal offence and having been denied access to a lawyer during the early stages of his interrogation responds in a particular way – or as in that case, does not respond – to the questions put to him. The need for caution is not removed simply because an accused is eventually allowed to see his solicitor and then refuses to answer questions. A jury must be given a strong and careful warning that they must take into account all of the relevant circumstances; they must have discounted all reasonable ('innocent') explanations for the accused's silence or statements before they consider using this material against him; and the jury must be told to be careful not to accord disproportionate weight to this evidence."

76. The trial judge considered that the applicable code of practice (see paragraphs 181-185 below) and the caution were primarily designed to protect an accused from self-incrimination (both the old and new-style cautions) and to warn him of the consequences if he chose to answer questions (both cautions) and the harm that could be done to his case if he failed to reveal elements of his defence on which he later relied at trial (the new-style caution). Neither the code nor the caution was intended to protect defendants from telling lies. The judge explained:

> "134. ...Whilst I recognise that an accused may benefit from having a solicitor remind him of his moral duty to tell the truth, in my view it is an invalid argument to suggest that an interview is necessarily inadmissible because the suspect did not have the advantage of a consultation with a solicitor, who had been excluded for good cause, in order to tell him that he should not deceive the police. Second, ... it cannot be said that the use of the new-style caution induced any of these three defendants to reveal parts of their defence so as to avoid adverse inferences being drawn during their trial. Instead they told lies."

77. He concluded that, although he had given weight to the absence of a solicitor during the safety interviews and the use of the wrong caution, there had been no significant unfairness or material infringement of the applicants' right to a fair trial. He then went on to consider the specific proceedings in each of the three applicants' cases.

78. As regards Mr Omar, the judge noted that he had been the first of those who had detonated devices to be brought into custody and that he had, therefore, been a person of particularly high interest to investigators. He found that the safety interviews had been conducted expeditiously and that as soon as they had been completed Mr Omar had been given access to a solicitor. The interviews had been neither coercive nor oppressive, as

accepted by Mr Omar's counsel. Although not specifically raised by counsel, the judge further observed that no legitimate complaint could be made as to the overall length of the interviews: in interview, Mr Omar had been suggesting to officers that he had not been involved in the alleged offences, yet it had emerged as the questioning progressed that he knew some of those involved and that he had information as to particular events. The judge continued:

> "141. ... Whether interviews of this kind need to be short or long, or somewhere in between, will depend on all the circumstances. Given the vital subject matter – the need to preserve life and limb and to prevent serious damage to property – the police were entitled in their questions to press and probe, as in any conventional interview, since long experience has demonstrated that although an unhelpful answer may be given initially, systematic but fair questioning can unearth detail which the interviewee was reluctant or unable to provide at the outset. These exchanges are often organic, and although the **reason** for asking the questions should only be to preserve the safety of the public, the **subject-matter** of the questions may perforce include seemingly extraneous matters, so as to enable the officers to approach a given 'safety' issue by a variety of different routes." (original emphasis)

79. Although a breach of the applicable code of practice had occurred when the new-style caution had been administered at the beginning of safety interview C (see paragraph 34 above), the judge noted that this had not affected Mr Omar's attitude to the questioning. He had continued telling lies consistent with what he had said in safety interviews A and B, where he had been correctly cautioned (see paragraphs 30-31 above). The new-style caution had not led him to incriminate himself.

80. As regards Mr Ibrahim, the judge reiterated that by the time he had arrived at Paddington Green police station there had been eighteen suspects in the custody suite, all held under terrorism provisions in relation to the events of 21 July (see paragraph 71 above). He continued:

> "143 ... For the police these were unique and extremely difficult circumstances. They had to ensure that there was no contact or communication between any of the suspects, and with those – such as Ibrahim – who potentially may have yielded 'forensic evidence' elaborate procedures were followed to ensure that evidence of this kind was not lost or contaminated. He arrived at Paddington Green wearing special clothing and the booking-in procedure did not conclude until between 16.12 and 16.20. It would have been impractical for him to speak to a solicitor during that process. At 17.00 and 17.40, when the duty solicitor rang, neither of the two rooms with an appropriate telephone socket was available. The decision to hold a safety interview was recorded in the custody record at 18.10, and Ibrahim was taken from his cell for the safety interview at 19.58. On the evidence, it is clear that there was a breakdown of communication in that the investigating and interviewing officers ... were not told that [the duty solicitor] had been trying to speak to Ibrahim from 17.00. Furthermore, Mr MacBrayne had decided not to delay the interview to enable a solicitor to attend at the police station for a face-to-face meeting prior to any interview because of the length of time such a conference may take. Apart from the risk of delay to the interview, Mr MacBrayne did not object in principle to Ibrahim seeing a lawyer prior to the safety interview.

144. Although the officers could have set a time-limit on any legal consultation at the police station – a possibility that Mr MacBrayne did not address – I am persuaded that the decision to hold a safety interview without waiting for [the duty solicitor] to arrive at Paddington Green Police Station was wholly sustainable. Proper advice in these circumstances could not be given in a few minutes; indeed, for the conference with a solicitor who was new to the case to have had any real value it would have needed to last for a significant period of time. I acknowledge that [the duty solicitor], whose offices were only a little over two miles from the police station, could have attended at short notice, and that there was, in theory, time for a face-to-face conference between 18.10 and 19.58. However, the officers were working under exceptional pressure; it was uncertain as to when the interviews of each of the 18 suspects would occur, given the pressure on facilities; there was considerable demand for the four available solicitor/client conference rooms; and in all the circumstances it was wholly understandable that no officer appreciated that there was time to ask [the duty solicitor] to attend for a meeting with Mr Ibrahim before the safety interview began. Mr MacBrayne gave his authorisation for a safety interview at 18.10 and I do not consider that the unforeseen delay in organising the interview until 19.58, on these facts, constitutes a breach of Ibrahim's rights to consult a solicitor 'as soon as reasonably practicable'. On an assessment of what was reasonable on this highly unusual day, the failure to arrange a face-to-face conference during that less-than-two-hour period, or indeed during the longer period following the first telephone call from the duty solicitor, was not unreasonable. These rights cannot be assessed in a vacuum, but in the light of the circumstances prevailing at the time."

81. However, the judge was of the view that it should have been possible, between 5 p.m. and 7.58 p.m., to ensure that the duty solicitor was given access to Mr Ibrahim by telephone and he accordingly concluded that, to this limited extent, Mr Ibrahim had been incorrectly denied access to legal advice by telephone. However, the judge considered that this error did not involve a material infringement of his defence rights, noting:

"145. ... [T]his infringement of his rights was of low significance: it would have been impossible for [the duty solicitor], in speaking to Ibrahim for the first time over the telephone, to give detailed and informed advice in those circumstances, and she would have been unable to provide material assistance on the decision which he had to take. Although for this defendant the choice was a straightforward one, [the duty solicitor] would have needed to understand the entirety of the main background circumstances before she could give advice that would have been useful to Ibrahim as regards the options confronting him. She could have advised him of his rights, but save for any issues arising out of the misuse of the new-style caution, his core rights had already been made clear to him: he was entitled to legal advice (which had been delayed for public safety reasons); he was entitled to remain silent; and anything he did say may be given in evidence against him. There is no suggestion that he did not understand these straightforward matters."

82. The judge noted again that the use of the new-style caution at the beginning of the safety interview was an error, but he considered that the erroneous use of that caution was a straightforward and wholly understandable oversight on the part of the officers conducting the interview, given the exceptional pressure under which they had been operating. For the reasons already given (see paragraph 78 above), he rejected the suggestion that once an interviewee had given an answer on a

particular issue the officer should have explored the matter no further during safety interviews. Such an approach, he said, could amount to a dereliction by the officers of their duty. He considered that so long as the questioning was fair and so long as its purpose was to address safety issues, the officers were entitled to press and probe in an attempt to unearth useful information relevant to the protection of the public. They were not expected to believe and accept what was said by the detainee, and investigating his motives and attitudes to terrorism could be highly relevant to the question whether there was a subsisting danger to the public. The judge found that Mr Ibrahim's safety interview had been short, that it was not suggested that it had been conducted coercively, that the questions had not gone beyond legitimate questioning for safety purposes and that Mr Ibrahim had seen a lawyer around seven and a half hours after his first request to see one. Finally, he noted that it was accepted by Mr Ibrahim that the conversation which had taken place upon his arrest was admissible (see paragraph 40 above), although its content was disputed.

83. As regards Mr Mohammed, the judge rejected the submission that the holding of a safety interview had not been objectively justified. He was confident that what had taken place had been a *bona fide* safety interview and that the officers had been entitled to conclude that the single question put to Mr Mohammed upon his arrest had not been a sufficient investigation of the potential dangers. The judge again emphasised that the risk to the public of outstanding explosives and conspirators had been considerable and found that it had been "wholly justified" to hold a safety interview without the delay that would have resulted from allowing him access to a lawyer. He repeated that giving proper advice at this stage, from solicitors not previously involved, would in all likelihood have taken a considerable period of time.

84. The judge noted that Mr Mohammed's access to legal advice had been delayed for about four hours, during which time eight minutes of questioning had taken place. There was no suggestion that the interview had been held in coercive circumstances. Aside from the fact of the interview and the terms of the new-style caution, there was no evidence of any pressure having been applied. The judge recorded that Mr Mohammed's stance under questioning had been that he had been wholly uninvolved in the events of 21 July, and that although the officers had pressed him on this for a short and wholly appropriate period of time, he had resolutely maintained that he had no relevant information to impart. The judge was sure that the short interview had not exceeded the legitimate bounds or purpose of a safety interview and had, on the contrary, been focused and appropriate.

85. As to the fairness of the proceedings, in the light of his analysis of the facts, the judge began by citing passages from the House of Lords where their Lordships had referred to the "triangulation of interests" which had to

be considered, namely the position of the accused, of the victims and their families and of the public. Their Lordships had also referred to the fact that individual rights should not be treated as if enjoyed in a vacuum and that the purpose of Article 6 of the Convention was not to make it impracticable to bring those accused of crime to justice. The judge continued:

> "158. Those passages, in my judgment, reveal a critical aspect of the approach that the court should adopt when determining applications to exclude evidence on the basis of suggested unfairness. Trials must be fair, and judges have the obligation of ensuring that the trial process is not undermined by admitting evidence that would defeat that objective. However, the evidence which the defendant seeks to exclude should not be evaluated in a vacuum, and the court should not apply some rigid formula, thereby ignoring the true context of the disputed material. On these applications, the court is called upon to exercise discretion, and that can usually only be achieved if all of the relevant circumstances are taken into consideration. There is no pre-determined result, and each case depends on the application of the relevant principles to the particular facts."

86. The judge emphasised that the right to a lawyer was recognised under domestic and European law as an important safeguard for an accused which should only exceptionally be denied. Where an interview with a defendant who had requested legal representation took place before the opportunity for consultation had been afforded, the court was required to scrutinise the circumstances with great care.

87. The judge considered that the submission that the applicants had been confronted with irreconcilable propositions when asked to participate in the safety interviews merited careful analysis. However, he found that the propositions were not irreconcilable and contradictory. He considered that the three applicants had been confronted with a "stark but clear choice": either they could help the police in the knowledge that what they said might be used against them, or they could protect themselves and remain silent. He noted that they had been warned that failure to reveal elements of their defence later relied on at trial might count against them. He continued:

> "161. ... What is clear beyond doubt is that the defendants were not misled or deceived as to the underlying purpose of the interviews, the possible consequences of answering questions or the potential risks of not revealing elements of their defence: these matters were explained in straightforward language and it has not been suggested that any defendant failed to understand what was said to them ... The change in the words of the caution as regards [Mr Omar] in interview C appears to have passed by unnoticed; certainly, nothing has been advanced to support any argument that it caused confusion or pressure. Centrally, they were told that anything they said may be used in evidence against them ..."

88. The judge noted that the questions posed in the interviews had concerned the construction and detonation of the devices, which the three applicants now admitted. They had, therefore, not been faced with an unfair dilemma: it had been for them to decide at that stage in the unfolding events whether their personal interests or the public interest took priority. The judge further emphasised that the defence that the applicants had chosen not

to reveal at that stage – the truth, as they now maintained in their defence statements – had been directly relevant to the public safety issues and easy to describe. It had not required any detailed understanding of the criminal law or a complicated factual explanation. It could have been summed up by the single word "hoax". The judge accepted that it was sometimes necessary to have the assistance of a lawyer before a suspect could understand and describe a complicated defence, but said that this had not been the case here. He noted:

> "161. ... The defendants might have a more credible position on this issue if they had answered questions in ways which were at least arguably designed to assist the police and which, as a result, incriminated them. However, it is common ground that the defendants either lied or failed to reveal what they knew during these safety interviews: rather than incriminate themselves, they offered false, exculpatory explanations. Having been warned that anything they said may be used in evidence, they chose not to tell the police the truth ..."

89. The judge further found that the invitation to cooperate in the process of protecting the public had not been an impermissible inducement. Finally, he concluded that the new-style caution had not, on the material introduced in the *voir dire*, pressured the applicants into providing any element of their various defences and that they could not validly claim that they had been induced impermissibly into revealing their "true" cases.

90. The judge emphasised again:

> "162. What occurred in London in July 2005 was wholly exceptional; indeed, since the end of the Second World War, the perceived threat to the Capital during that month was without precedent in our national life. When the potential connection was made between the events of 7 and 21 July by the investigating officers, their inevitable concern was that the United Kingdom had become the target of what may turn into a wave of terrorist attacks. Many died on 7 July, and yet more were injured in terrible circumstances, and exactly a fortnight later it seemed that it was merely by good fortune that a repeat event had been avoided. The perpetrators on 7 July were dead and the police had incomplete information about them; when the devices detonated on 21 July, the police had no means of knowing whether yet more were destined to be set off in the near future; and a high priority for those charged with protecting the public was to find and defuse any other bombs and to arrest outstanding conspirators."

91. The judge noted that, among other things, terrorism was usually intended to create chaos and panic and to disrupt the proper functioning of public life. It was, he said, no doubt intended by the perpetrators that the emergency and law enforcement services, faced with events of this nature, would have to function in a highly adverse environment. Indeed, in the absence of evidence to the contrary from the defendants, it was a fair inference that it had been contemplated by the defendants that they would cause a considerable strain to, or breakdown of, the normal and proper administrative procedures in multiple fields, thereby maximising the effect of their terrorist event. This conclusion applied equally, the judge said, whether the devices were intended to kill and maim or to be hoax devices

which only partially detonated. The resort by the police to safety interviews, the delays in providing access to lawyers and the mistakes as to the caution were "a direct and unsurprising result of the defendants' deliberate actions".

92. In his conclusion to his ruling, the judge noted that the applicants had, by their own admission, caused the wholly exceptional and stressful environment within which the police had been forced to operate and that had led to the need to hold safety interviews. Further, instead of assisting the police in their understanding of the extent of the continuing risk, or lack of one, they admitted that they had availed themselves of this opportunity to tell a series of highly misleading, exculpatory lies. It was not suggested that they had failed to understand that they had the right to remain silent, or that they were unfit to participate in the interviews.

93. The judge set out in detail the approach he had adopted to the exercise of his discretion whether to exclude the evidence. In particular, he had given full weight to the principle that access to legal advice before and during questioning was one of the most fundamental rights that should only be denied on reasonable grounds in particular cases. He had borne in mind the need for the court to have regard to the fact that the police should have the systems in place and the resources available to enable them to investigate all crime efficiently. That said, he added, the police could not be expected to anticipate and make provision for every kind of exceptional eventuality, particularly if the chaotic event in question had not occurred before. Further, in determining the admissibility of the statements, the court was fully entitled to weigh in the balance the fact that it had been necessary to conduct the interviews and that the state of affairs that had led to the denial of legal advice was the direct result of the applicants' deliberate action.

94. The judge said that he had also taken into consideration the fact that the environment in which the applicants had been held had not been in any true sense coercive; indeed, he said, the opposite was the case. The applicants' dietary and religious needs had been punctiliously catered for and their fitness for interview carefully assessed. It had not been suggested that the questioning was oppressive or unfair. While the judge accepted that the erroneous administration of the new-style caution had involved a level of indirect compulsion, this was not, in his view, decisive: the choice for the applicants had been an easy one and they had not been induced by the caution to incriminate themselves but had instead told deliberate, exculpatory lies.

95. The judge explained that he had also taken into account that the evidence of the safety interviews was potentially of high relevance to the central question raised in the trial, namely whether the defences now advanced were possibly true. He said that it was not, therefore, "marginal or unimportant evidence" but instead could provide the jury with considerable insight into the true intentions of the defendants. So long as it was fair to

each defendant to introduce the safety interviews in his case, it was, the judge said, strongly in the public interest for the material to form part of the evidence bearing in mind the "triangulation of interests". He therefore concluded that there had been no material infringement of the right of any of the applicants to exercise their defence rights. None of the applicants had needed the presence of a lawyer as a counterweight to anything adverse that had happened during their detention or safety interviews. The use of the wrong caution had not, on the facts, undermined the protection against self-incrimination. Moreover, there was nothing unfair in admitting the evidence given the circumstances analysed in detail in the ruling. Having thus weighed the requirements of Article 6 of the Convention, the judge ruled the interviews admissible in their entirety. He noted that "carefully crafted" jury directions would be necessary and that these would be discussed with counsel in due course.

(b) The other prosecution evidence

96. Aside from the statements made in the safety interviews, the prosecution led evidence that the applicants had extremist views. They relied on books and printed material, audio material, including the last message of the 11 September 2001 suicide bombers, and video material showing beheadings and other atrocities, including homemade films, found at the residences of Mr Omar and Mr Osman. There was evidence that the first three applicants and Mr Osman had attended a training camp in the Lake District in May 2004 and there was a clear inference that the purpose was training for Jihad. Mr Ibrahim had spoken of training for Jihad in Afghanistan or Iraq in summer 2004 and at the end of 2004 he had left the United Kingdom to go on Jihad, returning in March 2005. Some of those who had gone with him had not returned and were presumed to have been killed. There was evidence that Mr Omar had tried to convince an outsider to the group of the legitimacy of suicide bombings and other terrorist activity and had made clear that he supported murderous operations carried out against the United Kingdom and the United States, expressing support for the 11 September 2001 suicide bombings. In early 2005, he had shouted at an imam of a mosque who had condemned suicide bombings in Pakistan that he should not "mislead the people". Also introduced as evidence were jottings referring to martyrdom on the same pad of paper that had been used to note the amount of materials supposed to go into each bomb.

97. The prosecution further relied on evidence as to the purchase of the material for the bombs and their preparation. Between April and July 2005, Mr Ibrahim, Mr Omar and Mr Asiedu had purchased 443 litres of liquid hydrogen peroxide at 18 per cent concentration, the highest concentration available to the public, in a total of 284 containers. There was evidence that they had requested liquid hydrogen peroxide at 60 or 70 per cent strength. The prosecution contended that they had boiled the lower-strength hydrogen

peroxide to increase its concentration. Of the 228 empty bottles later recovered, 36 had handwritten markings on them with the figure of "70" or "70%", which the prosecution contended was proof that the defendants believed that the requisite concentration for explosion had been reached. Handwritten calculations and notes in Mr Ibrahim's handwriting were also relied upon. A rota showed over 200 hours' work boiling the hydrogen peroxide. The prosecution's expert gave evidence that TATP was a suitable primary explosive for use in a detonator. Evidence was led that shrapnel had been attached to the outside of the plastic tubs. This would have increased fragmentation upon explosion and maximised the possibility of injury.

98. Both prosecution and defence experts agreed that the bombs were not viable. The prosecution's expert explained that this was because the hydrogen peroxide, at 58 per cent concentration, had not reached the necessary concentration required for explosion. He pointed out that if the purpose had been a hoax, no increase in concentration would have been necessary. In response to the defence claim that the hydrogen peroxide had been concentrated and then diluted again with tap water (see paragraph 101 below), he explained that his analysis of the isotope composition of London tap water showed that this was not possible, a conclusion not disputed by the defence expert.

99. The prosecution also referred to a vast body of telephone and CCTV evidence of extensive contacts between the men from March 2005. A farewell letter written by Mr Mohammed, which the prosecution alleged was a suicide note, was also admitted. A witness gave evidence that he had received the letter on 21 July 2005 from Mr Mohammed's brother and had been asked to pass it on to Mr Mohammed's partner. A tripod for a video camera had been found in Mr Mohammed's residence. Mr Mohammed's fingerprints were on the tripod box and Mr Osman's fingerprints were on the tripod. An empty box for a video camera had been recovered in Mr Osman's residence and a video camera had been found in his possession when he was arrested in Rome. The prosecution alleged that the camera had been used to film a suicide video in Mr Mohammed's residence, although no such video was ever found. The jury also heard evidence from passengers on the trains where three of the bombs had been detonated as to the applicants' behaviour. In respect of Mr Ibrahim, the bus driver gave evidence of his unusual behaviour in boarding the bus. Finally, the prosecution referred to the lack of any credible plans for what was to happen after the detonations.

100. Copies of the custody records were provided to the jury.

(c) The defence evidence

101. The first three applicants gave evidence to the effect that their actions had been intended as a hoax. They had initially planned to leave the bombs unattended in public to make a point about the Iraq war. After the

events of 7 July, the plan changed to detonating the bombs but not the main charge of hydrogen peroxide. To this end, they claimed that although they had tried to concentrate the hydrogen peroxide by boiling it, they had then watered it down so that it would no longer be at the necessary concentration for an explosion.

102. Mr Omar said that he had told the truth and lies during his safety interviews. He said that he had been truthful as regards the potential harm to the public, but he had not wanted Mr Ibrahim and Mr Mohammed to be killed by the police and so had not provided their true names or locations. He alleged that he had been told that he had better cooperate and had been afraid that he might be tortured, so he had told the officers what they wanted to hear.

103. Mr Ibrahim explained that he had not said, during his safety interview, that it was a hoax because he had known that he was supposed to get advice from a solicitor and had thought that there was something going on. He accepted that there had been no problem for him to say during the interview that it had been a hoax. He also agreed that seeing a solicitor would not have affected his decision as to whether he should tell the truth or whether he would lie. He said he did not trust the police and, despite the fact that the interview was being tape-recorded, he had believed that they would twist his words. He said that he had tried to protect his coaccused, that he had simply been talking for himself and that he had been confused at the police station and had not known what to say. He had been aware of the purpose of the safety interview, having been told that it was about protecting the public from suicide bombers. He explained that he had felt that he had to answer questions because it was a safety interview designed to save lives, although he had understood that he did not have to speak unless he wanted to. He had not admitted his involvement in making the TATP because he had been directing his answers at the concern as to any outstanding risk to the public. He agreed that he had claimed not to know his coaccused but explained that he had done this because he had not wanted to incriminate anyone. He said that he had decided not to say anything about his case and the plan until he had seen his solicitor; he had been concerned that if he had mentioned the hoax his words might have been misinterpreted or twisted.

104. Mr Mohammed explained his farewell letter, saying that it had in fact been written on 23 July 2005 after the shooting of the man mistaken for one of the suspects (see paragraph 17 above) because he had thought that he too would be shot by the police. It was pure coincidence that it had been written on the same pad as that used for the detonator. As regards the safety interview, Mr Mohammed said that he had understood that he did not have to speak unless he wanted to, but had thought that he had to talk because it was a safety interview designed to save lives. He explained that he had wanted to see a solicitor but had been interviewed without one. He agreed

that by the time that the interview had taken place, he had no longer feared that he would be killed, but said that he had thought that he would be harmed. That, he said, was the sole reason for the lies he had told during the interview. He had said that he was not involved because he had thought that the police officers did not know who he was and that if he denied everything he would be permitted to leave the police station and go home. He said that the statement prepared after he had spoken to his solicitor (see paragraph 56 above) was partially true and partially false. He had not told the whole truth because he had not received legal advice, had felt under pressure and had been upset.

105. Like the first three applicants, Mr Asiedu's case prior to trial was that the events of 21 July 2005 had been a hoax. However, after Mr Ibrahim had given evidence, Mr Asiedu gave oral evidence and changed his previous position. He claimed to have learned on the morning of 21 July 2005 that the devices were real bombs. He had been too confused and frightened to refuse the device that had been handed to him but, in accepting it, he had not intended to join or play any part in the conspiracy.

(d) The summing-up

106. The judge provided copies of his summing-up to counsel in advance of delivery and invited comments from them on its content. During his summing-up to the jury, delivered orally after copies had been distributed to jury members, the judge gave the following direction in respect of the statements made in the safety interviews:

> "What about the lies, members of the jury, told by some defendants to the police? It is admitted that the defendants Ibrahim, Asiedu, Omar and Mohammed lied to the police in different ways during their interviews ... [B]efore you even begin to take any lies into consideration, you must pay careful attention to the circumstances in which the lies were told and those circumstances vary between the defendants.
>
> First, you will recall that because of the exceptional circumstances that existed in July 2005 safety interviews were authorised in the cases of Ibrahim, Omar and Mohammed. That meant that those defendants were questioned in an attempt to preserve the safety of the public before they had the opportunity of consulting with a solicitor. It is not alleged by anyone that legal advice was denied by the officers as a result of bad faith or dishonesty. However, access to legal advice prior to interview is a right that is usually afforded to a suspect and you should take into consideration that this did not happen. For instance, a solicitor may have advised the defendant in question to remain silent or they may have reminded the defendant that he should tell the truth and that there may be consequences if he lied. Therefore, when considering whether to hold any lie told by those three defendants during a safety interview against them, remember that this safeguard with these safety interviews was withheld."

107. The judge also directed the jury to bear in mind that incorrect cautions had been used. He explained:

"As a result, it was confused and potentially confusing for all three defendants. The new-style caution that was administered may have put inappropriate pressure on them to speak. When considering whether or not to hold any lie told by a defendant during a safety interview against him, take into account, therefore, that unsatisfactory history as regards the use of the caution.

However, as regards the use of the new-style caution, you are also entitled to bear in mind that none of these three defendants were in fact pressurised into revealing anything that they have later relied on in this trial. To the contrary, on all or most material issues they lied."

108. In respect of those lies, the judge observed:

"In addition, for Ibrahim, Asiedu, Omar, Osman and Mohammed when assessing lies they told whilst in police custody, whether in a safety interview or otherwise, you should consider two further questions: on the particular issue you are considering, you must decide whether the defendant you are considering did in fact deliberately tell lies. If you are not sure he did, ignore this matter on that issue. If you are sure, consider why did the defendant lie on that issue. The mere fact that a defendant tells a lie is not in itself evidence of guilt. A defendant may lie for many reasons and they may possibly be innocent ones in the sense that they do not denote guilt. It is suggested here that lies were told for a variety of reasons: out of fear of admitting a degree of involvement or knowledge but which the defendant says falls short of his being a conspirator, that is Asiedu; to protect others who they feared would be falsely accused and might be killed or injured as a result; out of fear of admitting involvement, as they claim, in a hoax attack, or out of panic, distress, confusion, or from fear of being assaulted.

...

If you think that there is, or may be, an innocent explanation for the lies told by the defendant you are considering, then you should take no notice of them. It is only if you are sure that he did not lie for an innocent reason that his lies can be regarded by you as evidence supporting the prosecution case, subject to the other directions I have just given you on this issue relating to the safety interviews."

109. Concerning the failure of the applicants to mention during the safety interviews the defence led at trial, the judge directed as follows:

"Let us turn then to the failure of the defendants to answer questions in interview. The first matter to stress is that you must not hold it against Ibrahim, Omar and Mohammed that they failed to mention during the safety interviews matters which they later relied on in court. That is because, as I have just explained to you, access to a lawyer had been denied at that stage and the law is that in those circumstances a defendant is not to be criticised for failing to mention matters that later form part of his defence. Of course it follows from the direction I have just given you about lies that if instead of remaining silent they told lies, you are entitled to take those untruths into account, subject always to the matters I have just directed you to take into account ... [M]y clear direction to you is that you must not hold it against Ibrahim, Omar and Mohammed that they failed to mention during the safety interviews matters which they later have relied on in this court."

110. As regards Mr Omar's safety interviews, the judge said:

> "On all significant issues it is admitted by Omar that from the outset he did not tell the truth, indeed quite the opposite ... Members of the jury, he denied any responsibility for these devices ...
>
> Over and again he protested that he was telling the truth and that he had told the police all that he knew. Members of the jury, the wrong caution did not lead him in fact to incriminate himself at all in the sense of being compelled to reveal what he says is his true defence, but instead he told a series of exculpatory lies."

111. The judge reminded the jury of Mr Omar's explanation for his conduct during the interviews (see paragraph 102 above). He further noted that Mr Omar's counsel accepted that the police had been genuinely concerned for the public, that they had been concerned to prevent a further attack and that Mr Omar's access to legal advice had been delayed as a result. The judge reminded the jury that in normal circumstances, Mr Omar would have been advised by a lawyer prior to interview. Had this been done, he said, Mr Omar might have conducted the interview somewhat differently. The judge noted that counsel accepted that all the safety interviews had been conducted moderately and there was no suggestion that they had been conducted oppressively.

112. Next, the judge reminded the jury of the circumstances surrounding Mr Ibrahim's arrival at the police station, noting that at 5 p.m. the duty solicitor had called and asked to speak with him. The judge continued:

> "[She] was told that Mr Ibrahim was not available and that was because the two reception rooms with telephone sockets were being used and they may have been used for consultations, fingerprinting, booking in or signing forms. They had at least seventeen prisoners and there was a horrendous pressure on rooms. Unusually, the whole of the custody suite was being used – it was in lockdown mode – for terrorist detainees as of 5.05 p.m. on 28 July. It was the busiest they had ever been. The detainees had to be prevented from seeing or speaking to each other and they had to be carefully supervised and they had to restrict the opportunities, and this restricted the opportunity to move prisoners."

113. The judge noted that the duty solicitor had called back at 5.40 p.m. and had again been told by a police officer that no rooms were available. The judge added:

> "[The police officer's] only option was to wait for one of those rooms to fall free and then to call the solicitor back. However, it was for the investigating officers to prioritise who should use the room."

114. The judge reminded the jury of the reasons why a safety interview had been authorised and of the evidence of Superintendent MacBrayne:

> "He told you that there was at least one outstanding individual. He was fearful that there might be a further suicide attack. He needed to gain information to prevent a further act of terrorism and to arrest perpetrators. He had been in communication with the investigating officers. They were very busy and this was a large-scale terrorist investigation. Urgent interviews, he said, are very rare and he contemplated that this would take place before the detainee saw his solicitor.

> He would not have objected to a telephone or a face-to-face interview, so long as it did not delay the interview. He accepted that they could limit the length of time of the consultation. It was for the investigating officer and the custody officer to make the decision as to whether or not there could be a solicitor/client consultation before the interview."

115. The judge reminded the jury of Mr Ibrahim's explanation for his conduct during the safety interviews (see paragraph 103 above).

116. Finally, the judge told the jury that he had found that between 5 and 8 p.m., Mr Ibrahim should have had telephone contact with a lawyer. He instructed the jury to bear in mind that he had been incorrectly denied telephone legal advice during that period.

117. In respect of Mr Mohammed, the judge reminded the jury of his evidence as to why he had lied during the safety interview and in his statement prepared after receiving legal advice (see paragraph 104 above).

118. As regards the later interviews that took place after the applicants had seen their legal representatives and had received the new-style caution, the trial judge directed the jury that the applicants had failed to give an account of three matters that they relied on at trial, even though they had been asked questions about them in interview, namely (i) the true events leading up to 21 July 2005; (ii) their knowledge of and association with their coaccused; and (iii) their true state of mind, purpose and intention in relation to the deployment of the bombs. He explained that the failure to mention these matters during the interviews which had taken place after they had received legal advice could be held against them.

(e) The verdicts and sentences

119. On 9 July 2007 the jury unanimously convicted the first three applicants and Mr Osman of conspiracy to murder. The jury was unable to reach verdicts in respect of Mr Asiedu and Mr Yahya and a retrial in their cases was ordered. They subsequently pleaded guilty to lesser charges.

120. On 11 July 2007 the first three applicants and Mr Osman were sentenced to life imprisonment with a minimum term of forty years' imprisonment.

3. The appeal of the first three applicants

121. The first three applicants sought leave to appeal against their convictions. They argued *inter alia* that the trial judge had erred in his ruling admitting the evidence of the safety interviews.

122. On 23 April 2008 the Court of Appeal refused leave to appeal against conviction.

123. Setting out the background to the applicants' arrest and questioning, the court observed:

> "5. ... It is virtually impossible to imagine the pressure and concerns which must have been felt by the police investigating teams. Two weeks earlier four bombs had

been successfully detonated with the dreadful consequences with which we are familiar, and they were now faced with four more bombs, again in the transport system, which had been detonated, but failed to explode. The bombers involved on 7th July had perished, but the perpetrators of the second intended atrocity were at large, free to repeat their murderous plans, and to do so more effectively. They had to be found and detained, and the immediate objective of the investigation, including interviews of those arrested in connection with these incidents, was directed to public safety."

124. The Court of Appeal expressed, at the outset of its judgment, the following, general conclusion as to the nature and conduct of the trial:

"7. It is axiomatic that every defendant, even a defendant alleged to be involved in direct and dangerous violence on the citizens and institutions of this country, is entitled to a fair trial at which his guilt must be proved. This trial was marked with conspicuous fairness and commanding judicial control by Mr Justice Fulford. The defendants were represented at public expense by leading counsel of distinction and experience, with absolute clarity about their professional responsibilities both to their clients, and to the court. The jury's difficulty in agreeing verdicts in relation to Asiedu and Yahya demonstrates that they approached the issues with the open-minded fairness and lack of prejudice which is one of the customary characteristics of the jury system. Now that the applicants have been convicted after a fair trial before an impartial tribunal, we are entitled to record, after a lengthy examination of the evidence, that their defences to the charge of conspiracy to murder were ludicrous."

125. The court summarised the evidence against the applicants presented at trial, including evidence of their extremist views, the purchase of the hydrogen peroxide and construction of the bombs and the letter written by Mr Mohammed (see paragraphs 96-99 above). It considered that the history of the purchase of the hydrogen peroxide in such vast quantities "[told] something of the commitment of the purchasers". The handwritten marking on the recovered bottles provided "compelling evidence" that the manufacturers of the bomb had believed that the critical strength had been achieved, and there was "overwhelming evidence" linking all four bombers with the construction of the bombs. As to the applicants' defence at trial, the Court of Appeal made the following observation:

"17. If these were hoax bombs we find it hard to conceive why it was necessary for the peroxide to be boiled in order to increase its concentration, or why both Asiedu and Yahya, independently, when buying hydrogen peroxide asked for it to be supplied at 60-70% strength, or the highest available percentage. Equally, it is astonishing to imagine why nearly 100 gallons of hydrogen peroxide was needed unless its purpose was to increase its strength. The handwritten figures '70' or '70%' of 36 bottles made devastating evidence. Each one demonstrated that the manufacturers of the bombs believed that they had in fact achieved the critical concentration necessary to ensure that the bombs exploded. Indeed a significant part of the trial was taken up by the efforts by applicants to explain away this crucial evidence. In very brief summary it was contended that after the concentration in the hydrogen peroxide had been increased, it was then watered down. Moreover it is difficult to understand how any political point, if that was all that was sought to be made, could be improved by the incorporation of shrapnel within the bomb. The shrapnel was intended to cause death and maiming. There could be no other purpose. And if this expedition were intended

> as a hoax or a political demonstration, there was a remarkable silence from the applicants themselves after they had made their escapes. If their objective was a hoax, half a moment's attention to the outpouring of the news about the unsuccessful bombings would have demonstrated that their objective had been achieved. Yet no such assertion or claim or explanation was given or offered to the police or the media or the public before any of the applicants was arrested."

126. In respect of the impact of the admission of the safety interviews, the court noted that this had been the subject of challenge before the trial court and constituted the first ground of appeal. The court explained that it would return to a detailed consideration of the issue later in its judgment and commented:

> "20. ... At this stage we simply record that if the records of the police interviews were properly admitted, they were sufficient, on their own, utterly to undermine the 'hoax' defence."

127. Concluding its opening remarks, the court referred to the trial judge's summing-up and directions to the jury, noting:

> "29. Fulford J summed up the case to the jury. The most superficial glance reveals that it was the product of characteristic thoroughness and accuracy. Save in relation to minor and wholly unsubstantiated arguments, it is not criticised by counsel on behalf of the applicants. The essential contentions advanced by counsel are directed at the judge's decisions in relation to the police interviews ..."

128. The court then turned to the facts of the case. It considered, first, the facilities at Paddington Green Police Station, noting that it had been imperative to ensure that there was no means of communication between suspects and that cross-contamination in the course of searches of suspects had to be avoided. It explained that the urgent need to address the understandable fears identified by Superintendent McKenna in his October 2006 witness statement (see paragraph 66 above) involved two distinct considerations: first, the lawful arrest and detention of those believed to be responsible for the terrorist attack; and, second, immediate public protection from any further violent incidents. The court observed that those suspected of terrorist offences, if rightly suspected, were likely to be able to provide assistance to investigating officers performing their responsibilities for public safety. It was therefore of the view that an interview process which, so far as possible, enabled the police to protect the public was a necessary imperative. It considered that the question whether the results of such interviews should be used as evidence against the suspects was delicate. However, it did not accept that the evidence of safety interviews should never be admitted at trial, explaining:

> "36. ... The circumstances in which it is directed by a senior police officer that safety interviews should take place are operational, in short, how best, in a situation of immediate urgency, to secure public safety. The pursuit of this objective with a suspect who is invited to provide the police with relevant information may produce crucial evidence incriminating him in the offence for which he has been detained, or indeed other offences. The admission of the safety interviews or their fruits, in

> evidence at a subsequent trial is subject to the ordinary principles governing a fair trial, and the over-arching provisions in section 78 of The Police and Criminal Evidence Act 1984 (PACE). Much would turn on the nature of the warning or caution, if any, given by the police to the suspect. Thus, for example, if the suspect were to be assured in terms that any information provided by him would not be used against him, that would provide a powerful argument against the admission of incriminating evidence obtained in consequence. Much, too, may turn on whether the interviews produce evidence directly relevant to the charge which led to the suspect's original detention, or whether the first connection that the prosecution may establish against him with any offence arises directly from his full co-operation with them during the course of the safety interview. As ever, these will be fact-specific decisions, to be made in the overall circumstances of each individual case. What however is clear is that the legislative structure does not preclude the use of the evidence obtained in safety interviews and, given the existing safeguards available to a defendant and the obligation on the trial judge to make the judgment necessary to enable him to exercise his discretion under section 78 of PACE, it would be wholly inappropriate for this court to impose the kind of self-denying ordinance which the submission based on public policy grounds would require."

129. The court emphasised that the safety interviews had not revealed anything which could have led the police to take steps to protect the public and that none of the applicants had said anything which directly incriminated them, or involved any confession to participation in, or even remote knowledge of, the conspiracy to murder on 21 July. Nevertheless, it noted, the interviews provided important evidence against the applicants, not because they had told the truth and revealed knowledge of or involvement in terrorist activity, but because they had made a number of demonstrably untrue assertions without suggesting the defences that they later advanced at trial. In that sense, the interviews had produced material on which the prosecution proposed to rely to undermine the applicants' credibility.

130. The court accepted that, owing to police error, incorrect cautions had been administered to the applicants before they had told the lies in question. However, it emphasised that each of the men had been warned that the answers given in the safety interviews might be used in evidence against him. The court continued:

> "37. ... So they were under no illusions. They did not purport to incriminate themselves at all. They chose to lie. On any view that was an important consideration in the exercise of Fulford J's discretion."

131. The court was satisfied that the exercise of discretion by the trial judge had been fully informed and defendant-specific, and that he had approached the relevant issues with care. It examined in detail and approved of the trial judge's comments as to the choice facing the applicants during questioning and the nature of the circumstances in which the interviews had taken place, and his approach to the exercise of his discretion (see paragraphs 87, 90 and 93 above). It reviewed at length the circumstances of each of the first three applicants' arrests and questioning.

132. As regards Mr Omar, the Court of Appeal noted that he had been the first of the defendants to be arrested and that, as a consequence, what he had had to say had been of absolutely crucial importance to the stark public safety issues confronting the police at the time. It observed that during the *voir dire*, it had been expressly accepted that the decision to hold a safety interview before Mr Omar was granted access to a lawyer had been a valid decision under Schedule 8 of the Terrorism Act 2000 (see paragraphs 64-65 and 68 above and 189 below), that the interviews had been conducted fairly and moderately, and that they had been neither coercive nor oppressive. At trial it had been conceded that, although the safety interviews had been long interviews, the police had not pursued their objective of identifying potential public dangers in a way which had been excessive, that the questioning and length of interviews had not been unfair and that the questions had been focused on public safety issues. At the *voir dire*, the prosecution had not, therefore, been required to call evidence: the statement of Superintendent McKenna and the content of the safety interviews had been taken as read (see paragraph 65 above). Had Mr Omar questioned the reasons for the decision to delay legal advice, the prosecution would have been entitled to call evidence to explain why the police had believed Mr Omar to be a terrorist. The court continued:

> "75. ... For good and understandable forensic reasons, these issues were not raised at trial. Instead, the essential submission on behalf of Omar on the *voir dire* was that any interview which followed denial of access to a solicitor was inadmissible, and that telling lies in the course of a safety interview should be equated with a failure to mention facts ... In any event the mistaken use of the 'new style' caution failed to give adequate protection to Omar because, properly understood, it would have led him to believe that if he chose not to answer questions his silence could not be used against him."

133. Having explained how the trial judge dealt with these submissions, the Court of Appeal then observed that it was now faced with an altogether different submission from Mr Omar. It was argued that the entire issue of the safety interviews had been mishandled by Mr Omar's trial counsel and that it had been inappropriately conceded that Superintendent McKenna's decision was lawful. The court noted that this was not a retrial, yet it was nevertheless being invited to reconduct the *voir dire* on the basis of counsel's submission that, so far as Mr Omar was concerned, the police had acted unlawfully and that their unlawful activity, which had been overlooked at trial, required to be addressed now. It continued:

> "80. ... Expressed in this way, in a system in which the rule of law must prevail, the submission is superficially attractive. However it ignores or sidelines two important further considerations. First, breaches of the relevant Code do not make subsequent police actions unlawful, at any rate in the sense that they are or would be sufficient of themselves to lead to the exclusion of the results of the subsequent interviews. When, as the judge found, the police were not seeking deliberately to manipulate the system in bad faith, he was required to address the exclusionary powers provided by

> section 78 of PACE: no more, no less. This leads to the second consideration, that it is always open to the defendant's advocates at trial to make a deliberate forensic decision to waive or ignore, and therefore choose not to rely on the breaches of the relevant Code, if the effect of inviting attention to them may increase rather than diminish the defendant's difficulties. In short, the trial advocate must make his own judgment whether to advance argument based on breaches of the relevant Code, or to argue some, or one, but not all of them."

134. In the absence of bad faith, the crucial question was whether to admit the results of the interviews when Mr Omar had been deprived of access to his lawyer, irrespective of whether Mr Omar had been denied the right to have a solicitor contacted as soon as he asked for one. The court could see nothing to support the conclusion that the decision to admit the evidence of the safety interviews in Mr Omar's case had been flawed.

135. In respect of Mr Ibrahim, the court noted that three submissions had been advanced by his counsel. First, it had been argued that the superintendent's conclusion that a pre-interview consultation between Mr Ibrahim and the duty solicitor would cause unnecessary delay had been a serious error of judgment because the safety interview had not taken place until over an hour later. Second, it had been contended that the continued questioning of Mr Ibrahim after he had denied knowing anything had constituted a breach of the applicable code (see paragraph 196 below). Finally, it had been submitted that the administration of the new-style caution had contributed to the unfairness by introducing an element of coercion. The Court of Appeal explained in detail how the trial judge had approached these matters and concluded that it saw no basis for interfering with his decision that the statements made during safety interview should be admitted.

136. As regards Mr Mohammed, his counsel had submitted that the entitlement to access to a solicitor before and during his safety interview had been breached. The decision to delay such access was said to have been improper and unfair, and on close analysis, unreasonable. Although bad faith had not been alleged at trial, counsel now suggested that the interview had not been an urgent interview at all since it had started while the solicitors had been on their way to the custody suite. There had therefore been no reason not to delay the interview. Moreover, he had been given the new style caution rather than the old-style caution. The Court of Appeal explained how the trial judge had approached these matters and concluded that it saw no basis for interfering with his decision that the admission of the evidence of the safety interview would not render the trial unfair.

C. The case of the fourth applicant

1. The fourth applicant's questioning by the police

(a) Introduction

137. The fourth applicant was a friend of Mr Osman, having been introduced to him by Mr Osman's brother, Mr Abdul Sherif, in around 1999. On 23 July 2005, two days after the attempted bombings, the fourth applicant met Mr Osman at Clapham Junction train station. The two men returned together to the fourth applicant's home. Mr Osman stayed with the fourth applicant until 26 July.

138. Meanwhile, on the afternoon of 25 July a surveillance camera was filming the entrance to the fourth applicant's block of flats. The camera subsequently zoomed in on the fourth applicant and his flat. At 6 p.m., an undercover surveillance officer was deployed in the vicinity of the fourth applicant's home. On the morning of 26 July, officers observed the fourth applicant and a man later identified as Mr Osman leaving the address. The fourth applicant accompanied Mr Osman to a bus stop, where Mr Osman caught a bus to Waterloo train station. The fourth applicant returned home.

139. On the morning of 27 July the fourth applicant went to work. When he was returning from work at around 5.30 p.m., he was approached by two police officers who sought his assistance as a potential witness in their investigation into the 21 July attacks. He agreed to assist them and accompanied them to Kennington Police Station.

(b) The police interviews as a witness

140. The police officers began interviewing the fourth applicant as a witness at 6.15 p.m. By about 7.15 p.m. the officers considered that, as a result of the answers he was giving, he was in danger of incriminating himself and should be cautioned and informed of his right to legal advice. They sought instructions from senior officers. They were told that they should continue to interview the fourth applicant as a witness and accordingly did so.

141. At about 12.10 a.m. on 28 July, the fourth applicant was taken to point out an address where he believed Mr Osman lived.

142. Between 1.30 a.m. and 5 a.m. on 28 July, at the police station, a witness statement was taken from the fourth applicant.

(c) The witness statement

143. In the statement, the fourth applicant recounted how he had become friends with Mr Osman in around 1999 but had lost contact with him the following year. He stated that, on 23 July 2005, Mr Osman had come running up to him at Clapham Junction railway station as he was about to board a train, and the two men had greeted each other as old friends. They

had boarded the same train to Vauxhall and at the fourth applicant's stop, Mr Osman had decided to alight with him on the pretext of wishing to speak about something. As they walked towards the fourth applicant's home, Mr Osman had told the fourth applicant that he was in trouble with the police. He claimed to have stolen some money and to have escaped from police custody. When they arrived at the fourth applicant's flat, Mr Osman had asked him to put on the television, and together they had watched a report of the attempted bombings which showed photographs of the men sought by the police. Mr Osman had then said that he knew the men and that they were good men. When the photograph of a fourth man sought in connection with the attacks had appeared on screen, Mr Osman had pointed at the screen and said, "that's me". At first the fourth applicant had not believed him since the photograph did not resemble Mr Osman. But as Mr Osman had continued to discuss the justification for the attacks, the fourth applicant had begun to realise that he was telling the truth. He had become frightened and had wanted Mr Osman out of his home. Mr Osman had then asked to stay with the fourth applicant for two nights and, fearing for his personal safety if he refused, the fourth applicant had acceded to the request.

144. The witness statement also described an injury to Mr Osman's thigh, which he had said was incurred while escaping after his bomb had failed to explode. Mr Osman had further explained how he had pressed the button to activate his bomb but nothing had happened. He had given details of his escape from the underground train and his movements over the next two days, when he had gone to stay with a friend in Brighton who had lent him a car. He had shown the fourth applicant photographs of the other bombers in a national newspaper which he had brought with him and revealed their names. The police showed the fourth applicant a number of photographs and he confirmed the identities of three of the males photographed according to the information provided by Mr Osman. The fourth applicant also explained that Mr Osman had mentioned a fifth bomber who had not detonated his bomb; the fourth applicant did not know the identity of this person. The fourth applicant explained that Mr Osman had made a few calls from his mobile phone, but had spoken in Eritrean.

145. The statement went on to explain that the next day, conversation with Mr Osman had been limited. However, he had told the fourth applicant how the bombers had prepared their bombs and had given him details of videos the group had recorded prior to the bombings, in which they had explained their actions. Mr Osman had made another call on his mobile in the afternoon. He had gone out briefly later that night and had returned with cash. He had asked to borrow clothes and the fourth applicant had indicated that he should help himself. On the morning of 26 July Mr Osman had packed a bag and told the fourth applicant that he was going to catch a Eurostar train to Paris from Waterloo train station. He had left for the

station at around 8 a.m. and about an hour later had called the fourth applicant to say that he was on a train. The fourth applicant had then switched off his mobile telephone so that Mr Osman could not contact him any further.

146. In the statement, the fourth applicant described Mr Osman's wife and recorded the fact that he had taken police officers to a block of flats where he believed that Mr Osman and his wife lived. He concluded the witness statement by emphasising that it had been a chance meeting at Clapham Junction and that he had not taken part in any arrangement to assist or harbour Mr Osman. He said that he had only let Mr Osman stay because he had been afraid.

(d) The interviews and statements as a suspect

147. After the witness statement had been signed on the morning of 28 July 2005, one of the officers telephoned his superiors to seek further instructions and was told to arrest the fourth applicant. The fourth applicant was arrested and cautioned. He was asked whether he wanted the services of a solicitor but declined saying, "No, maybe after interview if it gets serious".

148. On 30 July 2005, after having received legal advice, the fourth applicant was interviewed as a suspect in the presence of his solicitor. He was asked if he had had the chance to go through his written statement with his solicitor and he confirmed that he had. The solicitor was asked if she had had enough time to advise her client and she replied:

> "My role is to advise Mr Abdurahman in relation to his rights and procedures in relation to his interview. It is to intervene on his behalf when I feel it's necessary to intervene and to assist him in drawing to his attention any matters that may arise at any time in relation to his position and in relation to his rights. In that context, Mr Adburahman has had an opportunity of considering the statement that he made voluntarily when he was stopped on 27th July. In the context of your disclosure that has been provided, I have advised him that he has various options open to him and he's instructed me that he would wish to rely on a statement that he would now wish to read so that it can be recorded on tape and would thereafter not wish to make any further comment in relation to matters until such time as there is additional disclosure, in the hope that his statement will deal with the limited disclosure that has so far been provided and I trust it will do so."

149. In the prepared statement, the fourth applicant confirmed that he had had no prior knowledge of the events of 21 July and deplored them. He continued:

> "I was stopped by the police on Wednesday, 27th July, and agreed to assist them in every way possible. See my statement dated 28th July 2005. I gave as much detail as possible about somebody known to me as Hamdi."

150. He went on to correct aspects of his witness statement in so far as it related to the physical description he had given of Mr Osman. He added:

> "I would like to emphasise that the CCTV video image of Hamdi (I pause to say that that turned out to be Mr Hussein Osman) released to the media was unrecognisable to me as being an image of him and when Hamdi first claimed knowledge of any participation in these events, I did not believe him or I did not believe him to be involved until I was stopped by the police."

151. He made some further small comments about the witness statement and declined to answer any further questions.

152. On 1 August 2005 the fourth applicant was interviewed as a suspect a second time. He again declined to answer questions but insisted that he had been assisting the police from the beginning and did not wish to make any further statements. He was interviewed further on 2 August 2005 and repeated that he was not and never would be a terrorist and had not played any part in what had happened. In his last interview, on 3 August, he said that everything he knew was contained in his original witness statement. He was charged at 2.20 p.m. on 3 August 2005.

2. The fourth applicant's trial

153. In October 2007 the trial of the fourth applicant and four other men began at the Crown Court at Kingston before Judge Worsley QC and a jury. The fourth applicant was accused of assisting Mr Osman and failing to disclose information concerning the four bombers after the bombings. His codefendants included Mr Sherif, who was accused among other things of giving his passport to the fourth applicant for Mr Osman's escape to Rome, and Mr Wahbi Mohammed, the brother of the second applicant, accused among other things of taking the video camera used to film suicide messages on the morning of 21 July 2005 and later giving it to the fourth applicant to give to Mr Osman.

(a) The prosecution case

154. The prosecution case was that the fourth applicant had been prepared to give Mr Osman shelter even though he had known that Mr Osman had been involved in the attacks. The prosecution also alleged that the fourth applicant had collected Mr Sherif's passport and given it to Mr Osman to aid his departure to Rome. Finally, it was alleged that the fourth applicant had collected from Mr Wahbi Mohammed the video camera which had been used to film suicide messages by the would-be bombers, and had given it to Mr Osman.

(b) The admissibility of the witness statement

155. The fourth applicant applied to have the witness statement of 28 July 2005 excluded, relying on four matters. First, that the statement had been taken in breach of the applicable code of practice, in particular because he had not been cautioned or informed of his entitlement to free legal advice. Second, that the breach had been deliberate. Third, that he had been

induced to make the statement on the pretence that he was a witness and would be free to go home after the statement was completed. Fourth, that the statement had been taken in the early hours of the morning, when he was tired. As a result of all of these matters, the fourth applicant submitted, the statement was a confession made by him in circumstances likely to render it unreliable pursuant to section 76(2) PACE (see paragraph 199 below). Alternatively, he submitted that it ought to be excluded pursuant to the general discretion to exclude evidence under section 78 PACE (see paragraph 201 below).

156. The prosecution opposed the application but accepted that the witness statement amounted to a confession for the purposes of section 76 PACE. The prosecution also accepted that there had been a breach of the relevant code of practice in failing to caution the fourth applicant or offer him the services of a solicitor when the two police officers had come to the conclusion that they should take instructions from their superiors (see paragraph 140 above).

157. At the *voir dire*, the two police officers gave evidence that, when they had first approached the fourth applicant on the afternoon of 27 July 2005, it was with a view to his assisting the police as a potential witness. It was also accepted by the parties that, at that stage, the police officers did not have sufficient information to justify arresting him or treating him as a suspect. One of the officers explained that by 7.15 p.m. he had taken the view that, as a result of the answers that the fourth applicant was giving, he was in danger of incriminating himself and should be cautioned and informed of his right to legal advice. The officers had accordingly suspended the interview and sought instructions from one of the senior officers in charge of the investigation. They had been told that they should continue to interview the fourth applicant as a witness and had therefore done so. In his evidence, one of the officers expressed surprise that, when the witness statement was completed, he had been instructed to arrest the applicant.

158. On 3 October 2007 the trial judge refused the application to have the witness statement excluded. He accepted that at the time when the fourth applicant had arrived at the police station there had been no reasonable objective grounds to suspect him of any offence and that it had been entirely appropriate to treat him as a witness. However, in view of the prosecution concession that reasonable objective grounds to suspect the fourth applicant of an offence could be said to have crystallised by the conclusion of his first oral account, the judge was satisfied that there had been a breach of the applicable code at the time when the fourth applicant had made his written witness statement.

159. The trial judge found as a fact that there was no evidence of oppression of the fourth applicant while he had been at the police station. Nor, the judge said, had anything been said or done by the police officers

that could have rendered the witness statement unreliable. He pointed out that the fourth applicant had "freely adopted" the witness statement after he had been cautioned and had received legal advice. The judge therefore did not accept that the statement should be excluded under either section 76 or section 78 PACE.

160. Finally, the judge referred to the right of the defence to put matters concerning the fourth applicant's challenge to the witness statement before the jury. The jury would be directed appropriately on the question of reliability. In the circumstances no breach of Article 6 § 3 of the Convention arose.

161. The defence subsequently made an application to have excluded those parts of the witness statement which the fourth applicant had withdrawn or qualified in his subsequent interviews. These parts concerned the physical description given of Mr Osman and statements which indicated that the fourth applicant had come to believe that Mr Osman was involved in the attacks. The prosecution opposed the application because the qualifications later made demonstrated the detail in which the fourth applicant had subsequently considered his witness statement. The application was refused, the trial judge finding that exclusion of the passages would be misleading to the jury. He explained that the jury would be able to hear the full circumstances in which the fourth applicant had come to adopt the witness statement.

(c) The other prosecution evidence

162. The other prosecution evidence led at trial against the fourth applicant included:

(i) CCTV footage from 23 July 2005 showing the fourth applicant and Mr Osman together at Clapham Junction railway station, at Vauxhall railway station and walking towards the fourth applicant's flat;

(ii) mobile telephone cellsite analysis (analysis of where mobile telephone calls had been made), consistent with Mr Osman having made telephone calls at the fourth applicant's flat;

(iii) CCTV footage showing the fourth applicant meeting Mr Wahbi Mohammed and collecting from him the camera alleged to have been used to film martyrdom videos made by the bombers;

(iv) evidence of telephone contact between the fourth applicant and Mr Sherif, allegedly for the purpose of collecting the latter's passport for Mr Osman and for which the fourth applicant had given no explanation despite the fact that the two had not met for some years prior to the telephone contact;

(v) mobile telephone cellsite analysis consistent with the fourth applicant having met Mr Sherif to collect the passport;

(vi) footage from a police surveillance camera showing Mr Osman leaving the fourth applicant's flat on 26 July, in the company of the fourth applicant, en route to Waterloo station;

(vii) a newspaper report on the attempted bombings, with pictures of the bombers (including Mr Osman), found in the fourth applicant's flat with the fourth applicant's fingerprints on it;

(viii) telephone contact between the fourth applicant and Mr Osman after the latter had taken the Eurostar from Waterloo, indicating that Mr Osman had spoken to the fourth applicant twice by mobile telephone on 26 July and had twice attempted to telephone him on 27 July from Italy;

(ix) The fourth applicant's police interviews of 30 July and 1 August, after he had been arrested and had received legal advice, in which he admitted that Mr Osman had stayed at his flat and stated that the contents of his 28 July witness statement were accurate (see paragraphs 148-152 above).

(d) The application for a stay on grounds of abuse of process

163. At the conclusion of the prosecution case, the fourth applicant applied to have the proceedings stayed on the grounds that the prosecution was an abuse of process. He argued that the order given to the police officers to continue to treat him as a witness, and not a suspect, meant that he had been tricked into giving his witness statement. He claimed that he had effectively been told that he would not be prosecuted. In other words, later treating him as a suspect and prosecuting him was inherently unfair.

164. On 5 November 2007 the judge refused the application. He held that it would only be an abuse of process to prosecute someone who had received an unequivocal representation that he would not be prosecuted and had acted on that representation to his detriment. No such unequivocal representation had been made to the fourth applicant. Even if he had thought that there had been such a representation, he had not acted on it to his detriment. The judge explained:

> "I have to look at the evidence as a whole and the position of Mr Abdurahman as a whole when I'm considering whether the facts may justify the staying of the charges against him.
>
> Mr Abdurahman had the opportunity in the course of interview when he was under caution to say that that which he had said before was untrue, was inaccurate or was given at a time when he was so tired that it was really unreliable and riddled with inaccuracy. He did not do that. At a time when he had been able to consult with his solicitor and consider in detail the statement which he had given to the police, he adopted it and ... to this day he adopts effectively that which he had said to the police."

165. The judge found that far from being an affront to justice for the case to continue, it would be an affront to justice for the case not to continue. He noted that the fourth applicant was ably represented, had been

able to make clear his position after he made his witness statement and had given his detailed comments on it when he was a suspect. While there was, as the prosecution conceded, an element of unfairness in his being treated initially as a witness, it was right to look at the overall picture. The judge reached the "very clear" conclusion that this was certainly not a case where he came even remotely near saying that it could be unfair for the fourth applicant to be tried.

(e) The trial proceedings

166. Mr Osman was called to give evidence by his brother, Mr Sherif. He confirmed that he had sheltered at the fourth applicant's flat and said that the latter had believed what was said in the news. The fourth applicant had said that the police were looking for him (Mr Osman) but that he was not recognisable from the images disseminated in the media. Mr Osman did not believe that the fourth applicant had been afraid of him. He further confirmed that he had asked the fourth applicant to make contact with Mr Sherif to collect the passport. The fourth applicant had done so at around 8-9 p.m. on the evening of 25 July 2005. After returning with the passport, the fourth applicant had gone to Waterloo station to book a Eurostar ticket for Mr Osman. He had been unable to do so because he did not have the passport number with him, but he had checked the timetable for the following day. Mr Osman was subjected to extensive cross-examination by counsel for the fourth applicant. It was put to him that he was lying to protect his family, an allegation that Mr Osman denied.

167. Mr Sherif gave oral evidence and was also cross-examined by the fourth applicant's counsel. He admitted that he had provided the passport for Mr Osman's travel. He gave evidence that the fourth applicant had come to see him at home on the evening of 24 July 2005 and had asked for his passport in order to enable Mr Osman to leave the country. He had said that Mr Osman was at his (the fourth applicant's) home. Mr Sherif had been afraid and had not wanted to provide the passport. However, he had subsequently changed his mind. A text message to the fourth applicant later that evening and a telephone call the next day were to make arrangements for the fourth applicant to collect the passport. The fourth applicant had collected the passport from his home at around 7.45 p.m. on 25 July 2005. It was put to Mr Sherif by the fourth applicant's counsel that he was lying but Mr Sherif insisted that he was telling the truth and that the fourth applicant had collected the passport.

168. The fourth applicant did not give evidence at trial. His defence was based upon the content of his witness statement of 28 July 2005. It was admitted that he had collected the video camera and had given it to Mr Osman, but counsel explained that this had been an innocent errand and that there had been no attempt to conceal it. It was further admitted that on 25 July 2005 at around 8.45 p.m. the fourth applicant had attended the ticket

office at Waterloo Station. It was not admitted that he had collected the passport, and counsel emphasised that the only evidence to support this had been given by Mr Osman and Mr Sherif, both of whom he said were unreliable and had ulterior motives for the evidence that they had given. Counsel invited the jury to ignore the witness statement, referring to the admitted breaches of the code by the police. He emphasised that the interview had taken place over a long period of time, that there had been a failure to caution the fourth applicant and that he had not been given legal advice.

(f) The summing-up to the jury and the verdict

169. Before the jury retired to consider its verdict, the trial judge delivered his summing-up. On the matter of the witness statement, he directed them as follows:

> "You remember the long, handwritten witness statement that Abdurahman signed and the subsequent interviews when he answered questions asked by the police. The prosecution say that, in addition to the other evidence against him, the defendant, Abdurahman, made a witness statement which amounts to a confession on which you can rely. The defendant says that you should not rely upon his written witness statement since it was obtained in circumstances likely to render it unreliable.
>
> He says that he was tricked by the police into providing an account by them treating him as a witness when, in breach of the codes of practice laid down for the police to follow, he should first have been cautioned; secondly, allowed access to a solicitor; thirdly, had his interview tape-recorded; and fourthly, should have been given suitable and effective, uninterrupted rest periods.
>
> The law is this, when considering his case, the question for you to consider is whether Abdurahman's witness statement is something you should take into account as evidence in his case or whether you should disregard it. The question is not whether you think that it is fair that he's being tried. If you think that the statement was or might have been obtained by something said or done which was likely to render it unreliable, you must disregard it, even if you think that it was or may have been true.
>
> Breach of the code, however, does not lead to the automatic rejection as evidence of a written statement made by a witness who is later made a defendant. If you are sure that, despite the breaches of the code, the statement was freely given in the sense that he would have said those things whether or not he was cautioned and even if all the rules in the code had been followed and that it was true, then you will take it into account when considering your verdicts in relation to Abdurahman.
>
> The prosecution say that, whatever breaches may have arisen in respect of the codes of practice which the police should obey, you can safely rely on the written witness statement made and signed by Abdurahman because he clearly adopted it in his interviews as 'valuable information' which he was providing to the police. Indeed he made detailed corrections which reflected accurately what he always wished to say at a time when he had been cautioned and had a solicitor to advise him. Abdurahman has chosen, as is his right, not to tell you on oath why he said the things he did and what he would have done if arrested and cautioned. Do not speculate."

170. As regards the fourth applicant's silence at trial, the judge directed the jury as follows:

> "The defendant, Abdurahman, as you know, has not given evidence before you. That is his right, he is entitled to remain silent and to require the prosecution to make you sure of his guilt. You must not assume that he is guilty of any offence because he has not given evidence.
>
> Two matters arise from his silence. First, you try this case according to the evidence and you will appreciate that Abdurahman has not given any evidence at this trial to undermine, contradict or explain the evidence put before you by the prosecution. Secondly, his silence at this trial may count against him. This is because you may draw the conclusion that he has not given evidence because he has no answer to the prosecution's case or none that would bear examination. If you do draw that conclusion, you must not convict him wholly or mainly on the strength of it but you may treat it as additional support for the prosecution case.
>
> However, you may only draw such a conclusion against him if you think it's a fair and proper conclusion, if you're satisfied about two things. First, that the prosecution's case is so strong that it clearly calls for an answer by him; secondly, that the only sensible explanation for his silence is that he has no answer to the prosecution allegations or none that would bear examination.
>
> The defence, I remind you, invite you not to draw any conclusion from his silence on the basis that there was an admitted breach of the code of practice which is in place to protect defendants such that they say you should reject the prosecution submission but you can safely rely on anything said by him to the police in his long written statement. If you think that the breaches of the code amount to a good reason why you should not draw any conclusion from his silence, then do not do so. Otherwise, subject to what I have said, you may do so."

171. The judge reminded the jury of the prosecution case and the various elements of evidence against the fourth applicant (see paragraph 162 above). He explained:

> "The prosecution rely on the witness statement he made and signed because they say it was adopted by him and that he's an intelligent young man, apparently a capable employee at a solicitor's firm. There is no reference, they point out, to the camera, the passport, and he lied over the date and destination of Osman's departure."

172. The judge also reminded the jury of the fourth applicant's defence, set out in his witness statement, and of the submissions of his defence counsel at trial.

173. On 4 February 2008, the fourth applicant was convicted of assisting Mr Osman (count 12) and of four counts of failing to disclose information about the bombers after the attacks (counts 16-19). He was sentenced to five years' imprisonment on count 12 and five years' imprisonment on counts 16-19, to be served consecutively. Mr Sherif was convicted of assisting Mr Osman and failing to disclose information about him after the bombings. He was acquitted of having had prior knowledge of the attacks. He, too, was sentenced to five years' imprisonment on each count, to be served consecutively.

3. The fourth applicant's appeal

174. The fourth applicant and his codefendants appealed against conviction and sentence to the Court of Appeal. The fourth applicant argued that the trial judge had been wrong to admit the witness statement.

175. On 21 November 2008 the Court of Appeal dismissed the appeal against conviction. It expressed some concern about events at the police station but considered that the trial judge had not erred in admitting the impugned witness statement. Concerning the fact that the statement had been made in breach of the applicable code, the court said:

> "38. The way the police behaved is undoubtedly troubling. The decision not to arrest and caution Abdurahman when the officers interviewing him believed that they had material which gave them reasonable grounds for suspecting that he had committed an offence was a clear and deliberate instruction to ignore the Code. But at that stage the police dilemma is understandable. Abdurahman was providing information about Osman which could have been of critical importance in securing his arrest, which was the priority at that time. It seems to us that the judge was entitled to come to the conclusion that the prosecution had established that nothing was said or done which could undermine the reliability of the witness statement. He was entitled to take into account the fact that in the prepared statement he made after caution he asserted that he was seeking to give assistance to the police. That was repeated in the later interviews. He said nothing therefore to suggest that the circumstances were such as to render it likely that what he said was not reliable. It seems to us, therefore, that the judge was also entitled to conclude from all material that Abdurahman, with the help of legal advice, was repeating, subject as we have said to some corrections, what was in the witness statement as his account of the part such as it was, that he played in relation to Osman in the days after 21st July. Further, given the appellant's adoption of that witness statement, we do not consider that the judge's decision to permit the statement to go before the jury in the exercise of his discretion under s. 78 of the Act can be said to be perverse or affected by any error of law."

176. As to the refusal of the trial judge to stay the trial on grounds of abuse of process, the Court of Appeal explained:

> "39. ... The main thrust of the argument on Abdurahman's behalf is that to prosecute on the basis of a statement that he gave when being treated as a witness is quite simply unfair. He was, it is said, effectively being told that he would not be prosecuted and gave assistance accordingly. The judge in our view rightly rejected this argument. There was no evidence that this appellant made his statement because he believed he was not going to be prosecuted. He gave no evidence to that effect; and there is nothing in the interviews after he was arrested to suggest that that was the reason for his having made the witness statement. On the contrary, he made the witness statement because he wanted to assist the police. In this type of case, the court is only likely to conclude there has been an abuse of process if a defendant can establish that there has been an unequivocal representation by those responsible for the conduct of the prosecution and that the defendant has acted to his detriment: see *R v Abu Hamza* [2007] 1 Cr App R 27, [2006] EWCA Crim 2918, in particular at paragraph 54. That was not the situation here."

177. In respect of the appeal against sentence, the court acknowledged that personal circumstances such as youth or vulnerability might be pertinent to sentence, but emphasised that this was not the case in respect of

most of the appellants before it, including the fourth applicant. The court noted that the appellants had acted without any regard whatsoever to their public duty, and continued:

> "None except Abdurahman made any disclosure at all until they were arrested ..."

178. In conclusion, the Court of Appeal partly allowed the fourth applicant's appeal against sentence, on account of the help he had given to the police:

> "47. The assistance that [the fourth applicant] gave to Osman was of the utmost significance. We conclude, however, that we can and should reflect the fact that, albeit only after he had been seen by the police, he gave at least some help and information ..."

179. It reduced the sentences in respect of count 12 and counts 16-19 to four years' imprisonment each. It noted that the conviction for failing to disclose information about Mr Osman added little to the criminality involved in assisting him, so the sentence on that count was to be served concurrently. The remaining counts, involving his failure to disclose information about the other bombers, were clearly a separate offence that justified a consecutive sentence. The consequence was a total of eight years' imprisonment. In dealing with Mr Sherif's appeal against sentence, the court noted the critical role that he had played in enabling Mr Osman's escape and considered that it justified "a very severe sentence which cannot be mitigated as it was in the case of [the fourth applicant] by his giving any information at any stage to the police". Taking into account 467 days spent under home arrest, he was sentenced to six years and nine months' imprisonment on the count of assisting Mr Osman. A four-year sentence for failing to disclose information about Mr Osman was to be served concurrently.

180. On 3 February 2009 the Court of Appeal refused to certify a question of general public importance for the consideration of the House of Lords.

II. RELEVANT DOMESTIC LAW AND PRACTICE

A. Cautions

181. Section 66 PACE requires the Secretary of State to issue a code of practice, *inter alia* on the detention, treatment and questioning of persons by police officers. The applicable code of practice is Code C. Section 10 of Code C concerns cautions and at the relevant time paragraph 10.1 provided:

> "A person whom there are grounds to suspect of an offence must be cautioned before any questions about an offence, or further questions if the answers provide the grounds for suspicion, are put to them if either the suspect's answers or silence

(i.e. failure or refusal to answer or answer satisfactorily) may be given in evidence to a court in a prosecution."

182. Prior to the enactment of the Criminal Justice and Public Order Act 1994 ("the 1994 Act"), the wording of a caution (commonly referred to as the old-style caution) was:

"You do not have to say anything, but anything you do say may be given in evidence."

183. Section 34 of the 1994 Act permits adverse inferences to be drawn by a jury where a defendant fails to mention during police questioning any fact relied on in his defence in subsequent criminal proceedings. The precise circumstances in which such adverse inferences can be drawn are normally explained to the jury in detail in the trial judge's summing-up.

184. The wording of the caution that has been routinely given since the entry into force of the 1994 Act (commonly referred to as the new-style caution) is contained in paragraph 10.5 of Code C and is as follows:

"You do not have to say anything. But it may harm your defence if you do not mention when questioned something which you later rely on in Court. Anything you do say may be given in evidence."

185. Pursuant to section 34(2A) of the 1994 Act, adverse inferences from a defendant's failure in police interview to mention facts later relied on in his defence cannot be drawn at trial if the defendant was not allowed an opportunity to consult a solicitor prior to being questioned.

B. Safety interviews

1. The Terrorism Act 2000

186. The Terrorism Act 2000 ("the 2000 Act") governs the arrest and detention of those suspected of committing terrorist offences. Section 41 allows a police constable to arrest without a warrant a person whom he reasonably suspects to be a terrorist. In the case of an arrest under section 41, the provisions of Schedule 8, which address *inter alia* access to legal advice, apply. The law cited below sets out the position at the material time; amendments which are not significant in the present cases have since been made to the relevant provisions.

187. Paragraph 6 of Schedule 8 set out the right of a detainee, if he so requested, to have one named person informed, as soon as was reasonably practicable, that he was being detained ("the right not to be held incommunicado"). This right was subject to paragraph 8.

188. Paragraph 7 provided that a person who was arrested as a suspected terrorist was entitled, if he so requested, to consult a solicitor as soon as reasonably practicable, privately and at any time ("the right to legal advice"). This right was also subject to paragraph 8.

189. Paragraph 8(1) provided that an officer of at least the rank of superintendent could authorise a delay in the entitlements set out in paragraphs 6 and 7. Pursuant to paragraph 8(2), such authorisation could be given only if the officer had reasonable grounds for believing that the exercise of the entitlements would have any of the following consequences:

> "(a) interference with or harm to evidence of a serious arrestable offence,
>
> (b) interference with or physical injury to any person,
>
> (c) the alerting of persons who are suspected of having committed a serious (arrestable) offence but who have not been arrested for it,
>
> (d) the hindering of the recovery of property obtained as a result of a serious (arrestable) offence or in respect of which a forfeiture order could be made ...;
>
> (e) interference with the gathering of information about the commission, preparation or instigation of acts of terrorism,
>
> (f) the alerting of a person and thereby making it more difficult to prevent an act of terrorism, and
>
> (g) the alerting of a person and thereby making it more difficult to secure a person's apprehension, prosecution or conviction in connection with the commission, preparation or instigation of an act of terrorism."

190. Paragraph 8(7) provided that where authorisation was given, the detainee had to be informed of the reasons for the delay as soon as practicable and the reasons had to be recorded.

2. The relevant provisions of Code C

191. At the material time no specific codes of practice existed in relation to the above provisions. Code C (see paragraph 181 above) also covered those detained on suspicion of terrorism.

192. Section 5 of Code C dealt with the right not to be held incommunicado. Paragraphs 5.1 and 5.2 set out the general right to have a named person contacted, as established in paragraph 6 of Schedule 8 to the 2000 Act, and explained that the exercise of the right could only be delayed in accordance with Annex B of the Code (see 198 below).

193. Section 6 of Code C dealt with the right to legal advice. Paragraphs 6.1 and 6.5 set out the general right to legal advice, as established in paragraph 7 of Schedule 8 to the 2000 Act, and explained that the exercise of the right could only be delayed in accordance with Annex B of the Code.

194. Paragraph 6.6 explained that a detainee who wanted legal advice could not be interviewed until he had received such advice unless:

(a) Annex B applied; or

(b) an officer of superintendent rank or above had reasonable grounds to believe that:

(i) the consequent delay might have, *inter alia*, the consequences set out in paragraph 8 (a) to (d) of Schedule 8 to the 2000 Act (see paragraph 189 above); or

(ii) when a solicitor had been contacted and had agreed to attend, awaiting his arrival would cause unreasonable delay to the process of the investigation.

195. Paragraph 6.6 also explained that, in these cases, the restriction on drawing adverse inferences from silence (see paragraph 185 above) would apply because the suspect had not had the opportunity to consult a solicitor. Annex C clarified that the old-style caution (see paragraph 182 above) was to be used.

196. Paragraph 6.7 explained that once sufficient information had been obtained to avert the risk, the questioning should cease until the detainee had obtained legal advice.

197. The Notes for Guidance attached to Code C, included paragraph C:6A:

> "In considering if paragraph 6.6(b) applies, the officer should, if practicable, ask the solicitor for an estimate of how long it will take to come to the station and relate this to the time detention is permitted, the time of day ... and the requirements of other investigations. If the solicitor is on their way or is to set off immediately, it will not normally be appropriate to begin an interview before they arrive. If it appears necessary to begin an interview before the solicitor's arrival, they should be given an indication of how long the police would be able to wait before 6.6(b) applies so there is an opportunity to make arrangements for someone else to provide legal advice."

198. Part B of Annex B specifically concerned persons detained under the 2000 Act. It provided that the rights discussed in sections 5 and 6 of Code C could be delayed for up to forty-eight hours if there were reasonable grounds to believe that the exercise of the right would lead to the consequences set out in paragraph 8 of Schedule 8 of the 2000 Act (see paragraph 189 above).

C. The admissibility of evidence

199. Section 76(1) PACE provides that a confession made by an accused person may be given in evidence against him in so far as it is relevant to any matter in issue in the proceedings and is not excluded by the court in pursuance of this section. Section 76(2) provides:

> "If, in any proceedings where the prosecution proposes to give in evidence a confession made by an accused person, it is represented to the court that the confession was or may have been obtained–
>
> (a) by oppression of the person who made it; or
>
> (b) in consequence of anything said or done which was likely, in the circumstances existing at the time, to render unreliable any confession which might be made by him in consequence thereof,

> the court shall not allow the confession to be given in evidence against him except in so far as the prosecution proves to the court beyond reasonable doubt that the confession (notwithstanding that it may be true) was not obtained as aforesaid."

200. Under section 82(1) PACE a "confession" includes any statement "wholly or partly adverse to the person who made it, whether made to a person in authority or not and whether made in words or otherwise".

201. Section 78(1) PACE provides:

> "In any proceedings the court may refuse to allow evidence on which the prosecution proposes to rely to be given, if it appears to the court that, having regard to all the circumstances, including the circumstances in which the evidence was obtained, the admission of the evidence would have such an adverse effect on the fairness of the proceedings that the court ought not to admit it."

D. The reopening of criminal proceedings

202. The Criminal Cases Review Commission is an independent body set up to investigate claims that a person has been wrongly convicted of a criminal offence or wrongly sentenced. It is regulated by the Criminal Appeal Act 1995. Where a person has been convicted on indictment, section 9(1) gives the Commission the power to refer, at any time, the conviction to the Court of Appeal. Under section 9(2), any such reference is to be treated for all purposes as an appeal by the person concerned against conviction. The Commission may refer a case where a defendant alleges that he has had an unfair trial if it considers that there is a real possibility that the conviction will not be upheld.

III. RELEVANT EUROPEAN UNION AND INTERNATIONAL LEGAL MATERIALS

A. European Union law

1. The right to be informed

203. On 22 May 2012 the European Union adopted Directive 2012/13/EU on the right to information in criminal proceedings. All EU Member States except Denmark participate in the Directive. The Directive is founded upon the rights laid down in the European Union Charter of Fundamental Rights, and in particular Articles 6, 47 and 48 thereof, by building upon Articles 5 and 6 of the Convention as interpreted by this Court. In its preamble, the Directive explains that the right to information about procedural rights "which is inferred from the case-law" of this Court, should be explicitly established by the Directive.

204. Article 1 of the Directive clarifies that the right to information has two aspects: information on procedural rights and information on the

accusation. Pursuant to Article 2, the Directive applies from the time a person is made aware by the competent authorities that he is suspected or accused of having committed a criminal offence. Such a person must be provided promptly with information concerning at least the five procedural rights listed in Article 3(1) of the Directive, namely: the right of access to a lawyer; the right to free legal advice; the right to be informed of the accusation; the right to interpretation and translation; and the right to remain silent. Article 8(2) provides that suspects must have the right under national law to challenge the failure to provide the relevant information. The Directive does not address how evidence obtained without prior information on procedural rights should be treated in any subsequent criminal proceedings.

205. The deadline for transposition of the Directive was 2 June 2014.

2. The right of access to a lawyer

206. On 22 October 2013 the European Union adopted Directive 2013/48/EU covering the right of access to a lawyer, the right to have third parties informed of detention and the right to communicate with third parties and with consular authorities. The United Kingdom (along with Ireland and Denmark) chose not to participate in the Directive and in consequence it is not applicable in those States. The Directive lays down minimum rules concerning the right of access to a lawyer in criminal proceedings and in proceedings for the execution of a European arrest warrant. In doing so, it promotes the application of the Charter, in particular Articles 4, 6, 7, 47 and 48 thereof, by building upon Articles 3, 5, 6 and 8 of the Convention, as interpreted by this Court. In its Recital 21, it explains, by reference to case-law of this Court, that where a person other than a suspect or accused person, such as a witness, becomes a suspect or accused person, that person should be protected against self-incrimination and has the right to remain silent. In such cases, questioning by law enforcement bodies should be suspended immediately and may only be continued if the person concerned has been made aware that he is a suspect or accused person and is able to fully exercise the rights provided for in the Directive.

207. Article 2 provides that the rights in the Directive apply to:

> "suspects or accused persons ... from the time when they are made aware by the competent authorities ..., by official notification or otherwise, that they are suspected or accused of having committed a criminal offence, and irrespective of whether they are deprived of liberty."

208. Article 2(3) clarifies that it also applies:

> "to persons other than suspects or accused persons who, in the course of questioning ..., become suspects or accused persons."

209. Article 3 provides for the right of access to a lawyer "without undue delay" and in any event prior to questioning. That right entails the

right to meet the lawyer in private prior to questioning, the right for the lawyer to be present during questioning and the right to have the lawyer attend evidence-gathering acts.

210. Pursuant to Article 3(6), temporary restrictions on the right of access to a lawyer are permitted at the pre-trial stage in exceptional circumstances where one of two compelling reasons is demonstrated. The first is that there is an urgent need to avert serious adverse consequences for the life, liberty or physical integrity of a person. The second is that immediate action by the investigating authorities is required to prevent substantial jeopardy to criminal proceedings. Pursuant to Article 8, any restrictions must be proportionate, be strictly limited in time, not be based exclusively on the type or seriousness of the offence and not prejudice the overall fairness of the proceedings. Restrictions are to be authorised by a duly reasoned decision on a case-by-case basis.

211. Article 12(2) addresses the question of remedies and provides that, without prejudice to national rules and systems on the admissibility of evidence, Member States shall ensure that, in criminal proceedings, in the assessment of statements made by suspects or accused persons or of evidence obtained in breach of their right to a lawyer or in cases where a derogation to this right was authorised in accordance with Article 3(6), the rights of the defence and the fairness of the criminal proceedings are respected.

212. The deadline for transposition of the Directive is 27 November 2016.

3. Privilege against self-incrimination and right to silence

213. On 12 February 2016 the European Union adopted Directive 2016/343 on the strengthening of certain aspects of the presumption of innocence and of the right to be present at the trial in criminal proceedings. The United Kingdom (along with Ireland and Denmark) chose not to participate in the Directive and in consequence it is not applicable in those States.

214. Pursuant to Article 2, the Directive applies to suspects or accused persons in criminal proceedings. Article 7 enshrines the right to silence and the privilege against self-incrimination. Article 10 requires States to ensure that, in the assessment of statements made by suspects in breach of the right to remain silent or the right not to incriminate oneself, the rights of the defence and the fairness of the proceedings are respected.

215. The deadline for transposition of the Directive is 1 April 2018.

B. International law

1. The International Covenant on Civil and Political Rights ("ICCPR")

216. The ICCPR sets out the right to a fair trial in its Article 14. Minimum rights in criminal proceedings are listed in Article 14 § 3, which provides, in so far as relevant:

> "3. In the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees, in full equality: ...
>
> ...
>
> (b) To have adequate time and facilities for the preparation of his defence and to communicate with counsel of his own choosing;
>
> ...
>
> (d) To be tried in his presence, and to defend himself in person or through legal assistance of his own choosing; to be informed, if he does not have legal assistance, of this right ...
>
> ...
>
> (g) Not to be compelled to testify against himself or to confess guilt."

217. The Human Rights Committee assesses compliance with the ICCPR. It has found that the right to a fair trial includes the right to be notified of defence rights, including the right to legal assistance and to remain silent (see *Saidova v. Tajikistan*, Communication no. 964/2001, views adopted on 8 July 2004; and *Khoroshenko v. Russian Federation*, Communication no. 1304/2004, views adopted on 29 March 2011).

2. International criminal tribunals

(a) The ICTY and the ICTR

218. Article 18 of the Statute of the International Criminal Tribunal for the Former Yugoslavia ("ICTY") and Article 17 of the Statute of the International Criminal Tribunal for Rwanda ("ICTR") provide for legal assistance for suspects if questioned by the prosecutor of the Tribunal during the pre-trial phase. Article 21 of the ICTY Statute and Article 20 of the ICTR Statute reproduce the content of Article 14 ICCPR (see paragraph 216 above). Rule 42 of the ICTY Rules of Procedure and Evidence provides:

> "(A) A suspect who is to be questioned by the Prosecutor shall have the following rights, of which the Prosecutor shall inform the suspect prior to questioning, in a language the suspect understands:
>
> (i) the right to be assisted by counsel of the suspect's choice or to be assigned legal assistance without payment if the suspect does not have sufficient means to pay for it;
>
> ...

(iii) the right to remain silent, and to be cautioned that any statement the suspect makes shall be recorded and may be used in evidence.

(B) Questioning of a suspect shall not proceed without the presence of counsel unless the suspect has voluntarily waived the right to counsel ..."

219. Rule 42 of the ICTR Rules of Procedure and Evidence is in substantially the same terms.

220. Rule 89(D) of the ICTY's Rules, and Rules 89(C) together with 70(F) of the ICTR's Rules, provide that a chamber may exclude evidence if its probative value is substantially outweighed by the need to ensure a fair trial. Rule 95 of the Rules of both the ICTY and the ICTR provides that no evidence shall be admissible if obtained by methods which cast substantial doubt on its reliability or if its admission is antithetical to, and would seriously damage, the integrity of the proceedings.

221. In *Prosecutor v. Karadžić* (Case No. IT-95-5/18-T, Decision on the Accused's Motion to Exclude Intercepted Conversations, 30 September 2010), the defendant applied to exclude evidence of intercepted conversations obtained in violation of Bosnian law. The trial chamber of the ICTY explained:

"7. It is well-settled that the approach adopted in [the Tribunal's Rules] is one which favours the admission of evidence so long as it is relevant and is deemed to have probative value which is not substantially outweighed by the need to ensure a fair trial. Accordingly, the Chamber must balance the fundamental rights of the accused with the essential interests of the international community in the prosecution of persons charged with serious violations of international humanitarian law ...

8. Tribunal jurisprudence is clear that evidence obtained illegally is not, *a priori*, inadmissible, but rather that the manner and surrounding circumstances in which the evidence was obtained, as well as its reliability and effect on the integrity of the proceedings, will determine its admissibility. Accordingly, in applying Rule 95, the Chamber must consider all relevant circumstances and only exclude evidence if the integrity of the proceedings would otherwise be seriously damaged" (footnotes omitted.)

222. The chamber explained that in light of its mandate to prosecute persons allegedly responsible for serious violations of international humanitarian law, it would be inappropriate to exclude relevant and probative evidence because of procedural considerations, as long as the fairness of the trial was guaranteed. It concluded that the admission of evidence obtained by Bosnian authorities in violation of Bosnian law would not damage the integrity of its proceedings and found the evidence to be admissible.

(b) The ICC

223. Article 55 of the Rome Statute of the International Criminal Court ("ICC"), which entered into force on 1 July 2002, sets out the rights of persons during an investigation under the Statute. Article 55 § 1 provides, *inter alia*, that a person shall not be compelled to incriminate himself or to

confess guilt and shall not be subjected to any form of coercion, duress or threat, to torture or to any other form of cruel, inhuman or degrading treatment or punishment.

224. On the question of procedural rights prior to questioning, Article 55 § 2 provides, in so far as relevant:

> "2. Where there are grounds to believe that a person has committed a crime within the jurisdiction of the Court and that person is about to be questioned ... that person shall also have the following rights of which he or she shall be informed prior to being questioned:
>
> ...
>
> (b) To remain silent, without such silence being a consideration in the determination of guilt or innocence;
>
> (c) To have legal assistance of the person's choosing, or, if the person does not have legal assistance, to have legal assistance assigned to him or her, in any case where the interests of justice so require, ...; and
>
> (d) To be questioned in the presence of counsel unless the person has voluntarily waived his or her right to counsel."

225. Article 67 sets out the procedural rights of the accused and reproduces, *inter alia*, the content of Article 14 § 3 (d) and (g) ICCPR (see paragraph 216 above).

226. Article 69 § 7 of the Rome Statute provides that evidence obtained by means of a violation of the Statute or internationally-recognised human rights shall not be admissible if:

> "(a) The violation casts substantial doubt on the reliability of the evidence; or
>
> (b) The admission of the evidence would be antithetical to and would seriously damage the integrity of the proceedings."

227. In *Prosecutor v. Lubanga* (Case No. ICC-01/04-01/06, Decision on the Confirmation of Charges, Pre-Trial Chamber I, 29 January 2007), a pre-trial chamber of the ICC considered the question of admissibility of illegally-obtained evidence. It accepted that the challenged evidence had been obtained in violation of the internationally-recognised human right to privacy. However, it said that given the terms of Article 69 § 7, it was clear that the evidence was not to be automatically excluded. Having concluded that the reliability of the evidence was not affected by the illegality, the court turned to consider the impact on the integrity of the proceedings. It explained that it had to ensure an appropriate balance between the rights of the accused and the need to respond to victims' and the international community's expectations. It continued:

> "86. ... Although no consensus has emerged on this issue in international human rights jurisprudence, the majority view is that only a serious human rights violation can lead to the exclusion of evidence.
>
> 87. Regarding the rules applicable before the international criminal tribunals and their jurisprudence, the generally accepted solution 'is to provide for the exclusion of

evidence by judges only in cases in which very serious breaches have occurred, leading to substantial unreliability of the evidence presented'." (footnotes omitted).

IV. RELEVANT COMPARATIVE LEGAL MATERIALS

A. Council of Europe States

228. From the information available to the Court, it would appear that temporary delays in affording the right of access to a lawyer are permitted by the laws of several member States of the Council of Europe. A review of the treatment of statements obtained in breach of the right to legal advice discloses that a number of States require statements made in the absence of a lawyer or without notification of the right to a lawyer to be excluded from trial, while in others the admission of the statement or the weight to be attributed to it is, at least to some extent, a matter for judicial discretion. The same is true in respect of statements obtained in breach of the right to silence or the privilege against self-incrimination.

B. The United States

229. The Fifth Amendment to the Constitution of the United States protects the right against self-incrimination. The right to legal advice is guaranteed by the Sixth Amendment. In *Miranda v. Arizona* 384 US 436 (1966), the Supreme Court held that statements made by a person during police questioning in custody were admissible at trial only if the suspect had been informed of his rights to silence and to legal advice. Following the judgment, failure to give a "Miranda warning" prior to questioning meant that any evidence obtained had to be excluded at trial.

230. In *New York v. Quarles* 467 US 649 (1984) the Supreme Court held that there was a "public safety" exception to the requirement that Miranda warnings be given before a suspect's answers could be admitted into evidence and that the availability of that exception did not depend upon the motivation of the individual officers involved. It said that the police were entitled to interrogate suspects without informing them of their Miranda rights when "reasonably prompted by a concern for public safety". Justice Rehnquist explained:

> "Procedural safeguards which deter a suspect from responding were deemed acceptable in *Miranda* in order to protect the Fifth Amendment privilege; when the primary social cost of those added protections is the possibility of fewer convictions, the *Miranda* majority was willing to bear that cost. Here, had *Miranda* warnings deterred Quarles from responding to Officer Kraft's question about the whereabouts of the gun, the cost would have been something more than merely the failure to obtain evidence useful in convicting Quarles. Officer Kraft needed an answer to his question not simply to make his case against Quarles but to insure that further danger to the public did not result from the concealment of the gun in a public area.

> We conclude that the need for answers to questions in a situation posing a threat to the public safety outweighs the need for the prophylactic rule protecting the Fifth Amendment's privilege against self-incrimination. We decline to place officers such as Officer Kraft in the untenable position of having to consider, often in a matter of seconds, whether it best serves society for them to ask the necessary questions without the *Miranda* warnings and render whatever probative evidence they uncover inadmissible, or for them to give the warnings in order to preserve the admissibility of evidence they might uncover but possibly damage or destroy their ability to obtain that evidence and neutralize the volatile situation confronting them."

231. Where evidence has been obtained in the absence of a Miranda warning and in the absence of legal advice but the court is satisfied that the public safety exception applies, the evidence is admissible at trial.

C. Canada

232. The right to legal advice and the right to remain silent are protected by the Canadian Charter of rights and freedoms. A person is entitled to legal advice immediately upon arrest, although this right can be delayed where there are concerns for public safety provided that any limitations are prescribed by law and justified in a free and democratic society. The police have the obligation to inform a person of his right to counsel from the moment he is detained (see *R. v. Suberu* [2009] 2 SCR 460). As soon as the situation is under control, the suspect must have access to legal advice (see *R. v. Strachan* [1988] 2 SCR 980).

233. The Charter provides that where evidence is obtained in a manner that infringes an accused's rights under the Charter, it must be excluded at trial if, having regard to all the circumstances, the admission of the evidence would bring the administration of justice into disrepute. Relevant factors in this assessment were set out by the Supreme Court in *R. v. Collins* [1987] 1 SCR 265, namely the effect of the admission of the evidence on the fairness of the trial, the seriousness of the breach of the Charter and the effect of the exclusion of the evidence on the reputation of the administration of justice. The burden is on the person seeking exclusion of the evidence to show, on the balance of probabilities, that the Charter test for exclusion is satisfied.

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 6 §§ 1 AND 3 (c) OF THE CONVENTION

234. The applicants complained that their lack of access to lawyers during their initial questioning at the police station and the admission at trial

of the statements made in those interviews violated their right to a fair trial under Article 6 §§ 1 and 3 (c) of the Convention, which read as follows:

> "1. In the determination of ... any criminal charge against him, everyone is entitled to a fair and public hearing ...
>
> 3. Everyone charged with a criminal offence has the following minimum rights:
>
> ...
>
> (c) to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require;"

A. The Chamber's conclusions

235. The Chamber found no violation of Article 6 §§ 1 and 3 (c). It reiterated that the Court's primary concern under Article 6 § 1 was to evaluate the overall fairness of the proceedings and set out the general principles concerning the right to legal advice as formulated in *Salduz v. Turkey* [GC], no. 36391/02, ECHR 2008. It found that there had been compelling reasons to delay the applicants' access to legal advice in light of the exceptionally serious and imminent threat to public safety. It added that the submission that the police could have waited until solicitors arrived before beginning the interrogations was misguided since at least part of the reason for delaying legal advice was because the police had been concerned that access to legal advice would lead to the alerting of other suspects. It further found that no undue prejudice had been caused by the admission of the statements at trial having regard in particular to the counterbalancing safeguards contained in the legislative framework, to the trial judge's rulings and directions to the jury and to the strength of the other evidence in the cases.

B. The parties' submissions to the Grand Chamber

1. The applicants

(a) The first three applicants

236. The first three applicants argued that, properly understood, *Salduz*, cited above, imposed a bright-line rule prohibiting the use at trial of statements obtained during police interrogation in the absence of lawyers. In their view, this bright-line rule had been repeatedly reaffirmed by the Court, including in terrorism cases (citing, *inter alia*, *Płonka v. Poland*, no. 20310/02, 31 March 2009; *Pishchalnikov v. Russia*, no. 7025/04, 24 September 2009; and *Dayanan v. Turkey*, no. 7377/03, 13 October 2009). They further relied for support on the terms of Directive

2013/48/EU, Article 14(3)(d) ICCPR and the US Supreme Court's ruling in *Miranda v. Arizona* (see paragraphs 206-212, 216 and 229 above).

237. They argued that there were no compelling reasons to restrict their right to a lawyer. While the allegations were, admittedly, of the most serious order imaginable, this could not alone justify a restriction. The police could have contacted lawyers as soon as the applicants had requested legal representation. Had they done so, there was every prospect that the applicants would have been represented by the time the police were ready to conduct the safety interviews. In particular, the applicants considered that any concern as to possible leaks was wholly misplaced in light of the obligation of client confidentiality. The absence of compelling reasons was sufficient in and of itself to result in a violation of Article 6 §§ 1 and 3 (c).

238. In any event, they submitted that the restriction on legal advice had resulted in undue prejudice in their cases. The trial judge had described the evidence of the safety interviews as not marginal or unimportant but evidence which could provide the jury with considerable insight. The Chamber's reliance on the strength of other evidence in the case, in particular, was wrong since it was not founded on precedent, evidence could grow and contract over time and it gave too much scope to the prosecution to argue in favour of the admission of evidence obtained in breach of procedural rights.

(b) The fourth applicant

239. The fourth applicant argued that the deliberate failure to caution him had resulted in his being denied the fundamental right against self-incrimination. It was highly material that the prosecution case had been substantially based on his witness statement. The evidence of Mr Sherif and Mr Osman implicating him was unlikely to have been persuasive, given that Mr Sherif was also convicted at trial and Mr Osman had given evidence as a convicted bomber. The remainder of the prosecution evidence was insufficient to support a conviction.

240. The fourth applicant accepted that the right to legal advice could be temporarily restricted for compelling reasons on national security grounds, but emphasised that no derogation from the right to silence was permitted. He further argued that there were no compelling reasons to restrict his right of access to a lawyer. The fact that formal arrest might have resulted in his ceasing to disclose information of the utmost relevance to public safety was not a reasonable justification. He also contended that the interview had gone far beyond obtaining information about the bombers. In his submission, the absence of compelling reasons was sufficient in and of itself to result in a violation of Article 6 §§ 1 and 3 (c).

241. Further, even if there were compelling reasons to restrict his rights, such restriction should have been temporary and should have led to the holding of a safety interview, as in the first three applicants' cases. His

witness interview had not been restricted to the need to obtain information on any further planned attacks and the identities of the perpetrators, but had dealt also with his state of mind thus proving the mental element of the offences. He had been deliberately induced into making the statement on the false premise that he was a witness. He referred to the privilege against self-incrimination and the need for the prosecution to prove its case without resort to evidence obtained by coercion or oppression. Unlike the statements of the first three applicants, his statement had also been self-incriminatory. It had gone to the very heart of the prosecution case against him, and it was artificial to place any weight on corroborative evidence. The fact that he did not try to retract the statement was not decisive. He accepted that great weight had to be attached to the nature of the offences in his case, but argued that this had to be balanced against the conduct of the police.

242. Having regard to the entirety of the proceedings, the fourth applicant argued that there had been a violation of Article 6 §§ 1 and 3 (c) since his rights to be cautioned, to a lawyer and not to self-incriminate had been ignored and the admission of the statement had unduly and irretrievably prejudiced his defence.

2. The Government

243. The Government emphasised the fundamental nature of the right to a lawyer in domestic law, which reflected this Court's case-law. They accepted that a fundamental aspect of the right to a lawyer was access to a lawyer at the investigative stage, but argued that this was not an absolute right. First, such an approach was too inflexible and failed to recognise that at this stage the rights of the suspect may be competing with other important public interest factors. Second, Article 6 did not make provision for an absolute rule: in principle, the guarantees in Article 6 § 3 were specific aspects of a fair trial to be considered when evaluating whether, overall, the proceedings were fair. Third, there was no support for an absolute rule in the case-law of the Court, which made it clear that the right to a lawyer could be restricted. The Government noted that the Court in its recent judgment in *Dvorski v. Croatia* [GC], no. 25703/11, § 82, ECHR 2015, had not interpreted *Salduz* as laying down an absolute rule.

244. The Government argued that the Chamber in the present case had applied well-established case-law, including the *Salduz* judgment, and had reached a clear, emphatic conclusion on the facts of each case. In particular, the Government submitted, the Court's primary concern under Article 6 § 1 was to evaluate the overall fairness of proceedings. The intrinsic aim of the guarantee in Article 6 § 3 (c) was to contribute to ensuring the fairness of the proceedings as a whole. Article 6 § 3 (c) did not, therefore, guarantee an absolute right to legal assistance. A two-stage test applied: whether there were compelling reasons for the delay and whether there was undue prejudice to defence rights taking into account the fairness of the

proceedings as a whole. The absence of compelling reasons would not therefore automatically result in a violation of Article 6; it would be necessary to examine the entirety of the proceedings. The absence of compelling reasons would, however, be a very important factor. The Government considered that the factors to which the Chamber had had regard when assessing the overall fairness of the proceedings were appropriate.

245. In the Government's submission, there were compelling reasons for delaying legal advice in the first three applicants' case. The justification for the restriction was "absolutely overwhelming" given the potential for loss of life on a large scale, the urgent need to obtain information on planned attacks and the severe practical constraints. It was also significant that the delay was in accordance with a statutory scheme which followed the approach taken in Article 3(6) of EU Directive 2013/48 (see paragraph 210 above), and on the basis of individualised decisions taken by senior police officers in each case. The restriction did not arise from the systematic application of a blanket legal provision, it was limited in time to a maximum of forty-eight hours and the legal framework provided that where the reasons for the delay ceased to subsist, the delay had to end. The Government argued that the first three applicants were inviting this Court to put itself in the place of the police on the ground and second-guess their decision, and to overturn the factual evaluation of the trial judge, reviewed on appeal by the Court of Appeal. When the proceedings as a whole were evaluated, the rights of the defence had not been unduly or irretrievably prejudiced by the admission of the first three applicants' statements, for the reasons given by the Chamber at §§ 205-212 of its judgment.

246. The Government accepted that there had come a point during the questioning of the fourth applicant when the applicable code of practice had required the police to administer a caution. However, they considered that there were compelling reasons for the decision not to caution him, in light of the exceptional circumstances and extreme conditions in which the police were operating. At the time of his questioning three of the bombers had still been at large and the identification and arrest of the conspirators had been imperative for public safety reasons. The police had taken the decision they did on the basis of the need to obtain information to protect the public and this was not unreasonable in the circumstances. The failure to caution did not lead automatically to a violation of Article 6, but was only one aspect of the protection against self-incrimination. The absence of the caution was a matter to be considered and assessed by the trial judge when deciding whether fairness required the exclusion of the statement. The matter had been properly and carefully examined by the trial judge. Again, the Government argued, there had been no undue prejudice at trial, for the reasons given by the Chamber at §§ 215-223 of its judgment.

3. The third party intervener

247. Fair Trials International ("FTI") considered that it was not clear from the Court's case-law whether evidence obtained in the absence of a lawyer pursuant to a restriction justified by compelling reasons could be used to convict an accused without infringing the *Salduz* principle. There had been no significant clarification of "compelling reasons" in the post-*Salduz* case-law. Similarly, the Court had not explored whether the use of incriminating statements obtained in the context of a lawful derogation from the right of access to a lawyer would result in a violation of Article 6. There was a divergence in approach when it came to the role played by the incriminating statement in securing the conviction.

248. FTI argued that the right to a lawyer was an essential safeguard which extended beyond safeguarding a suspect's right to silence; that this right was insufficiently protected in the European Union; and that the recent EU Directive on access to a lawyer (see paragraphs 206-212 above) could be taken into account by the Court, notwithstanding the failure of the United Kingdom to sign up to that Directive. In FTI's view, the Court should make it clear that: (1) derogations from the right of access to a lawyer should be limited and based on concrete risks identified in a specific case; and (2) the rights of the defence would be irremediably prejudiced if evidence obtained in the context of even a lawful derogation had a bearing of any kind on conviction.

C. The Court's assessment

1. General principles

(a) Applicability of Article 6 in its criminal aspect

249. The protections afforded by Article 6 §§ 1 and 3 apply to a person subject to a "criminal charge", within the autonomous Convention meaning of that term. A "criminal charge" exists from the moment that an individual is officially notified by the competent authority of an allegation that he has committed a criminal offence, or from the point at which his situation has been substantially affected by actions taken by the authorities as a result of a suspicion against him (see *Deweer v. Belgium*, 27 February 1980, §§ 42-46, Series A no. 35; *Eckle v. Germany*, 15 July 1982, § 73, Series A no. 51; and *McFarlane v. Ireland* [GC], no. 31333/06, § 143, 10 September 2010).

(b) General approach to Article 6 in its criminal aspect

250. The right to a fair trial under Article 6 § 1 is an unqualified right. However, what constitutes a fair trial cannot be the subject of a single unvarying rule but must depend on the circumstances of the particular case (see *O'Halloran and Francis v. the United Kingdom* [GC], nos. 15809/02

and 25624/02, § 53, ECHR 2007-III). The Court's primary concern under Article 6 § 1 is to evaluate the overall fairness of the criminal proceedings (see, among many other authorities, *Taxquet v. Belgium* [GC], no. 926/05, § 84, ECHR 2010; and *Schatschaschwili v. Germany* [GC], no. 9154/10, § 101, ECHR 2015).

251. Compliance with the requirements of a fair trial must be examined in each case having regard to the development of the proceedings as a whole and not on the basis of an isolated consideration of one particular aspect or one particular incident, although it cannot be excluded that a specific factor may be so decisive as to enable the fairness of the trial to be assessed at an earlier stage in the proceedings (see *Can v. Austria*, no. 9300/81, Commission's report of 12 July 1984, § 48, Series A no. 96). In evaluating the overall fairness of the proceedings, the Court will take into account, if appropriate, the minimum rights listed in Article 6 § 3, which exemplify the requirements of a fair trial in respect of typical procedural situations which arise in criminal cases. They can be viewed, therefore, as specific aspects of the concept of a fair trial in criminal proceedings in Article 6 § 1 (see, for example, *Salduz*, cited above, § 50; *Gäfgen v. Germany* [GC], no. 22978/05, § 169, ECHR 2010; *Dvorski*, cited above, § 76; and *Schatschaschwili*, cited above, § 100). However, those minimum rights are not aims in themselves: their intrinsic aim is always to contribute to ensuring the fairness of the criminal proceedings as a whole (see *Can*, cited above, § 48; *Mayzit v. Russia*, no. 63378/00, § 77, 20 January 2005; and *Seleznev v. Russia*, no. 15591/03, § 67, 26 June 2008).

252. The general requirements of fairness contained in Article 6 apply to all criminal proceedings, irrespective of the type of offence in issue. There can be no question of watering down fair trial rights for the sole reason that the individuals in question are suspected of involvement in terrorism. In these challenging times, the Court considers that it is of the utmost importance that the Contracting Parties demonstrate their commitment to human rights and the rule of law by ensuring respect for, *inter alia*, the minimum guarantees of Article 6 of the Convention. Nevertheless, when determining whether the proceedings as a whole have been fair the weight of the public interest in the investigation and punishment of the particular offence in issue may be taken into consideration (see *Jalloh v. Germany* [GC], no. 54810/00, § 97, ECHR 2006-IX). Moreover, Article 6 should not be applied in such a manner as to put disproportionate difficulties in the way of the police authorities in taking effective measures to counter terrorism or other serious crimes in discharge of their duty under Articles 2, 3 and 5 § 1 of the Convention to protect the right to life and the right to bodily security of members of the public (see, *mutatis mutandis*, *Sher and Others v. the United Kingdom*, no. 5201/11, § 149, ECHR 2015 (extracts)). However, public interest concerns cannot justify measures which extinguish the very essence of an applicant's defence rights (see *Jalloh*, cited above, § 97;

Bykov v. Russia [GC], no. 4378/02, § 93, 10 March 2009; and *Aleksandr Zaichenko v. Russia*, no. 39660/02, § 39, 18 February 2010).

(c) Article 6 and pre-trial proceedings

253. The primary purpose of Article 6 as far as criminal matters are concerned is to ensure a fair trial by a "tribunal" competent to determine "any criminal charge" (see *Imbrioscia v. Switzerland*, 24 November 1993, § 36, Series A no. 275; *Brennan v. the United Kingdom*, no. 39846/98, § 45, ECHR 2001-X; *Shabelnik v. Ukraine*, no. 16404/03, § 52, 19 February 2009; and *Dvorski*, cited above, § 76). However, as noted above, the guarantees of Article 6 are applicable from the moment that a "criminal charge" exists within the meaning of this Court's case-law (see paragraph 249) and may therefore be relevant during pre-trial proceedings if and in so far as the fairness of the trial is likely to be seriously prejudiced by an initial failure to comply with them (see also *Imbrioscia*, cited above, § 36; and *Dvorski*, cited above, § 76). The investigation stage may be of particular importance for the preparation of the criminal proceedings: the evidence obtained during this stage often determines the framework in which the offence charged will be considered at the trial and national laws may attach consequences to the attitude of an accused at the initial stages of police interrogation which are decisive for the prospects of the defence in any subsequent criminal proceedings. An accused may therefore find himself in a particularly vulnerable position at that stage of the proceedings, the effect of which may be amplified by increasingly complex legislation on criminal procedure, notably with respect to the rules governing the gathering and use of evidence (see *Salduz*, cited above, §§ 52 and 54; see also *Dvorski*, cited above, § 77). The manner in which Article 6 §§ 1 and 3 are to be applied during the investigation stage depends on the special features of the proceedings involved and on the circumstances of the case (see *Imbrioscia*, cited above, § 38).

254. Complaints under Article 6 about the investigation stage tend to crystallise at the trial itself when an application is made by the prosecution to admit evidence obtained during the pre-trial proceedings and the defence opposes the application. As the Court has explained on numerous occasions, it is not the role of the Court to determine, as a matter of principle, whether particular types of evidence, including evidence obtained unlawfully in terms of domestic law, may be admissible. As explained above (see paragraph 250), the question which must be answered is whether the proceedings as a whole, including the way in which the evidence was obtained, were fair (see *Jalloh*, cited above, § 95; and *Bykov*, cited above, § 89). However, an exception to this approach applies in the case of confessions obtained as a result of torture or of other ill-treatment in breach of Article 3: the Court has explained that the admission of such statements as evidence to establish the relevant facts in criminal proceedings renders

the proceedings as a whole unfair, irrespective of the probative value of the statements and irrespective of whether their use was decisive in securing the defendant's conviction (see, for example, *Gäfgen*, cited above, § 166).

(d) Access to a lawyer

(i) The position in the Court's case-law

255. The right of everyone "charged with a criminal offence" to be effectively defended by a lawyer, guaranteed by Article 6 § 3 (c), is one of the fundamental features of a fair trial (see *Salduz*, cited above, § 51; and *Nechiporuk and Yonkalo v. Ukraine*, no. 42310/04, § 262, 21 April 2011). Prompt access to a lawyer constitutes an important counterweight to the vulnerability of suspects in police custody, provides a fundamental safeguard against coercion and ill-treatment of suspects by the police, and contributes to the prevention of miscarriages of justice and the fulfilment of the aims of Article 6, notably equality of arms between the investigating or prosecuting authorities and the accused (see *Salduz*, cited above, §§ 53-54; and *Pishchalnikov*, cited above, §§ 68-69).

256. However, it has long been recognised that there is scope for access to legal advice to be, exceptionally, delayed (see, for example, *John Murray*, cited above; *O'Kane v. the United Kingdom* (dec.), no. 30550/96, 6 July 1999; and *Magee* and *Brennan*, both cited above). After reviewing the existing case-law in this area, the Court in *Salduz*, cited above, § 55, said:

> "... [T]he Court finds that in order for the right to a fair trial to remain sufficiently 'practical and effective' ..., Article 6 § 1 requires that, as a rule, access to a lawyer should be provided as from the first interrogation of a suspect by the police, unless it is demonstrated in the light of the particular circumstances of each case that there are compelling reasons to restrict this right. Even where compelling reasons may exceptionally justify denial of access to a lawyer, such restriction – whatever its justification – must not unduly prejudice the rights of the accused under Article 6 ... The rights of the defence will in principle be irretrievably prejudiced when incriminating statements made during police interrogation without access to a lawyer are used for a conviction."

257. The test set out in *Salduz* for assessing whether a restriction on access to a lawyer is compatible with the right to a fair trial is composed of two stages. In the first stage the Court must assess whether there were compelling reasons for the restriction. In the second stage, it must evaluate the prejudice caused to the rights of the defence by the restriction in the case in question. In other words, the Court must examine the impact of the restriction on the overall fairness of the proceedings and decide whether the proceedings as a whole were fair. This test has been cited and applied on numerous occasions by the Court. However, the Court considers that the application of the *Salduz* test in its subsequent case-law discloses a need to clarify each of its two stages and the relationship between them.

(ii) The meaning of "compelling reasons"

258. The first question to be examined is what constitutes compelling reasons for delaying access to legal advice. The criterion of compelling reasons is a stringent one: having regard to the fundamental nature and importance of early access to legal advice, in particular at the first interrogation of the suspect, restrictions on access to legal advice are permitted only in exceptional circumstances, must be of a temporary nature and must be based on an individual assessment of the particular circumstances of the case (see *Salduz*, cited above, § 54 *in fine* and § 55). It is of relevance, when assessing whether compelling reasons have been demonstrated, whether the decision to restrict legal advice had a basis in domestic law and whether the scope and content of any restrictions on legal advice were sufficiently circumscribed by law so as to guide operational decision-making by those responsible for applying them. To date, the Court has not provided guidance on what might be considered compelling reasons under this limb of the *Salduz* test. The compelling nature of the reasons advanced by a respondent Government to justify restrictions on legal assistance during police questioning must be assessed on a case-by-case basis, with reference to the general criteria set out above.

259. The Court accepts that where a respondent Government have convincingly demonstrated the existence of an urgent need to avert serious adverse consequences for life, liberty or physical integrity in a given case, this can amount to compelling reasons to restrict access to legal advice for the purposes of Article 6 of the Convention. In such circumstances, there is a pressing duty on the authorities to protect the rights of potential or actual victims under Articles 2, 3 and 5 § 1 of the Convention in particular. The Court notes, in this regard, that Directive 2013/48/EU, which enshrines the right to legal assistance, provides for an exception to this right in exceptional circumstances where, *inter alia*, there is an urgent need to avert serious adverse consequences for the life, liberty or physical integrity of a person (see paragraph 210 above). Similarly, in the United States, following its ruling in *Miranda v. Arizona*, the Supreme Court made clear in its judgment in *New York v. Quarles* that there is a "public safety exception" to the Miranda rule, permitting questioning to take place in the absence of a lawyer and before a suspect has been read his rights where there is a threat to public safety (see paragraphs 229-230 above; see also the position in Canada and in a number of those member States of the Council of Europe whose laws permit temporary delays in access to legal advice, at §§ 232 and 228 respectively, above). However, in so far as the Chamber judgment can be taken to have accepted that a general risk of leaks might qualify as compelling reasons, this finding must be rejected: the Court considers that a non-specific claim of a risk of leaks cannot constitute compelling reasons so as to justify a restriction on access to a lawyer.

(iii) The fairness of the proceedings as a whole

260. The question arises whether a lack of compelling reasons for restricting access to legal advice is, in itself, sufficient to found a violation of Article 6. The first three applicants have cited case-law of this Court subsequent to *Salduz*, cited above, which they contend makes it clear that *Salduz* intended to lay down a bright-line rule precluding any use at trial of statements made without legal advice (see paragraph 236 above). However, the approach taken in *Salduz* itself does not support this argument and the Grand Chamber in *Dvorski*, cited above, § 82 *in fine*, does not appear to have understood *Salduz* in this way. In its summary of the general principles applicable to the case, the Court in *Salduz*, § 52-54, referred to the overall fairness assessment that had to be carried out when determining whether there had been a breach of Article 6 rights. It said that the rights of the defence would "in principle" be irretrievably prejudiced when incriminating statements made during police interrogation without access to a lawyer were used for a conviction, indicating that the rule, while strict, was not absolute (§ 55). It is also noteworthy that, having concluded that there were no compelling reasons to deny the applicant access to a lawyer in that case (§ 56), the Court nonetheless went on to examine the trial proceedings and, in particular, to assess the impact of the admission of statements made in the absence of a lawyer on the fairness of the proceedings as a whole (§§ 57-62).

261. The first three applicants also referred, *inter alia*, to Directive 2013/48/EU and the judgment of the United States Supreme Court in *Miranda v. Arizona* in support of their argument that a bright-line rule was appropriate and necessary (see paragraphs 206-212 and 229 above). While it is true that the approach in the United States is a strict one, it is noteworthy that Directive 2013/48/EU is silent on whether evidence obtained in violation of the guarantees it contains can be fairly admitted at trial, but merely requires that suspects have "an effective remedy under national law" in the event of a breach of the rights under the Directive (see paragraph 211 above). The laws of the Contracting Parties of the Council of Europe show a diversity of practice in this respect with some favouring automatic exclusion and others preferring to allow judicial discretion (see paragraph 228 above). In Canada, evidence obtained in breach of its Charter of Rights and Freedoms may be admissible at trial (see paragraph 233 above). A similar approach is taken by the international criminal tribunals examined above (see paragraphs 220-222 and 226-227 above).

262. The Court accordingly reiterates that in assessing whether there has been a breach of the right to a fair trial it is necessary to view the proceedings as a whole, and the Article 6 § 3 rights as specific aspects of the overall right to a fair trial rather than ends in themselves (see paragraphs 250-251 above). The absence of compelling reasons does not,

therefore, lead in itself to a finding of a violation of Article 6 of the Convention.

(iv) The impact on the fairness assessment of the presence or absence of compelling reasons

263. The fact that the absence of compelling reasons is not, in itself, sufficient for a finding of a violation of Article 6 of the Convention does not mean that the outcome of the "compelling reasons" test is irrelevant to the assessment of overall fairness.

264. Where compelling reasons are found to have been established, a holistic assessment of the entirety of the proceedings must be conducted to determine whether they were "fair" for the purposes of Article 6 § 1. As noted above, a similar approach is taken in Article 12 of EU Directive 2013/48/EU on, *inter alia*, the right of access to a lawyer, and a number of jurisdictions approach the question of admissibility of evidence by reference to its impact on the fairness or integrity of the proceedings (see paragraph 261 above).

265. Where there are no compelling reasons for restricting access to legal advice, the Court must apply a very strict scrutiny to its fairness assessment. The failure of the respondent Government to show compelling reasons weighs heavily in the balance when assessing the overall fairness of the trial and may tip the balance in favour of finding a breach of Article 6 §§ 1 and 3 (c) (see, for a similar approach with respect to Article 6 §§ 1 and 3 (d), *Schatschaschwili*, cited above, § 113). The onus will be on the Government to demonstrate convincingly why, exceptionally and in the specific circumstances of the case, the overall fairness of the trial was not irretrievably prejudiced by the restriction on access to legal advice.

(e) The privilege against self-incrimination

266. The right not to incriminate oneself is primarily concerned with respecting the will of an accused person to remain silent and presupposes that the prosecution in a criminal case seek to prove their case without resort to evidence obtained through methods of coercion or oppression in defiance of the will of the accused (see *Saunders v. the United Kingdom*, 17 December 1996, §§ 68-69, *Reports* 1996-VI; *Jalloh*, cited above, §§ 100 and 102; and *Bykov*, cited above, § 92). The right to remain silent under police questioning and the privilege against self-incrimination are generally recognised international standards which lie at the heart of the notion of a fair procedure under Article 6. Their rationale lies, *inter alia*, in the protection of the accused against improper compulsion by the authorities, thereby contributing to the avoidance of miscarriages of justice and to the fulfilment of the aims of Article 6 (see *John Murray*, cited above, § 45; Jalloh, *cited above*, § 100; and *Bykov*, cited above, § 92).

267. It is important to recognise that the privilege against self-incrimination does not protect against the making of an incriminating statement *per se* but, as noted above, against the obtaining of evidence by coercion or oppression. It is the existence of compulsion that gives rise to concerns as to whether the privilege against self-incrimination has been respected. For this reason, the Court must first consider the nature and degree of compulsion used to obtain the evidence (see *Heaney and McGuinness v. Ireland*, no. 34720/97, §§ 54-55, ECHR 2000-XII; *O'Halloran and Francis*, cited above, § 55; and *Bykov*, cited above, § 92). The Court, through its case-law, has identified at least three kinds of situations which give rise to concerns as to improper compulsion in breach of Article 6. The first is where a suspect is obliged to testify under threat of sanctions and either testifies in consequence (see, for example, *Saunders*, cited above; and *Brusco v. France*, no. 1466/07, 14 October 2010) or is sanctioned for refusing to testify (see, for example, *Heaney and McGuinness*, cited above; and *Weh v. Austria*, no. 38544/97, 8 April 2004). The second is where physical or psychological pressure, often in the form of treatment which breaches Article 3 of the Convention, is applied to obtain real evidence or statements (see, for example, *Jalloh*, *Magee* and *Gäfgen*, all cited above). The third is where the authorities use subterfuge to elicit information that they were unable to obtain during questioning (see *Allan v. the United Kingdom*, no. 48539/99, ECHR 2002-IX).

268. Testimony obtained under compulsion which appears on its face to be of a non-incriminating nature, such as exculpatory remarks or mere information on questions of fact, may be deployed in criminal proceedings in support of the prosecution case, for example to contradict or cast doubt upon other statements of the accused or evidence given by him during the trial, or to otherwise undermine his credibility. The privilege against self-incrimination cannot therefore reasonably be confined to statements which are directly incriminating (see *Saunders*, cited above, § 69).

269. However, the right not to incriminate oneself is not absolute (see *Heaney and McGuinness*, cited above, § 47; *Weh*, cited above, § 46; and *O'Halloran and Francis*, cited above, § 53). The degree of compulsion applied will be incompatible with Article 6 where it destroys the very essence of the privilege against self-incrimination (see *John Murray*, cited above, § 49). But not all direct compulsion will destroy the very essence of the privilege against self-incrimination and thus lead to a violation of Article 6 (see *O'Halloran and Francis*, cited above, § 53). What is crucial in this context is the use to which evidence obtained under compulsion is put in the course of the criminal trial (see *Saunders*, cited above, § 71).

(f) The right to notification of the right to a lawyer and the right to silence and privilege against self-incrimination

270. In *Aleksandr Zaichenko*, cited above, § 52, in the context of its examination of the applicant's complaint of a failure to respect his privilege against self-incrimination and right to silence, the Court explained that once there was a suspicion of theft against the applicant, it became incumbent on the police, in all the circumstances of the case, to inform him of these rights. In *Schmid-Laffer v. Switzerland*, no. 41269/08, §§ 29 and 39, 16 June 2015, the Court noted that when the applicant was first interviewed by the police there was nothing in the case-file to suggest that she should have been treated as a person accused of an offence and should have been informed of her right to remain silent. However, during her second interrogation, by which time she was subject to a "criminal charge" for the purposes of Article 6, it had become incumbent on the police in the circumstances of the case to inform her of her right to silence and privilege against self-incrimination.

271. A right to information about defence rights is provided for under other international instruments. The UN Human Rights Committee has made it clear that the right to a fair trial under Article 14 ICCPR implies the right to be notified of procedural rights, including the right to legal assistance and the right to remain silent (see paragraphs 216-217 above). The Rules of Procedure and Evidence of the ICTY and the ICTR and Article 55 of the ICC Statute expressly provide that suspects are to be notified of their right to a lawyer and right to remain silent (see paragraphs 218-219 and 224 above). The importance of notifying suspects of their rights has also been recognised by the adoption of Directive 2012/13/EU on the right to information in criminal proceedings (see paragraphs 203-205 above). The Directive's preamble explains that the right to information about procedural rights, which is inferred from this Court's case-law, should be explicitly established. Article 3 of the Directive requires that suspects be notified of five procedural rights, including the right to a lawyer and the right to remain silent. Recital 21 of Directive 2013/48/EU on access to a lawyer also explains that where, in the course of police questioning, a witness becomes a suspect, questioning may only continue once he has been made aware that he is a suspect and is able to fully exercise his right to legal advice.

272. The Convention is intended to guarantee rights that are practical and effective and not theoretical and illusory (see, among many other authorities, *Salduz*, cited above, § 51; and *Dvorski*, cited above, § 82). In order to ensure that the protections afforded by the right to a lawyer and the right to silence and privilege against self-incrimination are practical and effective, it is crucial that suspects be aware of them. This is implicit from the Court's application of the "knowing and intelligent waiver" standard to any purported waiver of the right to counsel (see *Dvorski*, cited above,

§ 101). The Court therefore finds that it is inherent in the privilege against self-incrimination, the right to silence and the right to legal assistance that a person "charged with a criminal offence" for the purposes of Article 6 has the right to be notified of these rights.

273. In the light of the nature of the privilege against self-incrimination and the right to silence, the Court considers that in principle there can be no justification for a failure to notify a suspect of these rights. Where a suspect has not, however, been so notified, the Court must examine whether, notwithstanding this failure, the proceedings as a whole were fair (see, for example, the approach taken in *Schmid-Laffer*, cited above, §§ 36-40). Immediate access to a lawyer able to provide information about procedural rights is likely to prevent unfairness arising from the absence of any official notification of these rights. However, where access to a lawyer is delayed, the need for the investigative authorities to notify the suspect of his right to a lawyer and his right to silence and privilege against self-incrimination takes on a particular importance (see *Brusco*, cited above, § 54). In such cases, a failure to notify will make it even more difficult for the Government to rebut the presumption of unfairness that arises where there are no compelling reasons for delaying access to legal advice or to show, even where there are compelling reasons for the delay, that the proceedings as a whole were fair.

(g) Relevant factors for the fairness assessment

274. Having regard to the fact that a criminal trial generally involves a complex interplay of different aspects of criminal procedure, it is often artificial to try and categorise a case as one which should be viewed from the perspective of one particular Article 6 right or another. As noted above (see paragraph 254), complaints concerning a failure to respect the express or implied Article 6 rights at the investigation stage in criminal proceedings will often crystallise at trial, when the evidence obtained is admitted. When examining the proceedings as a whole in order to assess the impact of procedural failings at the pre-trial stage on the overall fairness of the criminal proceedings, the following non-exhaustive list of factors, drawn from the Court's case-law, should, where appropriate, be taken into account:

(a) Whether the applicant was particularly vulnerable, for example, by reason of his age or mental capacity.

(b) The legal framework governing the pre-trial proceedings and the admissibility of evidence at trial, and whether it was complied with; where an exclusionary rule applied, it is particularly unlikely that the proceedings as a whole would be considered unfair.

(c) Whether the applicant had the opportunity to challenge the authenticity of the evidence and oppose its use.

(d) The quality of the evidence and whether the circumstances in which it was obtained cast doubt on its reliability or accuracy, taking into account the degree and nature of any compulsion.
(e) Where evidence was obtained unlawfully, the unlawfulness in question and, where it stems from a violation of another Convention Article, the nature of the violation found.
(f) In the case of a statement, the nature of the statement and whether it was promptly retracted or modified.
(g) The use to which the evidence was put, and in particular whether the evidence formed an integral or significant part of the probative evidence upon which the conviction was based, and the strength of the other evidence in the case.
(h) Whether the assessment of guilt was performed by professional judges or lay jurors, and in the case of the latter the content of any jury directions.
(i) The weight of the public interest in the investigation and punishment of the particular offence in issue.
(j) Other relevant procedural safeguards afforded by domestic law and practice.

2. The application of the general principles to the facts of the case

(a) The first three applicants

275. The first three applicants complain that they were interviewed without having had access to a lawyer and that the statements they made were admitted in evidence against them. There is no doubt that at the time of their safety interviews they were subject to a "criminal charge" within the meaning of Article 6 of the Convention. As noted above, the Court is required to decide whether there were compelling reasons for the temporary restrictions on the applicants' access to legal advice before assessing whether the admission of the comments made during the safety interviews rendered the criminal proceedings as a whole unfair.

(i) Compelling reasons

276. The Government argued that the compelling reasons for delaying legal advice arose from the potential for loss of life on a large scale, the urgent need to obtain information on planned attacks and the severe practical constraints under which the police were operating. The Court has accepted above that compelling reasons may exist where an urgent need to avert serious adverse consequences for life, liberty or physical integrity has been convincingly made out (see paragraph 259 above). It is in no doubt that such a need existed at the time when the safety interviews of the first three applicants were conducted. In suicide attacks on three underground trains and a bus two weeks earlier, fifty-two people had been killed and

countless others injured. When the first three applicants and Mr Osman detonated their devices on 21 July, again on three underground trains and a bus, it was inevitable that the police would conclude that the United Kingdom had become the target of a wave of terrorist attacks. They had every reason to assume that the conspiracy was an attempt to replicate the events of 7 July and that the fact that the bombs had not exploded was merely a fortuitous coincidence. The failure of the bombs to explode meant that the perpetrators of the attack were still at liberty and free to detonate other bombs, possibly successfully. As Superintendent McKenna explained, the discovery of a fifth, undetonated bomb two days after the attacks as well as the recovery of a vast amount of chemicals at an address linked to the suspects gave further credence to this very real fear (see paragraph 66 above). The police were operating under enormous pressure and their overriding priority was, quite properly, to obtain as a matter of urgency information on any further planned attacks and the identities of those potentially involved in the plot. The Court finds that the Government have convincingly demonstrated in the case of the first three applicants the existence of an urgent need to avert serious adverse consequences for the life and physical integrity of the public.

277. However, as noted in paragraph 258 above, the existence of exceptional circumstances which satisfy the substantive requirement of compelling reasons does not automatically provide adequate justification for limiting suspects' access to legal advice. Other factors which must be taken into account include whether there was a basis for the restriction in domestic law, whether the restriction was based on an individual assessment of the particular circumstances of the case and whether the restriction was temporary in nature. In the first three applicants' case, there was a clear framework in place, set out in legislation, regulating the circumstances in which access to legal advice for suspects could be restricted and offering important guidance for operational decision-making (see paragraph 186-198 above). The legislation provided that restrictions on legal assistance had to end as soon as the circumstances justifying them ceased to exist (see paragraph 196 above). Restrictions were further subject to a strict upper time-limit of forty-eight hours (see paragraph 198 above). An individual decision to limit each of the applicants' right to legal advice was taken by a senior police officer based on the specific facts of their cases, and the reasons for the decision were recorded. It is clear from the reasons given that the authorisation was made in accordance with the legislative framework and that the applicants' procedural rights were taken into account (see paragraphs 28, 43 and 51 above). The decision to restrict legal advice was subsequently reviewed by the trial judge and by the Court of Appeal (see paragraphs 68-95 and 122-136 above).

278. It is true that the trial judge found in the case of Mr Ibrahim that he could have been allowed to speak with his lawyer by telephone and that, to

this limited extent, he had been incorrectly denied access to his lawyer (see paragraph 81 above). However, it is important to put this finding in context. There were eighteen detainees arrested in connection with the attempted bombings and held at the same police station as Mr Ibrahim, all of whom had to be detained separately to avoid communication and cross-contamination of forensic evidence (see paragraphs 71 and 80 above). The possibility of restricting access to legal advice in exceptional circumstances such as those arising in the present case recognises the unique and highly difficult conditions. It is not surprising that in such a high-intensity situation, a minor "breakdown of communications" may occur. In the exceptional circumstances with which the police in London were faced in July 2005, it was appropriate for them to focus maximum attention and resources on investigations and interviews and they cannot be criticised for having failed to realise that there was a small opportunity in which a consultation room with a telephone socket was available and in which Mr Ibrahim could therefore have been afforded access to a lawyer by telephone.

279. In conclusion, the Court is satisfied that the Government have convincingly demonstrated that there were compelling reasons for the temporary restrictions on the first three applicants' right to legal advice.

(ii) The fairness of the proceedings as a whole

280. The Court recalls that in the case of Mr Omar, access to legal advice was delayed for a little over eight hours, during which time he was questioned for a total of about three hours. Mr Ibrahim's access to legal advice was delayed for around seven hours and he was questioned during that time for about half an hour. Mr Mohammed's access to legal advice was delayed for about four hours, during which time eight minutes of questioning took place. It falls to the Court to examine the entirety of the criminal proceedings in respect of the first three applicants in order to determine whether, despite the delays in providing legal assistance, they were fair, within the meaning of Article 6 § 1.

281. First, as noted above, the possibility of restricting access to legal advice was set out in law (see paragraph 277 above) and in spite of the pressures under which the police were operating, save for the errors as to the wrong cautions (see paragraphs 34, 45, 54, 79, 82 and 84 and above), the police adhered strictly to the legislative framework which regulated how they had to conduct their investigation. Further, the purpose of the safety interviews – to obtain information necessary to protect the public – was strictly observed in the first three applicants' cases. As the trial judge noted, in questioning Mr Omar the police officers concentrated throughout on issues that might have revealed information relevant to assisting them to locate people or items that could pose a danger to the public. There had also been no suggestion at trial by those acting for Mr Omar that the police had

exceeded the requirements of what was necessary or that the lines of questioning had not been relevant to the public safety issues (see paragraph 70 above). In respect of Mr Ibrahim, the judge considered that the questions put did not go beyond legitimate questioning for safety purposes and as regards Mr Mohammed, he found that the questioning did not exceed the legitimate bounds or purpose of a safety interview and was focused and appropriate (see paragraphs 82 and 84 above). None of these findings is disputed before this Court. It is also noteworthy that the applicants had been formally arrested and informed of their right to silence and their right to legal advice. They had also been told the reasons for the decision to restrict their access to legal advice.

282. The admissibility of evidence at trial was governed by section 78 PACE which allowed the judge to refuse to admit evidence where its admission would have an adverse effect on the fairness of the proceedings (see paragraph 201 above). The applicants duly challenged the admissibility of the safety interview evidence on the basis of the failure to afford them legal advice and the administration of the wrong cautions, invoking section 78 PACE. While Mr Ibrahim and Mr Mohammed contested the authorisation to restrict legal advice, Mr Omar accepted that the police had had good grounds for deciding to hold safety interviews in his case and that the interviews had been fairly conducted (see paragraphs 64-65 and 69-70 above). A *voir dire*, or "trial within a trial", took place before the trial judge in order for the applicants' complaints to be thoroughly examined. At the hearing, the applicants were able to present evidence as to the circumstances of the questioning. In light of the fact that Mr Omar did not challenge the safety interviews themselves, the evidence of the safety interview process in his case was taken as read. However, oral evidence was heard in respect of the decision to authorise safety interviews in the cases of Mr Ibrahim and Mr Mohammed (see paragraph 67 above). All three applicants were represented by counsel who were able to make submissions as to the fairness of admitting the safety interview evidence. In a detailed and comprehensive ruling, the trial judge examined the circumstances prevailing at the police station, the specific circumstances of each applicant's arrest and questioning and the impact of the restriction on legal advice on each applicant. He gave clear reasons for his findings that the restrictions were justified and that they did not result in any unfairness. He also considered in detail the applicants' arguments as to the administration of the wrong cautions and explained why he was of the view that this had not led to any material unfairness (see paragraphs 68-95 above).

283. Further, the ruling that the statements were admissible did not prevent the applicants from challenging the statements at trial. All three applicants were able to take the stand and, again, present evidence as to the circumstances of their questioning, to call witnesses, to make submissions

through their counsel as to the alleged unfairness of delaying their access to legal advice and to invite the jury not to take their statements into account. Notably, it was also open to them to explain why they had told lies during the safety interviews; indeed, all three applicants did provide an explanation for their conduct (see paragraphs 102-104 above).

284. The applicants were subsequently able to, and did, make their submissions in favour of excluding the evidence again before the Court of Appeal in support of their argument that the admission of the evidence had rendered the trial unfair and that their convictions should be quashed. The Court of Appeal reviewed carefully the trial judge's approach to the admission of the evidence and found that the exercise of his discretion had been fully-informed and defendant-specific. It was satisfied that he had approached the relevant issues with care (see paragraphs 122-136 above).

285. As to the quality of the evidence and the circumstances in which it was obtained, all three applicants now point to the alleged compulsion inherent in the erroneous administration of the new caution. It is noteworthy that Mr Omar made no such argument at the *voir dire* (see paragraphs 65 and 69-70 above). It is also significant, in his case, that at the point at which the wrong caution was administered, at the beginning of safety interview D, he had already been interviewed three times after the administration of the correct caution. In safety interview D, he gave answers consistent with his previous responses and there is nothing to suggest that the administration of the new-style caution compelled him to act any differently during that interview. In his final safety interview, the correct caution was again administered and, again, Mr Omar responded to police questions in the same way as he had throughout the previous safety interviews (see paragraphs 30-31 and 34-36 above). His argument that the new caution resulted in a degree of coercion or compulsion is thus entirely negated by the facts of his case.

286. The other two applicants were each interviewed only once, under the erroneously-administered new-style caution (see paragraphs 45 and 54 above). In practical terms, the consequence of the administration of the wrong caution was that they were wrongly told that it might harm their defence if they did not mention when questioned something that they later relied on in court. As with the old-style caution, they were also told that they did not have to say anything and that anything they did say could be admitted as evidence at trial. Thus it should have been plain to both applicants from the moment the interviews began that they were under no obligation to speak to the police and that anything that they chose to say, including lies, could be used against them at trial. It is not open to them now to argue that they answered police questions in ignorance of the fact that their responses might be admitted at trial. The question remains whether the additional element of the new caution, namely the warning that it might harm their defence if they did not mention when questioned something that

they later relied on in court, itself compelled them to tell lies in their interviews. The Court considers this argument to be untenable. Given the other two elements of the caution administered, namely the notification that they had the right to silence and the warning that anything they did say could be used as evidence against them, they were well aware that any possible prejudice averted by choosing not to remain silent had to be weighed against the inevitable prejudice to their defence which would be caused by the admission of their lies at trial. As the trial judge pointed out, his analysis of the fairness of admitting the statements might have been different had the applicants in fact incriminated themselves by telling the truth in response to the questions posed by the police (see paragraph 88 above).

287. It is also significant that the statements had been lawfully obtained following the careful application of the legislative framework in place. Aside from the administration of the wrong caution, the impact of which has been examined above, there were no defects in the pre-trial proceedings. Even after they had received legal advice, the applicants did not disclose what they later contended at trial was their true defence, namely that they had detonated the bombs as a political hoax. Indeed, this defence was not disclosed until the lodging of their defence statements in September 2006 over a year later (see paragraphs 58-60 above).

288. As to the importance of the safety interview evidence, the trial judge noted at the conclusion of his *voir dire* ruling that it was potentially of high relevance to the central issue in the trial, namely whether the hoax defences were possibly true. The evidence was, therefore, not "marginal or unimportant" (see paragraph 95 above). The Court of Appeal for its part observed at the outset of its judgment that the records of the police interviews were sufficient, on their own, utterly to undermine the applicants' "hoax" defence (see paragraph 126 above). However, account must be taken of the context in which these particular comments were made. When resolving issues around the admissibility of the statements, the trial judge and the Court of Appeal were taking this evidence in isolation. At trial, on the other hand, the statements were merely one element of a substantial prosecution case against the applicants. There was damning scientific evidence as to the construction of the bombs. It showed that they contained hydrogen peroxide at a concentration substantially higher than the concentration available to the public. There was evidence that the applicants and their co-conspirators had purchased an enormous quantity of hydrogen peroxide in the three months leading up to the attacks and had manually increased its concentration. A number of the empty bottles recovered had markings on them which the prosecution contended was evidence that the applicants believed that a concentration of hydrogen peroxide sufficient to cause an explosion had been achieved (see paragraph 97 above). The Court of Appeal noted that a significant part of the trial was taken up by the

applicants' efforts to explain away this "crucial evidence" (see paragraph 125 above).

289. In the face of such overwhelming evidence, it is not surprising that the prosecution case that the applicants had increased the concentration of the hydrogen peroxide was not disputed by the defence. However, the applicants claimed to have subsequently watered down the hydrogen peroxide to ensure that it would not explode. As the Court of Appeal commented, the applicants did not explain why they had engaged in such laborious work to increase the concentration of the hydrogen peroxide at all if there was no intention that the devices would explode (see paragraph 125 above). They also did not explain why they had increased the concentration and then watered it back down. In response to the defence claim that the concentration had been thus reduced, the prosecution's scientific expert gave evidence of the isotope composition of London tap water which showed that it was not possible that the hydrogen peroxide found in the devices had been watered down in this way. The defence expert did not dispute this conclusion and no alternative explanation was offered by the defence (see paragraph 98 above).

290. Evidence was also led that shrapnel had been attached to the outside of the plastic tubs holding the hydrogen peroxide. This, the prosecution argued, was intended to increase fragmentation upon explosion and maximise injuries and was entirely unnecessary if the bombs had been intended merely as a hoax (see paragraph 97 above). As the Court of Appeal found, the only reasonable explanation for the addition of the shrapnel was that it was intended that the bombs would explode (see paragraph 125 above).

291. Aside from the scientific evidence, there was extensive evidence of extremist material found at the residences of Mr Omar and Mr Osman. Evidence was led of occasions on which Mr Omar had expressed his extremist views in the presence of others or in public. There was evidence that Mr Ibrahim had spoken of training for Jihad and had, in fact, gone on Jihad in late 2004 (see paragraph 96 above). There was evidence of a video camera tripod found at Mr Mohammed's residence which the prosecution alleged had been used to film a suicide video at his home, although no video had subsequently been recovered. Also introduced in evidence was an alleged suicide note written by Mr Mohammed to his family. A vast body of telephone and CCTV evidence was admitted and showed extensive contacts between the men from March 2005 onwards. Finally, evidence was heard from witnesses present when the devices were detonated as to the applicants' behaviour following the detonation of the bombs (see paragraph 99 above).

292. In his summing-up to the jury, later described by the Court of Appeal as "the product of characteristic thoroughness and accuracy", the trial judge summarised the prosecution and defence evidence in detail and

carefully directed the jury on matters of law (see paragraphs 106-118 and 127 above). He set out in detail the circumstances of each of the applicants' arrests and interviews, including the contents of the interviews and the applicants' explanations for the lies that they had told. He also summarised the extensive prosecution and defence evidence in the case. He expressly instructed the jury to take into account when considering the lies told by the applicants that they had been questioned before having had access to legal advice. He explained that this was a right normally afforded to suspects. He gave examples of advice which might have been given by a lawyer and which might have persuaded the applicants to act differently. He further directed the jury to bear in mind that incorrect cautions had been used (see paragraphs 74, 79, 82 and 107 above), explaining that this was potentially confusing for the applicants and might have put inappropriate pressure on them to speak. He pointed out, however, that they had not in fact been pressured into revealing anything relied on at trial but had lied. He instructed the jury members that unless they were sure that each applicant had deliberately lied, they were to ignore the lies told. If, on the other hand, they were satisfied that the lies were deliberate, they were required to consider why the applicant had lied. The judge explained to them that the mere fact that a defendant had lied was not in itself evidence of guilt, since he might have lied for many, possibly innocent reasons. He reminded them that the applicants had put forward a variety of reasons as to why they had lied and told the jury members that if they were satisfied that there was an innocent explanation for the lies told then no notice should be taken of those lies. The lies could only be used as evidence to support the prosecution cases if the jury was sure that the applicants had not lied for innocent reasons. The judge also emphasised that the jury was not permitted to hold it against the applicants that they had failed to mention in the safety interviews matters on which they relied in court. Again, he reminded them that legal advice had been denied to them before the safety interviews. He further instructed the jury to bear in mind as regards Mr Ibrahim that he had been incorrectly denied legal advice by telephone before his safety interview.

293. Finally, there can be no doubt that there was a strong public interest in the investigation and punishment of the offences in question. Indiscriminate terrorist attacks are, by their very nature, intended to strike fear into the hearts of innocent civilians, to cause chaos and panic and to disrupt the proper functioning of everyday life. In such circumstances, threats to human life, liberty and dignity arise not only from the actions of the terrorists themselves but may also arise from the reaction of the authorities in the face of such threats. The case-law of the Court in recent years bears testimony to the difficulties of reconciling individual human rights and the public interest in the terrorism context (see, for example, *Saadi v. Italy* [GC], no. 37201/06, ECHR 2008; and *A. and Others v. the*

United Kingdom [GC], no. 3455/05, ECHR 2009; and *Nada v. Switzerland* [GC], no. 10593/08, ECHR 2012). These very applications, calling into question aspects of the police response to a terrorist attack, attest to the strain that such attacks place on the normal functioning of a democratic society. The public interest in preventing and punishing terrorist attacks of this magnitude, involving a large-scale conspiracy to murder ordinary citizens going about their daily lives, is of the most compelling nature.

294. In conclusion, the Court is satisfied that notwithstanding the delay in affording the first three applicants access to legal advice and the admission at trial of statements made in the absence of legal advice, the proceedings as a whole in respect of each applicant were fair. There has therefore been no violation of Article 6 §§ 1 and 3 (c) of the Convention.

(b) The fourth applicant

295. The fourth applicant complained that the self-incriminating statement he made as a witness, and therefore without having been notified of his privilege against self-incrimination or having been provided with access to a lawyer, was admitted at his trial.

296. The Court must first determine when the guarantees of Article 6 became applicable in the fourth applicant's case. Unlike the first three applicants, who were immediately arrested, he was approached by the police as a potential witness and invited to accompany them to the police station to assist with their investigation (see paragraph 139 above). The Court accepts that, at that stage, the police did not suspect him of involvement in a criminal offence and that he cannot claim to have been substantially affected by actions taken as a result of a suspicion against him (see paragraph 249 above). However, during the witness interview, the fourth applicant began to incriminate himself and the police officers conducting the interview suspended it to seek instructions from their superior. The Court is satisfied that at that point a suspicion that the fourth applicant had committed a criminal offence had crystallised, such that from that moment onwards his situation was substantially affected by the actions of the police and was accordingly subject to a "criminal charge" within the autonomous meaning of Article 6 of the Convention.

297. The Court must therefore decide whether there were compelling reasons for the restriction of the fourth applicant's access to legal advice before assessing whether the admission of his witness statement rendered the criminal proceedings as a whole unfair.

(i) Compelling reasons

298. As with the first three applicants, the Government relied on the exceptional circumstances prevailing in July 2005 as constituting compelling reasons to justify the restriction of the fourth applicant's access to a lawyer. The Court has accepted, in its examination of the case of the

first three applicants, that there was at the relevant time an urgent need to avert serious adverse consequences for life, liberty or physical integrity which amounted to compelling reasons for restricting access to legal advice in their cases (see paragraphs 276-279 above). The question is whether these exceptional circumstances were sufficient to constitute compelling reasons in the fourth applicant's case for continuing with his interview without cautioning him or informing him of his right to legal advice.

299. The Government did not dispute that the fourth applicant ought to have been cautioned at the point at which his interview was temporarily suspended for further instructions (see paragraph 246 above). The applicable code of practice made it clear that where in the course of questioning the answers given provided grounds for suspicion that the person had committed an offence, a caution had to be administered before any further questioning took place (see paragraph 181 above). It is significant that the consequence of this omission was that the fourth applicant was misled as to his procedural rights. The possibility of denying a suspect the procedural rights guaranteed by the code by declining to change his formal status when such a change had become appropriate was not set out in domestic law. There were, therefore, no legal provisions guiding operational decision-making by clarifying how any discretion was to be exercised or requiring regard to be had to an individual's Article 6 rights. It is also noteworthy that there was the possibility under the legal framework in place to delay access to legal advice for suspects who had been formally cautioned (see paragraphs 189-190, 194 and 196-198 above). This legal framework was applied to the first three applicants and could equally have been applied in the fourth applicant's case if the senior police officer had been of the view that an urgent police interview without prior access to legal advice was necessary. Such a decision would have been recorded in writing. By contrast, the decision not to arrest the fourth applicant but to continue to question him as a witness was not recorded and the specific reasons for it, including any evidence that his procedural rights were, in fact, taken into account, could not therefore be subject to *ex post facto* review by the domestic courts or by this Court.

300. In the light of the above, the Court finds that the Government have not convincingly demonstrated, on the basis of contemporaneous evidence, the existence of compelling reasons in the fourth applicant's case, taking account of the complete absence of any legal framework enabling the police to act as they did, the lack of an individual and recorded determination, on the basis of the applicable provisions of domestic law, of whether to restrict his access to legal advice and, importantly, the deliberate decision by the police not to inform the fourth applicant of his right to remain silent.

(ii) Fairness of the proceedings as a whole

301. It falls to the Court to examine the criminal proceedings in respect of the fourth applicant as a whole in order to determine whether they were fair, within the meaning of Article 6 § 1. However, as noted above (see paragraph 265), in the absence of compelling reasons for the restriction of the fourth applicant's right to legal advice, the burden of proof shifts to the Government to demonstrate convincingly why, exceptionally and in the specific circumstances of the case, the overall fairness of the trial was not irretrievably prejudiced by the restriction on access to legal advice.

302. In submitting that the trial as a whole was fair, the Government referred to the Chamber's analysis of the relevant factors listed above (see paragraph 246). The Court must therefore review these in turn.

303. Unlike the first three applicants, who were arrested and informed of their rights before being made subject to restrictions on legal advice in accordance with a legal framework which expressly governed cases such as theirs, as the Court has already noted above, the decision to continue to question the fourth applicant as a witness had no basis in domestic law and was contrary to the guidance given in the applicable code of practice. The failure to treat him as a suspect meant that notification of his procedural rights, which under domestic law is triggered by a decision that a person is suspected of an offence, did not occur. This constitutes, in itself, a shortcoming in terms of the guarantees afforded by Article 6, which, as the Court has explained (see paragraphs 272-273 above), include the right to be notified of one's privilege against self-incrimination. It is a particularly significant defect in the present case, where the applicant was not provided with access to a lawyer who could have informed him of his rights, and the Government have failed to provide convincing justification for it.

304. The admissibility of the witness statement was governed by sections 76 and 78 PACE (see paragraphs 199-201 above). In particular, section 76 required the judge to be sure beyond reasonable doubt that the statement had not been obtained by oppression. At trial, the applicant challenged the statement's admission on the basis of these provisions. Again, a "trial within a trial" took place in order for the judge to examine the circumstances in which the statement had been obtained and to determine whether it would be unfair to admit it. Evidence was heard from the police officers who had conducted the interview and the fourth applicant's counsel made legal submissions (see paragraph 157 above). In his ruling, the trial judge rejected the submission that there had been any oppression during the interview or that anything had been done or said by the police officers so as to render the statement unreliable. He also pointed out that the fourth applicant had "freely adopted" the witness statement after having been notified of his procedural rights and having received legal advice (see paragraph 159 above). He concluded that the defence would be able to put all matters concerning their challenge to the witness statement

before the jury and that the jury would be directed appropriately on how to approach the witness statement evidence (see paragraph 160 above). At the conclusion of the prosecution evidence, the fourth applicant applied to have the proceedings stayed on the basis of the unfairness inherent in the admission of the witness statement (see paragraph 163 above). The trial judge therefore again examined the circumstances in which the witness statement had been obtained. He pointed out that the fourth applicant could have said during his interviews as a suspect that what he had previously said was untrue or inaccurate, but had not done so. Instead, having consulted with his lawyer, he had adopted the witness statement; indeed, his defence at trial had been based on what he had told the police in that statement (see paragraph 164 above). However, it is striking that the trial court does not appear to have heard evidence from the senior police officer who had authorised the continuation of the witness interview. The lack of oral evidence on the question meant that the trial court was denied the opportunity of scrutinising the reasons for the decision and determining whether an appropriate assessment of all relevant factors had been carried out. This was all the more important given that the reasons for the decision had not been recorded in writing.

305. It is true that the fourth applicant was able to mount a further challenge to the witness statement by presenting his arguments as to the unfairness of the statement to the jury and inviting them not to take the statement into account. The fourth applicant chose not to give evidence at trial, as he was entitled to do, and his case was therefore presented in cross-examination of other witnesses and in submissions made by his counsel (see paragraph 168 above). The fourth applicant was also able to advance his arguments in respect of the admission of the witness statement on appeal to the Court of Appeal. That court carefully examined how the trial judge had approached the exercise of his discretion and concluded that he had been entitled to rule the evidence admissible (see paragraphs 175-179 above). However, as noted above (see paragraph 299), the failure to record the decision in writing or to hear oral evidence on the reasons for the decision to deny the fourth applicant legal advice prior to the taking of its statement meant that the Court of Appeal was unable to review those reasons and determine whether any discretion had been properly exercised.

306. In respect of the quality of the evidence and the circumstances in which it was obtained, it is important to emphasise that the trial judge found as fact that there had been no oppression of the fourth applicant at the police station (see paragraph 159 above). He explained that nothing had been done or said which could be said to have rendered the statement unreliable. It is noteworthy that the applicant did not claim in later interviews after consultation with his lawyer that his witness statement was incorrect or had been taken in circumstances that amounted to coercion. Having been

informed of his options by his lawyer (see paragraph 148 above), he did not seek to retract his witness statement and based his defence on it at trial. However, it is not disputed that the fourth applicant's witness statement amounted to a confession within the meaning of domestic law and was, despite various self-exculpatory remarks, a self-incriminating statement for the purposes of the present proceedings (see paragraphs 156 and 200 above). It must also be borne in mind that the statement had been obtained in breach of the applicable code of practice and in circumstances where he had not been notified of his right to legal advice or his privilege against self-incrimination. The direct consequence of the actions taken by the police officers was that the applicant was misled as to his fundamental procedural rights during questioning.

307. The applicant contended that the prosecution case had been substantially based on the witness statement. Neither the trial judge nor the Court of Appeal commented on the significance of the witness statement in the context of the other evidence in the case. However, the Court agrees with the fourth applicant that the statement clearly formed an important part of the prosecution case. In the statement, the applicant accepted that he had sheltered Mr Osman for several days, that he had been told by Mr Osman of the latter's role as one of the 21 July bombers, that he had been given information about the identities of the other bombers by Mr Osman, that he had provided Mr Osman with clothing and that he had been aware of Mr Osman's departure on the Eurostar (see paragraphs 143-146 above). There is no doubt that these admissions were central to the charges laid against him (see paragraphs 153-154 above).

308. It is true that the prosecution also relied on other evidence in the case. The fact that the fourth applicant had met Mr Osman, that the two had returned together to the fourth applicant's flat and that Mr Osman had spent three days there was demonstrated by CCTV evidence showing the two men meeting and walking towards the fourth applicant's flat, evidence from a police surveillance camera showing the two men leaving the fourth applicant's flat three days later and mobile telephone cellsite analysis consistent with Mr Osman having made telephone calls at the fourth applicant's flat. The prosecution relied on a newspaper, which contained a report on the bombings, including photographs of the suspects, with the fourth applicant's fingerprints on it to show that the fourth applicant was aware of the bombings and Mr Osman's apparent involvement (see paragraph 162 above). The prosecution also argued that the fourth applicant had provided further, critical practical assistance to Mr Osman, over and above the assistance that he had admitted in his witness statement. Thus, they introduced CCTV footage of a meeting with Mr Wahbi Mohammed at which he had given the fourth applicant a video camera to pass on to Mr Osman. They also contended that the fourth applicant had met Mr Sherif and collected from him a passport enabling Mr Osman to leave the United

Kingdom and introduced evidence of telephone contact between the two men and mobile telephone cellsite analysis consistent with a meeting having taken place. Mr Sherif gave evidence that the fourth applicant had collected a passport from him (see paragraph 167 above). Mr Osman gave evidence of the time he had spent at the fourth applicant's residence and the assistance that he had received while there. He said that the fourth applicant had gone to Waterloo station to book him a Eurostar ticket, and this was not disputed by the defence (see paragraph 166 above). Finally, there were the statements made by the applicant on 30 July and on 1 August after he had been arrested by the police and had received legal advice (see paragraphs 148-152 above).

309. However, the fact remains that the witness statement provided a narrative of what had occurred during the critical period, and it was the content of the statement itself which first provided the grounds upon which the police suspected the fourth applicant of involvement in a criminal offence. The statement thus provided the police with the framework around which they subsequently built their case and the focus for their search for other corroborating evidence. The Court therefore concludes that, having regard to the central position of the statement in the prosecution's case, it can be considered to have formed an integral and significant part of the probative evidence upon which the conviction was based.

310. In his summing-up to the jury, the trial judge drew attention to the irregularities that had occurred in the questioning of the fourth applicant and the taking of the witness statement. He summarised the fourth applicant's challenge to the statement and instructed the jury members that they were obliged to disregard the statement if they considered that it might have been obtained by something said or done which was likely to render it unreliable, even if they thought that it was or might be true (see paragraphs 169-172 above). However, it is significant that the jury members were instructed to take the statement into account if they were satisfied that it had been freely given, that the fourth applicant would have said these things even if the correct procedure had been followed and that the statement was true. Therefore, the Court considers that the trial judge's directions left the jury with excessive discretion as to the manner in which the statement, and its probative value, were to be taken into account, irrespective of the fact that it had been obtained without access to legal advice and without the fourth applicant having being informed of his right to remain silent.

311. As the fourth applicant accepted, great weight must be attached to the nature of the offences in his case (see paragraph 241 above). While the offences for which he was indicted were not of the magnitude of the offences committed by the first three applicants, the threat posed by terrorism can only be neutralised by the effective investigation, prosecution and punishment of all those involved in terrorism. However, taking into account the high threshold which applies where the presumption of

unfairness arises and having regard to the cumulative effect of the procedural shortcomings in the fourth applicant's case, the Court considers that the Government have failed to demonstrate why the overall fairness of the trial was not irretrievably prejudiced by the decision not to caution him and to restrict his access to legal advice. There has therefore been a violation of Article 6 §§ 1 and 3 (c) in the case of the fourth applicant.

II. APPLICATION OF ARTICLE 41 OF THE CONVENTION

312. Article 41 of the Convention provides:

> "If the Court finds that there has been a violation of the Convention or the Protocols thereto, and if the internal law of the High Contracting Party concerned allows only partial reparation to be made, the Court shall, if necessary, afford just satisfaction to the injured party."

A. Damage

313. The fourth applicant claimed 1,196,750 pounds sterling ("GBP") in respect of pecuniary damages for past and future loss of earnings and GBP 1,000,000 in respect of non-pecuniary damage.

314. The Government argued that the claim was based on an unmeritorious and highly speculative contention that there was a causal link between any violation and the fourth applicant's conviction. The claim was also extravagant, wholly unreasonable and vastly in excess of sums awarded by the Court in appropriate cases.

315. It does not follow from the Court's finding of a violation of Article 6 §§ 1 and 3 (c) of the Convention in the fourth applicant's case that he was wrongly convicted and it is impossible to speculate as to what might have occurred had there been no breach of the Convention. As to the claim for loss of earnings, the Court observes that no direct causal link has been established between the alleged loss and the violation found and dismisses the claim under this head. As regards his claim for non-pecuniary damage, the Court does not consider it necessary to make an award under this head in the circumstances of this case. The Court further notes that the fourth applicant may make an application to the Criminal Cases Review Commission to have the proceedings reopened (see paragraph 202 above). It therefore rejects his claim.

B. Costs and expenses

316. The fourth applicant also claimed "all legal costs incurred in respect of this application" and submitted two invoices. These showed counsel's fees of GBP 35,833, inclusive of VAT, for the costs and expenses incurred before the Court. A breakdown of the fees showed a total of

seventy-four hours' work by two counsel drafting the initial application and preparing submissions before the Chamber at a rate of between GBP 150 and GBP 275 per hour, exclusive of VAT; and a total of sixty-two hours' work by two counsel considering the Chamber judgment and preparing submissions for the Grand Chamber at a rate of between GBP 200 and GBP 300 per hour, exclusive of VAT.

317. The Government considered that the hourly rate charged appeared excessive. They further argued that the fee notes provided appeared to show duplication of work. In their view, a more appropriate figure was in the region of GBP 10,000.

318. According to the Court's case-law, an applicant is entitled to the reimbursement of costs and expenses only in so far as it has been shown that these have been actually and necessarily incurred and were reasonable as to quantum. The number of hours appears excessive having regard to the submissions provided and, in so far as it is possible to assess the actual work carried out in light of the general breakdown provided, it seems that there was some duplication. The Court therefore considers it reasonable to award the sum of 16,000 euros ("EUR").

C. Default interest

319. The Court considers it appropriate that the default interest rate should be based on the marginal lending rate of the European Central Bank, to which should be added three percentage points.

FOR THESE REASONS, THE COURT,

1. *Holds*, by fifteen votes to two, that there has been no violation of Article 6 §§ 1 and 3 (c) of the Convention in respect of the first three applicants;

2. *Holds*, by eleven votes to six, that there has been a violation of Article 6 §§ 1 and 3 (c) of the Convention in respect of the fourth applicant;

3. *Holds*, by sixteen votes to one,
   (a) that the respondent State is to pay the fourth applicant, within three months, the sum of EUR 16,000 (sixteen thousand euros), inclusive of any tax that may be chargeable to him, in respect of costs and expenses, to be converted into pounds sterling at the rate applicable at the date of settlement;
   (b) that from the expiry of the above-mentioned three months until settlement simple interest shall be payable on the above amount at a rate

equal to the marginal lending rate of the European Central Bank during the default period plus three percentage points;

4. *Dismisses*, by thirteen votes to four, the remainder of the fourth applicant's claim for just satisfaction.

Done in English and in French, and delivered at a public hearing in the Human Rights Building, Strasbourg, on 13 September 2016.

Lawrence Early	Guido Raimondi
Jurisconsult	President

In accordance with Article 45 § 2 of the Convention and Rule 74 § 2 of the Rules of Court, the following separate opinions are annexed to this judgment:

(a) concurring opinion of Judge Mahoney;

(b) joint partly dissenting, partly concurring opinion of Judges Sajó and Laffranque;

(c) joint partly dissenting opinion of Judges Sajó, Karakaş, Lazarova Trajkovska and De Gaetano;

(d) joint partly dissenting opinion of Judges Hajiyev, Yudkivska, Lemmens, Mahoney, Silvis and O'Leary;

(e) partly dissenting opinion of Judge Lemmens;

(f) dissenting opinion of Judge Sajó.

G.R.A.
T.L.E.

CONCURRING OPINION OF JUDGE MAHONEY

1. Apart from parting company with my colleagues in the majority in finding no violation of Article 6 in the case of the fourth applicant, I also have a serious reservation about one point in the reasoning concerning the general principles. This point does not affect the outcome in relation to either the fourth applicant or the first three applicants. Rather it goes to one aspect of the analysis of Article 6 which is not in issue in the present case but which may have repercussions in future cases.

2. The judgment proceeds on the basis that in order for the Court to be able to take account of the initial statements made by the applicants to the police when assessing the fairness of their trial, it must imperatively be established that Article 6 was already applicable at the time that they made their statements (see *Schmid-Laffer v. Switzerland*, no. 41269/08, §§ 26-32, 16 June 2015, which appears to reason on a similar basis); in other words that a "criminal charge" within the autonomous meaning of Article 6 had been laid when the "safety" interviews of the first three applicants were carried out and at the very moment when the fourth applicant began to incriminate himself, thereby turning himself from a witness into a suspect. The judgment accordingly finds it necessary to arrive at the conclusion that each applicant's situation, and in particular that of the fourth applicant, had "been substantially affected by actions taken by the authorities as a result of a suspicion against him" (see paragraphs 249, 275 and 296 of the judgment). To my mind, such an exercise not only goes against the Court's case-law on the test for determining when a "criminal charge" exists, but is not needed at all and leads to a somewhat artificial analysis of the facts in the fourth applicant's case.

3. At the heart of the present case is the statement in the landmark judgment in the case of *Salduz v. Turkey* ([GC], no. 36391/02, § 55, ECHR-2008) that

> "in order for the right to a fair trial to remain sufficiently 'practical and effective'..., Article 6 §1 requires that, as a rule, access to a lawyer should be provided as from the first interrogation of a suspect by the police, unless it is demonstrated in the light of the particular circumstances of each case that there are compelling reasons to restrict this right."

4. The *Salduz* judgment itself does not mention any requirement for the "criminal charge" already to have been brought when the initial police interview as a suspect is carried out, in order for that interview to be taken into account in assessing the fairness of any criminal proceedings subsequently pursued against the person interviewed.

5. As I understand it, the *Salduz* rule is based on the notion, existing before *Salduz*, that, once a person has been "charged" (so that the application of Article 6 under its criminal head is triggered), the fairness guarantee reaches back to events occurring before the "charge" in so far as

those facts are capable of influencing the fairness of the trial. One example of such pre-"charge" facts is entrapment by the police: if persons have been entrapped by the police into carrying out acts that they would not otherwise carried out, any criminal proceedings brought against them on the basis of those acts will be unfair (see, among many case-law authorities, *Teixeira de Castro v. Portugal*, 9 June 1998, §§ 34-36, *Reports of Judgments and Decisions* 1998-IV; *Bannikova v. Russia*, no. 18757/06, §§ 33-65, 4 November 2010; and *Lagutin and Others v. Russia*, nos. 6228/09, 19123/09, 19678/07, 52340/08 and 7451/09, §§ 89-101, 24 April 2014). Yet it cannot possibly be said that the person concerned was "charged" with a criminal offence at the time of the entrapment. The case-law on entrapment draws a clear distinction between the obtaining of evidence at the preliminary investigation stage and the subsequent use of evidence obtained at that stage from sources such as undercover agents or anonymous informants:

> "[T]he subsequent use of such sources by the trial court to found a conviction is a different matter and is acceptable only if adequate and sufficient safeguards against abuse are in place, in particular a clear and foreseeable procedure for authorising, implementing and supervising the investigative measures in question ..." (*Lagutin and Others v. Russia*, cited above, §90).

6. Similarly, with an initial interview with the police. A person may or may not already have been "charged" by the police when first interviewed. He or she may only be no more than a suspect at that stage. That does not alter the fact that, "in principle" (that is to say, as a general rule but not excluding exceptions), admission in evidence at a criminal trial of a statement made in an initial police interview as a suspect without access to legal advice will render the trial unfair. The existence or not of a "charge" at the moment of the initial police interview is, I believe, immaterial to the safeguard for criminal defendants that the *Salduz* rule represents. The Court's case-law on access to legal advice at the initial police interview as a suspect should not have the consequence of disturbing the common-sense reality of how criminal procedure is carried out progressively from one stage to another in most of our countries (from being approached as a possible witness, to being a suspect, to being charged and ultimately tried). It is not necessary, in the fourth applicant's case in particular, to run into one the two separate notions of (a) being questioned as a suspect and (b) being "charged" in order to ensure the fourth applicant the benefit of the guarantee under Article 6 that his trial should not have its fairness undermined by matters covered by the *Salduz* rule.

7. Yet, in the judgment (at paragraph 296) the section on application of Convention principles to the facts of the fourth applicant's case begins with the following analysis:

> "[D]uring the witness interview, the fourth applicant began to incriminate himself and the police officers conducting the interview suspended it to seek instructions from

> their superior. The Court is satisfied that at that point a suspicion that the fourth applicant had committed a criminal offence had crystallised, such that from that moment awards his situation was substantially affected by the actions of the police and was accordingly subject to a 'criminal charge' within the autonomous meaning of Article 6 of the Convention."

The consequence of such reasoning is that at the very moment at which a person becomes a suspect for the first time they are also automatically to be considered as having been "charged" with a criminal offence for the purposes of Article 6.

8. However, that the Convention does recognise that being a suspect is not co-extensive with being charged with a criminal offence is shown by the case-law on Article 5 §1(c), which permits "the lawful arrest or detention of a person effected for the purpose of bringing him before the competent legal authority on reasonable suspicion of having committed an offence". As was stated in *Erdagöz v. Turkey* (22 October 1997, § 51, *Reports of Judgments and Decisions* 1997-VI):

> "[T]he fact that an applicant has not been charged ... does not necessarily mean that the purpose of his detention [as a suspect] was not in accordance with Article 5 §1(c). ... [S]ub-paragraph (c) of Article 5 §1 does not presuppose that the police should have obtained sufficient evidence to bring charges... The object of questioning during detention under sub-paragraph (c) of Article 5 §1 is to further the criminal investigation by way of confirming or dispelling the concrete suspicion grounding the arrest. Thus, facts which raise a suspicion need not be of the same level as those necessary to justify ... the bringing of a charge, which comes at the next stage of the process of criminal investigation..." (See also, among many other authorities, *Murray v. the United Kingdom*, 28 October 1994, § 55, Series A no. 300-A.)

In short, being treated as a suspect and being charged with a criminal offence are not one and the same thing, as the judgment would have it: they are separate, successive stages of the criminal process in its wide sense.

9. In the present case, immediately after his witness statement had been signed early in the morning of 28 July 2005, the fourth applicant was arrested and cautioned (see paragraph 147 of the judgment). After receiving legal advice, he was interviewed as a suspect on three other occasions, on 30 July and 1 and 2 August 2005, before being charged under domestic law on 3 August 2005 (see paragraphs 148-152 of the judgment). On my understanding of the Convention principles, it is not necessary for the resolution of the fourth applicant's case to determine the exact occasion on which he can be said to have been "charged with a criminal offence" within the autonomous meaning of Article 6 of the Convention, since he had clearly been "charged" (at the very least on 3 August 2005) by the time that the question of the use of his initial statement as prosecution evidence arose. As I see it, the protection afforded to defendants in criminal trials by the *Salduz* rule on the use of evidence obtained during the initial interrogation by the police as a suspect is not dependent on the denial of access to a lawyer having occurred after the laying of the "criminal charge". In order

for the *Salduz* rule to apply to criminal trials, there is no need to equate, as the judgment does, being treated as a "suspect" with being "charged with a criminal offence".

10. What is more, the judgment somewhat misstates the classic test for the existence of a "criminal charge" as that test has been consistently expressed from the Court's early case-law onwards. The three case-law authorities cited by the judgment (namely *Deweer v. Belgium*, 27 February 1980, § 42-46, Series A no. 35; *Eckle v. Germany*, 15 July 1982, § 73, Series A no. 51; and *McFarlane v. Ireland* [GC], no. 31333/06, § 143, 10 September 2010) do not formulate the text, as the judgment does (at paragraph 249), as being whether "[an individual's] situation has been substantially affected by actions taken by the authorities as a result of a suspicion against him" (emphasis supplied). Taking *McFarlane* (§ 143) as the most recent of those authorities, what they say is:

> "'Charge', for the purposes of Article 6 §1, may be defined as 'the official notification given to an individual by the competent authority of an allegation that he has committed a criminal offence', a definition that also corresponds to the test whether 'the situation of the [suspect] has been substantially affected'..."

Thus, the test is not as formulated in the judgment, but is whether "the situation of the [suspect] has been substantially affected" (emphasis supplied). This language, unlike the changed language used in the judgment, shows that the simple fact of being treated as a suspect is not, in itself and of itself, sufficient. The situation of a person who is already a suspect must be further affected in some other, additional and substantial manner. Yet for the present judgment (paragraph 296), the fourth applicant became subject to a "criminal charge" from the very moment that "a suspicion that [he] had committed a criminal offence had crystallised", that is from the moment when, by incriminating himself, he for the very first time turned himself from a witness being interviewed into a suspect.

11. To remove the legal distinction between a person suspected of and a person charged with the commission of a criminal offence strikes me as excessive and at odds with the reality of the criminal process in its wider sense, with its successive stages of investigation, prosecution and trial, while at the same time being wholly unnecessary for the effective application of the *Salduz* rule (as for that of the rule against entrapment) once a person has been "charged". The result of removing that distinction is simply to introduce unnecessary conceptual confusion. That conceptual confusion has no consequences for the outcome of the present case, but may well have in future cases, I fear.

JOINT PARTLY DISSENTING, PARTLY CONCURRING OPINION OF JUDGES SAJÓ AND LAFFRANQUE

1. We understand the primary importance of protecting societies from terrorism. The authorities responsible for this difficult task face serious challenges. However, it is crucial that in striking the right balance between security needs and the exercise of fundamental rights and freedoms all democratic societies, and all Contracting States of the Convention, show due regard for the requirements of the rule of law and avoid straying from human-rights and rule-of-law principles. The Court in its well-established case-law, for example concerning Article 3 of the Convention, has stated that the Court is acutely conscious of the difficulties faced by States in protecting their populations from terrorist violence, but this makes it all the more important to stress that Article 3 enshrines one of the most fundamental values of democratic societies (see *A. and Others v. the United Kingdom* [GC], no. 3455/05, § 126, ECHR 2009). The Court has stressed the importance of adhering to the Convention values in a similar context in respect of Article 6 (see *Heaney and McGuinness v. Ireland*, no. 34720/97, ECHR 2000-XII, where the Court found that the security and public-order concerns invoked by the respondent Government could not justify a provision which extinguished the very essence of the applicants' rights to silence and against self-incrimination; see also *Salduz v. Turkey* [GC], no. 36391/02, ECHR 2008, and *El Haski v. Belgium*, no. 649/08, 25 September 2012).

2. In fact the present judgment itself acknowledges, in its paragraph 252, that there can be no question of watering down fair-trial rights for the sole reason that the individuals in question are suspected of involvement in terrorism, and that in challenging times it is of utmost importance that the Contracting Parties demonstrate their commitment to human rights and the rule of law, including, *inter alia*, the minimum guarantees of Article 6 of the Convention. Unfortunately, however, in its examination of the merits this judgment departs from the noble principle announced, and indeed the Court itself waters down rights, by failing to adhere to the guarantees of Article 6 as interpreted in its own well-established case-law, and without expressly stating it, *de facto* departs from that earlier well-established case-law, which has been widely applied by the national courts. This is most disappointing. A human-rights court must not relinquish a level of protection that it has already granted.

3. We regret that this judgment departs from the standards of a fair trial as determined in *Salduz*, under the guise of interpreting it. It diminishes the level of protection without good reason. It frustrates years of European efforts to provide a high level of protection to procedural rights. We cannot accept such backtracking. Moreover, in view of the facts of the present case we disagree with the manner in which the new standard is applied. For these

reasons we respectfully dissent regarding the first three applicants, while we concur with the finding of a violation in respect of the fourth applicant, but on grounds which differ from that of the majority.

I. Irretrievable Prejudice

4. This Court considers it important that from the initial stages of the proceedings, a person charged with a criminal offence who does not wish to defend himself or herself in person must be able to have recourse to legal assistance of his or her own choosing (for more detailed reasoning, see *Martin v. Estonia*, no. 35985/09, §§ 90 and 93, 30 May 2013, and *Dvorski v. Croatia* [GC], no. 25703/11, § 78, ECHR 2015).

The practical consequences were set out in *Salduz*, § 55, in which it was stated:

> "... [T]he Court finds that in order for the right to a fair trial to remain sufficiently 'practical and effective' ..., Article 6 § 1 requires that, as a rule, access to a lawyer should be provided as from the first interrogation of a suspect by the police, unless it is demonstrated in the light of the particular circumstances of each case that there are compelling reasons to restrict this right. Even where compelling reasons may exceptionally justify denial of access to a lawyer, such restriction – whatever its justification – must not unduly prejudice the rights of the accused under Article 6 ... The rights of the defence will in principle be irretrievably prejudiced when incriminating statements made during police interrogation without access to a lawyer are used for a conviction."

There are three distinct situations envisioned here:

(a) access to a lawyer is not provided from (at) the first interrogation without compelling reason;

(b) access to a lawyer is not provided from (at) the first interrogation where there is a compelling reason for such restriction; and

(c) while there are compelling reasons for the absence of a lawyer at the first interrogation, the incriminating statements are used to achieve a conviction[1].

These are three distinct situations with possibly different circumstances.

The last prong (c) concerns the use of incriminating statements to achieve a conviction. This is an irretrievable prejudice for the rights of the defence (and not merely with regard to access to justice). In our view, supported by the case-law, such prejudice is determinative for the overall

1. This is not as rigid and formalistic as an absolute exclusionary rule. It does allow, apparently, for the inclusion of the statements in the case file, but it prohibits their use in reaching conviction.

fairness of the trial *per se*. We admit that a less absolutist and non-literal[2] reading is also reasonable. In this approach, while the prejudice is irretrievable, the fairness aspect can be remedied by a special measure, namely exclusion of the evidence. This is the preferred solution in the member States. We note that the exclusionary rule does not solve all the problems resulting from the absence of a lawyer at the earliest stage of the investigation. The fairness of proceedings requires that an accused should be able to obtain the whole range of services specifically associated with legal assistance (*Dvorski*, § 78), which may be prejudiced by the absence of a lawyer at the early stage of the investigation.

5. In the middle scenario (b) there are compelling reasons for the absence of a lawyer, but the incriminating statements are not used for securing a conviction. This can be detrimental for the overall fairness of the trial if it causes undue prejudice.

6. In the first scenario (a) there is no compelling reason for the absence of a lawyer at the earliest stage of the proceedings. If incriminating statements are made and subsequently used for securing a conviction, the irretrievable prejudice to the rights of the accused, and consequently to the fairness of the trial, is even more obvious than in the third scenario. It is also possible that there is no use of such a statement or that no statement is made: in these circumstances the negative impact on the overall fairness of the proceedings, and hence of the trial, will be logically weightier than that of the absence of a lawyer for compelling reasons. In fact *John Murray v. the United Kingdom*, (8 February 1996, *Reports of Judgments and Decisions* 1996-I) states that the damage "is" (not even "can be"!) irretrievable (see below).

7. However, the judgment claims that "The test set out in *Salduz* for assessing whether a restriction on access to a lawyer is compatible with the right to a fair trial is composed of two stages. In the first stage the Court must assess whether there were compelling reasons for the restriction. In the second stage, it must evaluate the prejudice caused to the rights of the defence by the restriction in the case in question. In other words, the Court **must** examine the impact of the restriction on the overall fairness of the proceedings and decide whether the proceedings as a whole were fair" (see paragraph 257 of the judgment)[3]. It claims that the expression 'irretrievable

2. According to the Collins English Dictionary, "if you talk about irretrievable damage or an irretrievable situation, you mean that the damage or situation is so bad that there is no possibility of putting it right".

3. There is no reason given why the Court must always do so and why this is the only possible approach. See *Can v. Austria* (no. 9300/81, Commission's report of 12 July 1984, Series A no. 96), quoted in the judgment.
Moreover, and this in itself should have militated against the way in which the Court relies on the "fairness as a whole" methodology, in *Can* (§ 60) we find the following: "In view of the fact that the restriction lasted a considerable period at a juncture which was crucial for

prejudice' does not mean an absolute requirement, it is only a "rule, [which] while strict, was not absolute" (paragraph 260 of the judgment). This latter argument is not correct. "In principle" does not mean "subject to exceptions". Such an interpretation is contrary to the standard use of the expression in the Court's case-law, and it is contrary to the meaning given in standard dictionaries[4]. The very paragraph (§ 55) of *Salduz* that is analysed by the Court clearly distinguishes the "as a rule" ["...unless"] situation, referred to in the first prong, from "in principle", used in the third prong.

8. We are of the view that by using the expression "In other words"[5] the judgment:

- misconstrues the letter and spirit of the *Salduz* test and related case-law, and the national and EU understanding developed in response to *Salduz*;

- further, in determining what constitutes a compelling reason for restricting access to a lawyer, [it] applies an overbroad new test, which is applied contrary to the facts of the case.

9. *Salduz* claimed that the rights of the defence will be irretrievably prejudiced when incriminating statements made during police interrogation without access to a lawyer are used for a conviction. Irretrievable means that there can be no remedy to it (see, *inter alia*, *Płonka v. Poland*, no. 20310/02, 31 March 2009; *Pishchalnikov v. Russia*, no. 7025/04, 24 September 2009; and *Dayanan v. Turkey*, no. 7377/03, 13 October 2009).

10. Nevertheless, in the present case the Court came to the conclusion that such irretrievability does not have fatal consequences for the fairness of the trial, since fairness is a matter to be considered in the aggregate. Special remedy, such as exclusion, is not required (contrary to *A.T. v. Luxembourg*, no. 30460/13, 9 April 2015).

11. In the present case the Court is satisfied that a court has to take into account a number of factors and that the use of incriminating statements made in the absence of the lawyer is just one of those factors. This position contradicts the logic of *Salduz.* In the *Salduz* logic, even a justified denial of access to a lawyer must not unduly prejudice the rights of the accused under Article 6. The issue at stake remains the rights of the accused. Given the

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the development of the proceedings as a whole," without looking at the trial stage, the Commission concluded that there has been a violation of Art 6(3)(c) of the Convention by reason of the refusal to allow the applicant unsupervised personal contacts with his lawyer". Once again, the effect is to be considered *in view of the impact on the proceedings as a whole, and not at the trial. The violation was found for the specific violation of 6(3) c.*

4. "'In principle' - as a general idea or plan, although the details are not yet established..." Oxford Dictionary of English. No other meaning is given. The opposite is "in practice".
According to the *Larousse* French dictionary: "*En principe, si on s'en tient à la règle générale, selon toute vraisemblance, si rien ne vient l'empêcher*".

5. "In other words, the Court must examine the impact of the restriction…" (paragraph 257).

lack of access to a lawyer, a potential source of undue prejudice cannot be discounted by satisfying the ordinary requirements of a fair trial. The impermissible use of the evidence for conviction is singled out as an instance of irretrievable prejudice to the rights of the accused. Once the evidence is used for conviction, there is no place for further consideration of fairness.

12. This is exactly the conclusion in *Salduz*, where, having considered a number of additional shortcomings, apparently to deal with systemic failings in the Turkish system, and having examined certain factors which were considered fair, the Court concluded that the violation was based exclusively on the violation of defence rights[6]. The Court clearly stated that its conclusion did not concern a violation of the overall fairness but a violation of Article 6 § 3 (c) of the Convention in conjunction with Article 6 § 1 (*Salduz*, § 63). Contrary to what the present judgment claims as a truism (see § 7 above), namely that the Court must [always] consider overall fairness, it is the normal approach of this Court to apply bright-line rules in this context, that is, in view of the irretrievable impact of the violation on overall fairness. Overall fairness was not applied, *inter alia*, in *John Murray* (cited above), which was superseded by the *Salduz* Grand Chamber judgment. In *John Murray* (as good a terrorism case as the present one), it was held that notwithstanding the absence of the lawyer during the first 48 hours, the drawing of inferences from the silence was not unfair or unreasonable. While there was no problem with the overall fairness, "nevertheless, the issue of denial of access to a solicitor has implications for the rights of the defence which call for **a separate examination**" (see § 56 of that judgment). "To deny access to a lawyer for the first 48 hours of police questioning, in a situation where the rights of the defence may well be irretrievably prejudiced, is - whatever the justification for such denial - incompatible with the rights of the accused under Article 6" (*John Murray*, § 66). For a fresh authority following the same approach, see *A.T. v. Luxembourg* (cited above)[7]. There, the Court found a violation of Article 6 § 3 (c) of the Convention combined with Article 6 § 1. In that case the domestic courts were expected to undo the prejudice (i.e., they did not apply the exclusionary rule). But all this was not a matter of analysis of the overall fairness. Needless to say, with the approach taken in the present judgment there would have been no violation of Article 6.

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6. "In sum, even though the applicant had the opportunity to challenge the evidence against him at the trial and subsequently on appeal, the absence of a lawyer while he was in police custody irretrievably affected his defence rights (Salduz, § 62). In view of the above, the Court found a violation of Article 6 § 3 (c) of the Convention in conjunction with Article 6 § 1 (Salduz, § 63).

7. See further, *Aleksandr Zaichenko v. Russia*, no. 39660/02, 18 February 2010; *Khayrov v. Ukraine*, no. 19157/06, 15 November 2012; and *Grinenko v. Ukraine*, no. 33627/06, 15 November 2012.

13. It is noteworthy that in *Salduz*, the Court referred in the context of undue prejudice to other factors which were otherwise relevant for overall fairness, but did not find that these could counterbalance the undue prejudice. In the present case we are not dealing with undue, but instead with irretrievable prejudice, which cannot be counterbalanced at all.

14. While the Court often looks at the fairness of the proceedings as a whole, contrary to what the judgment seems to assume, there is no logically compelling ground to claim that only an "overall fairness" evaluation[8] (based on the outcome of the trial) can result in a finding of a violation of Article 6. There is nothing unique in the *Salduz* approach finding certain undue (and, in particular, irretrievable) prejudices fatal for the rights of the defence. This approach is present in the case-law from its early days, as quoted in the present judgment and in the additional cases cited above.

15. We agree, there has to be "regard to the development of the proceedings as a whole" but "it cannot be excluded that **a specific factor may be so decisive** as to enable the fairness of the trial to be assessed at an earlier stage in the proceedings" (see *Can v. Austria*, cited above, § 48, quoted in § 251). This is what *Salduz* did: it identified a decisive specific factor that enables the assessment to be conducted at an early stage in the proceedings. This is not a unique instance in the case-law. The same applies to a trial where incriminating statements are obtained by torture (see *Gäfgen v. Germany* [GC], no. 22978/05, § 166, ECHR 2010, in the context of self-incrimination), and most probably the same is true for incriminating statements resulting from direct compulsion (see *O'Halloran and Francis v. the United Kingdom* [GC], nos. 15809/02 and 25624/02, § 53, ECHR 2007-III, where the Court expressly rejected the idea that there is an absolute prohibition on direct compulsion under the privilege against self-incrimination. It does not follow from this position that certain forms of direct compulsion cannot be *per se* prejudicial to the overall fairness of a trial so that it amounts to a *per se* violation without further tinkering).

16. We insist on the literal meaning of the irretrievability principle set out in *Salduz* not only because we are of the view that legal certainty requires that such important principles must not be swept away without good reasons. We are of the view that the above principle is crucial for effective protection of the right to a fair trial. The Court has recognised that the fairness of the trial is likely to be seriously prejudiced by an initial failure to comply with its provisions, especially in regard to the rights mentioned in Article 6 § 3 (see *Imbrioscia v. Switzerland*, 24 November 1993, § 36, Series A no. 275; *Salduz*, § 50, and, most recently, *Dvorski v. Croatia*, cited above, § 76). The absence of a lawyer when a detained

8. One could argue that the overall fairness approach has been used to overcome inconveniences in the formulation used in Art 6 § 3. See, for example, *Bönisch v. Austria*, 6 May 1985, Series A no. 92; and Goss, Criminal Fair Trial Rights, Hart 2014.

suspect confronts the police for the first time has lasting effects on the entire proceedings, and the presence of a lawyer is a major guarantee against police abuse. In certain cases, such as the present one, there is no way to counter the original self-incriminatory statement. (One cannot retract a lie.) To allow a self-incriminatory statement made in the absence of a lawyer to serve as a ground for conviction makes the trial appear fundamentally suspicious. It goes to the heart of the conviction because of the impossibility of undoing its consequences at a later stage (unless an exclusionary rule is applied). Prudential considerations of police deterrence also militate in favour of the quasi-exclusionary rule of *Salduz*. If the investigative authorities know that certain practices which violate the accused's Article 6 § 3 rights may result in a mistrial, they will be reluctant to apply such practices. And, as mentioned in *Salduz*, early access to legal advice (counsel) is a fundamental safeguard against ill-treatment.

17. The present judgment provides a surprisingly laconic description of the practice of the member States: "a number of States require statements made in the absence of a lawyer ... to be excluded from trial, while in others the admission of the statement ... is, at least to some extent, a matter for judicial discretion". The fact is that the overwhelming majority of the member States have codified a mandatory exclusion rule, or have binding case-law which mandates the application of exclusionary rules for *Salduz*-type incriminations which cause irretrievable prejudice, if for example the accused makes such a request. In some countries the violation of the right to silence is the basis of the exclusionary rule, in others it is the lack of access to a lawyer[9]. Only a few countries have anti-terror legislation which authorises incommunicado detention for 3-5 days (France, Spain, the United Kingdom). The Spanish system has been the subject of very harsh CPT criticism in this respect[10].

18. To sum up: even if Article 6 § 3 rights are specific aspects of the right to a fair trial, as *Can* and human logic clearly indicate, there can be instances of irretrievable damage to that fairness that preclude fairness as a whole. Such a situation of irretrievable prejudice has been identified in *Salduz* as an absolute rule, and not as a rule with exceptions. We cannot see how irretrievable prejudice can be remedied without the exclusionary rule. The new approach does not provide any counterbalancing solution. The judgment merely sets out a list of criteria which, *inter alia*, have to be taken into consideration in the overall evaluation of the fairness in all cases as a matter of course (there is a counterbalancing element in these ordinary

9. *Can*, which seems to be the lead authority in the present judgment, had no difficulty in disregarding the practice of a good number of member States (§ 49). Here, the opposite occurs: while there is a strong trend towards the exclusionary rule in situations similar to the present one, the Court insists that this is immaterial, as evidence is a matter of national law.

10. Reports and responses published in April 2013, CPT/Inf (2013) 6, 7, 8 and 9.

requirements, contrary to what has been shown to exist in *Al-Khawaja and Tahery v. the United Kingdom* [GC] (nos. 26766/05 and 22228/06, ECHR 2011, in which the bright-line rule concerning the prohibition of the use of untested sole and decisive evidence was abandoned where the Court found there were counterbalancing factors in place.)

II. Compelling reasons for the absence of a lawyer

19. The Court has developed a new test to determine what amounts to a compelling reason for the absence of a lawyer, as required by *Salduz.* We find this new test incomplete and based on questionable inspiration. This incompleteness helped the Court to find compelling reasons and, ultimately, overall fairness. (This would have been more difficult had it been made clear that no compelling reason existed.) We agree that the existence of an urgent need to avert serious adverse consequences for life, liberty or physical integrity in a given case is an essential consideration in finding compelling reasons to restrict access to legal advice. It is a condition *sine qua non*. In such circumstances one need not wait for a lawyer to be present before an interrogation starts. Is this urgent need a good enough reason not to admit access to an available lawyer? The definition remains overbroad. Would the urgent need for an interrogation in order to avoid distant adverse consequences to possible future physical integrity suffice? What is missing from the definition is the clarification that the adverse consequence has to be imminent.

20. The Court's approach relies explicitly on *New York v. Quarles* 467 U.S. 649 (1984), which recognised a "public safety exception" to the Miranda rule, permitting questioning to take place in the absence of a lawyer and before a suspect has been read his rights where there is a threat to public safety. The reference to the American approach is misplaced and demonstrates the shortcoming in the Court's standard. The Supreme Court concluded "that the need for answers to questions in a situation posing a threat to the public safety outweighs the need for the prophylactic rule protecting the Fifth Amendment's privilege against self-incrimination". The case-law with regard to the federal- and state-level application of *Quarles* clearly indicates that it applies to actual threat. In every case, the public-safety exception applied – i.e. as in *Quarles*, there was a gun present when the non-Mirandized police questions were made. The firearm represented an imminent threat (where, as in *Quarles*, the matter is a consideration to be carried out "often in a matter of seconds" and the arresting policeman's question concerns the whereabouts of the weapon). The public-safety exception has never been used in the context of preventing future terrorist attacks which are deemed likely. In the recent terrorism case of Dzhokhar Tsarnaev, the prosecution refrained from including admissions made in the absence of a lawyer. While there is a public-safety exception under *Quarles*,

the Supreme Court is in line with the irretrievable prejudice position of *Salduz*: "So also with the Sixth Amendment right to counsel of choice. It commands, not that a trial be fair, but that a particular guarantee of fairness be provided—to wit, that the accused be defended by the counsel he believes to be best" (*US v. Gonzalez-Lopez*, 548 U.S. __2006). The US approach flatly rejects the overall assessment of the fairness of the trial: "'The Constitution guarantees a fair trial through the Due Process Clauses, but it defines the basic elements of a fair trial largely through the several provisions of the Sixth Amendment, including the Counsel Clause' (*Strickland*, supra, at 684-685). In sum, the right at stake here is the right to counsel of choice, not the right to a fair trial; and that right was violated because the deprivation of counsel was erroneous. No additional showing of prejudice is required to make the violation 'complete'" [*US v. Gonzalez-Lopez*, cited above).

21. The fact that there is an urgent need to save lives does not explain why and how the advice and presence, in particular, of a lawyer, that is, of a right, would, as a matter of principle, be detrimental to saving lives. (Again, assuming that it does not cause delay). Are we assuming that the psychological comfort derived from a lawyer's presence is of such comfort to terrorists that it undermines the prevention of calamities? The specific status of lawyers gives them a central position in the administration of justice as intermediaries between the public and the courts. They therefore play a key role in ensuring that the courts, whose mission is fundamental in a State based on the rule of law, enjoy public confidence (see *Morice v. France* [GC], no. 29369/10, §§ 132-133, ECHR 2015). Or is the Court of the view (as the Chamber seemed to concede) that the lawyer will help the cause of terrorists by precluding certain police tactics?

III. Situation of the four applicants

(a) The Court's approach to compelling reasons in the case of the first three applicants

22. The Court found that there were compelling reasons for not having access to a lawyer, given the exceptional circumstances in the aftermath of repeated terror attacks. We cannot agree more: this was an exceptional moment, requiring determined police action. But that is not the issue here. The requirements of the tailor-made definition of compelling reason provided by the Court were easily met. But the question is not whether there were exceptional circumstances and an urgent need, but whether there were compelling reasons not to have access to a lawyer under these circumstances. This fundamental issue is discussed only with regard to Mr Ibrahim: in his case the trial judge found that he could have been allowed to speak with his lawyer by telephone and that, to this limited extent, he had been incorrectly denied access to his lawyer (see

paragraphs 81 and 278) of the judgment). But this is considered by the Court as a nearly inevitable oversight by the police, who were working under extreme conditions.

23. In the case of Mr Omar, access to legal advice was delayed for a little over eight hours, during which time he was questioned for a total of about three hours. Mr Ibrahim's access to legal advice was delayed for around seven hours and he was questioned during that time for about half an hour. Mr Mohammed's access to legal advice was delayed for about four hours, during which time eight minutes of questioning took place.

24. We agree, the police could not wait for the arrival of lawyers and until advice was given in view of the (probably not fully disclosable) details of the charge. The police had the right and duty to determine the proper tactics of interrogation (when to start, when to interrupt, etc.). But the presence or availability of a lawyer did not matter to the police. "At 7.55 a.m. Superintendent MacBrayne ordered that Mr Omar be held incommunicado under Schedule 8 of the Terrorism Act 2000" (see paragraph 22). There was no consideration of the availability of lawyers or an individual assessment that waiting for the duty solicitor would cause delays or other risks with regard to the priority of preventing adverse consequences. This was in essence a blanket, non-individualised ban. When Mr Omar again requested a duty solicitor, he was told at 10.24 a.m. that delaying the interview would involve an immediate risk of harm to persons and that "awaiting the arrival of a solicitor and permitting any pre-interview consultation before any attempt to establish the above facts [WILL] cause unnecessary delay to this interview process" (see paragraph 28). The trial judge did not examine the matter of the availability of such a lawyer during the interviews. We believe that had a duty solicitor appeared, he or she should have been allowed to attend the interview (unless for some other compelling reason). But no duty solicitor was contacted before 12.19 p.m. Once again, we see no compelling reason for the delay. The fact is that the duty solicitor arrived only after the end of the safety interview.

25. In the case of Mr Ibrahim, telephone consultation was denied twice before the safety interview was even ordered (see paragraph 42). A duty solicitor arrived at the front desk of Paddington Green Police Station at 8 p.m. At that time the safety interview was already being conducted and it ended at 8.35 p.m.

26. As to Mr Mohammed, his incommunicado detention was authorised after he requested assistance. He was ordered to be held incommunicado, but about an hour later, around 6.59 p.m., a duty solicitor was called. A duty solicitor arrived at the front desk of the police station at 8 p.m. A brief safety interview commenced without the presence of the solicitor at 8.14 p.m.

27. In the case of Mr Omar safety interviews were conducted between 9 a.m. and 2.20 p.m. In this period, although Mr Omar repeatedly asked for

a lawyer, the duty solicitor was told only at 12.19 p.m. that safety interviews were taking place. We find it particularly troubling that the authorisation for incommunicado detention was for two days, clearly irrespective of the existence of any compelling reason that would have made the absence of a lawyer inappropriate. The reason given, namely that awaiting the arrival of the solicitor would cause unnecessary delays, is correct in theory but, in the case of Mr Omar, the reference to the absence of a lawyer is artificial, as it was caused by the police themselves. We conclude that there was no compelling reason for the absence of a lawyer in Mr Omar's case. The incriminatory statements were made in the absence of the lawyer, without compelling reasons for this absence at the interview stage or the lack of advice. The statements were used for conviction. We conclude that the rights of the defence were irretrievably prejudiced and not counterbalanced by the exclusion of the evidence. Hence Article 6 was violated.

28. As to Mr Ibrahim, it was the trial judge himself who acknowledged that the duty solicitor could have attended at short notice "and that there was, in theory, time for a face-to-face conference between 18.10 and 19.58" (quoted in paragraph 80). In this regard, we find it immaterial that the police officers were working under exceptional pressure and that the time available would have been insufficient for proper advising. The finding of the trial judge indicates that there were no compelling (objective) reasons not to have a solicitor present at the safety interview (other than the ban). The police made a mistake (as in the other cases); that we can understand. What we cannot understand is why the incriminating material emerging from the safety interview was used for the conviction. This is particularly odd because all the restrictions on legal advice in Schedule 8 of the Terrorism Act of 2000 are about measures concerning harm to evidence, arrest, alerting suspects or injury to persons, or are related to the delayed arrival of a solicitor, and do not concern the gathering evidence for conviction.

29. As to Mr Mohamed, the incriminating evidence was used for conviction and this irretrievable prejudice violates the Convention (Article 6 § 3 in conjunction with Article 6 § 1).

30. Contrary to the Court, we would have reached the same conclusion even if we had used the overall fairness approach of the judgment. Even assuming that there were compelling reasons for not allowing access to counsel at the crucial investigative moment, the Court should have applied heightened scrutiny to determine whether the absence of the lawyer did, or did not, unduly prejudice the rights of the accused under Article 6. "There will not be a fair trial, however, unless any difficulties caused to the defendant by a limitation on his rights are sufficiently **counterbalanced** by the procedures followed by the judicial authorities (see, for example, *Doorson v. the Netherlands*, 26 March 1996, § 70, *Reports* 1996‑II; *Van Mechelen and Others v. the Netherlands*, 23 April 1997, § 58, *Reports* 1997-III; *Jasper v. the United Kingdom* [GC], no. 27052/95, §§ 51-53,

16 February 2000; *S.N. v. Sweden*, no. 34209/96, § 47, ECHR 2002-V; and *Botmeh and Alami v. the United Kingdom*, no. 15187/03, § 37, 7 June 2007)" (quoting *A. and Others v. the United Kingdom*, cited above, § 205). After all, it is "the evidence obtained during the decisive early stage of the investigation [that] determines the framework in which the offence charged will be considered at the trial (see *Can v. Austria*, no. 9300/81, Commission's report of 12 July 1984, § 50, Series A no. 96)" (*Salduz*, § 54).

31. There is no sign of counterbalancing by the judicial authorities in the present case. Moreover, the Court has conducted a very deferential analysis of the overall fairness and the actions of the trial judge. It is true that the safety interview was used to gather information relevant for further investigation, aimed primarily at preventing further attacks, by apprehending the terrorists, and it was lawful (if one has no objections to the order that authorises 48 hours of being held incommunicado; certainly the police did not abuse that possibility). It is admitted both at the domestic level and by the Court that the new caution was administered erroneously, so that domestic law was broken, and the related information gathered was held to be "potentially of high relevance". For instance, the conviction of Mr Ibrahim cannot be considered fair as a whole, even under the unacceptable standards applied. It is immaterial that, according to the Court, there was enough damning additional evidence to secure the conviction. In the absence of manifest arbitrariness, it is not the role of this Court to second guess on the importance of the evidence which was considered as potentially of high relevance. The strong public interest in a conviction cannot overrule the Convention guarantees – this is the core message of the cases cited in the judgment[11], contrary to what the Court claims, namely that "the public interest in preventing and punishing terrorist attacks of this magnitude, involving a large-scale conspiracy to murder ordinary citizens going about their daily lives, is of the most compelling nature" (see paragraph 299). If punishment is of the "most compelling nature", than what is the role of all the safeguards granted by the Convention? If a State is of the view that such a compelling public interest exists, then the Convention provides the proper mechanism in Article 15. Derogation is possible, under the supervision of the Court. When it comes to preventing attacks, the aim of the safety interviews can be a different matter (up to a point) and we do

11. For example, the Court refers to *A. and Others v. the United Kingdom* [GC], no. 3455/05, ECHR 2009 (without any specific paragraph reference). While accepting that the al-Qaeda network had given rise to a "public emergency threatening the life of the nation" resulting in an urgent need to protect the population of the United Kingdom, it remains the case, however, that the applicants' right under Article 5 § 4 to procedural fairness was to be balanced against these important public interests. Article 5 § 4 must import substantially the same fair-trial guarantees as Article 6 § 1 in its criminal aspect (paragraphs 216-217). There is no concession to the compelling interest of prevention or conviction.

not rule out the possibility of restricting access to a lawyer for preventive purposes (if this is demanded by an imminent threat). What we cannot understand is why an instrument that is necessary for the prevention and protection of life and limb is accepted for the purposes of punishment (which serves the desire of justice, understood as retribution)? The matter is even more curious in the present case, where, according to the Court, there was enough evidence for conviction even excluding the evidence in question[12].

(b) Mr Abdurahman (the fourth applicant)

32. In the case of Mr Abdurahman the Court concluded that there was no compelling reason for the absence of the lawyer. Within its overall fairness analysis the Court shifted the burden of proof to the Government to demonstrate convincingly why, exceptionally and in the specific circumstances of the case, the overall fairness of the trial was not irretrievably prejudiced by the restriction on access to legal advice (see paragraph 300 of the judgment). The Court continued with the overall assessment approach and found that there has been a violation, primarily in view of the trial judge's instructions (which are essentially similar to those which were found to contribute to the fairness of the trial in the case of the first three applicants), because these left "excessive discretion" to the jury. This and the cumulative effect of other shortcomings cannot satisfy the high burden on the Government to prove fairness.

33. We agree that the Article 6 rights of the fourth applicant were violated. This follows from our understanding of *Salduz*: incriminating evidence, obtained in the absence of a lawyer, was admitted at trial. There is irretrievable prejudice. Moreover, there was no compelling reason for the absence of the lawyer, which can be a separate ground for finding a violation of Article 6 § 3 (c) in conjunction with Article 6. However, the fundamental cause of the violation lies elsewhere. In the present case the police knowingly continued the questioning when it became clear that Mr Abdurahman should be treated as suspect with all the attached rights of defence. The violation consists in a police set-up, which occurred before the issue of the presence of a lawyer could have come up. Of course, the absence of the lawyer was due to this set-up: if someone is not a suspect he or she cannot claim the rights granted to a suspect. However, the absence of a lawyer (a blatantly illegal restriction) is a secondary consequence of this broader, irretrievably prejudicial abuse.

12. While it cannot be a judicial consideration, given that the Court is concerned with a policy issue, namely "the most compelling nature of conviction", we find that this policy is contrary to the duty of respecting the most compelling nature of prevention of further loss of life. If a terrorist knows that information concerning other terrorists or the location of a bomb will result in his conviction, he will be less likely to co-operate.

JOINT PARTLY DISSENTING OPINION OF JUDGES SAJÓ, KARAKAŞ, LAZAROVA TRAJKOVSKA AND DE GAETANO

(Translation)

We voted against the last point of the operative provisions because, in our view, the Court should have made an award to the fourth applicant in respect of non-pecuniary damage.

In view of the circumstances of the case, the majority does not consider it necessary to make an award under this head. It further observes that the fourth applicant may make an application to the Criminal Cases Review Commission to have the proceedings reopened (see paragraph 315 of the judgment). In that regard it should be noted that an application to the Criminal Cases Review Commission does not constitute an effective remedy for the purposes of Article 35 § 1 (see *Tucka v. the United Kingdom* (dec.), 18 January 2011, §§ 15-17).

It is obvious that under Article 41 the Court decides on an amount of compensation for non-pecuniary damage if it considers it "necessary" to afford redress. As it has considerable latitude to determine in which cases the applicants should be awarded damages, the Court frequently concludes that the finding of a violation constitutes sufficient just satisfaction and that no monetary compensation is required (see, among many other authorities, *Nikolova v. Bulgaria*, no. 31195/96, § 76, ECHR 1999-II; *Vinter and Others v. the United Kingdom* [GC], nos. 66069/09, 130/10 and 3896/10, ECHR 2013; and *Murray v. the Netherlands* [GC], no. 10511/10, 26 April 2016). In order to arrive at that conclusion, the Court will have regard to all the circumstances of the case including the nature of the violations found as well as any special circumstances pertaining to the context of the case (see, for example, *Vinter*, cited above, and the dissenting opinion of Judges Spielmann, Sajó, Karakaş and Pinto de Albuquerque in the case of *Murray*, cited above). Where the circumstances warrant it, as in the case of *McCann and Others v. the United Kingdom* (27 September 1995, § 219, Series A no. 324), in which it declined to make any award in respect of non-pecuniary damage in view of the fact that the three terrorist suspects who were killed had been intending to plant a bomb in Gibraltar, or where the nature of the violation found warrants it, as in the case of *Tarakhel v. Switzerland* [GC], no. 29217/12, ECHR 2014, the Court rules that the finding of a violation is sufficient in respect of any non-pecuniary damage. In other words, it is only in very exceptional cases that it decides not to award compensation for non-pecuniary damage.

There may also be instances in which the Court decides to award a sum lower than that awarded in other cases relating to the Article concerned, again taking into consideration the particular circumstances of the context.

The most typical example is the case of *A. and Others v. the United Kingdom* [GC], no. 3455/05, ECHR 2009, in the context of terrorism, where the Court explained at length (§ 252, see also *Del Río Prada v. Spain* [GC], no. 42750/09, § 145, ECHR 2013) the reasons why it had awarded a sum significantly lower than those previously granted in other cases concerning unlawful detention.

As regards non-pecuniary damage in the present case, the majority does not consider it necessary to make an award under this head in the circumstances of this case. This differs from the usual form of words, according to which "the finding of a violation constitutes sufficient just satisfaction". Stating that it is not necessary to make an award, without offering the slightest explanation, is a new formulation in the case-law, one which we believe needs to be clarified. If the majority decides, on the basis of several factors, not to award just satisfaction it should set out the precise reasons for that decision.

The Court states in paragraph 311 of the judgment that the offences committed by the fourth applicant were less serious than those committed by the first three applicants, while stressing the importance of effective sanctions to deal with the threat of terrorism. It concedes that, as a result of the cumulative effect of the procedural shortcomings in the fourth applicant's case, that is to say, the decision not to caution him and to restrict his access to legal advice, the overall fairness of the trial was irretrievably prejudiced. There was therefore a violation of Article 6 §§ 1 and 3 of the Convention in the case of the fourth applicant.

The Court has always awarded a sum for violations of Article 6 §§1 and 3 in previous cases, even where there was a possibility of the proceedings being reopened. In the present case, as the remedy suggested by the majority (see paragraph 315 of the judgment) is of an extraordinary nature, it is not effective (see *Tucka*, cited above, § 17). It is difficult to understand the reasoning adopted, which places the emphasis on the possibility of pursuing a remedy that has previously been declared ineffective.

In view of the seriousness of the violation found in the case of the fourth applicant, and taking into consideration the particular circumstances of the context, we believe that the Court should have awarded a sum in respect of any non-pecuniary damage he may have suffered.

JOINT PARTLY DISSENTING OPINION OF JUDGES HAJIYEV, YUDKIVSKA, LEMMENS, MAHONEY, SILVIS AND O'LEARY

I. Introductory remarks

1. We should make clear from the outset that our difference of opinion with the majority of the Grand Chamber in the present case does not go to the recapitulation of the general principles concerning Article 6 §§ 1 and 3 (c), in respect of which we are in essence in Agreement.[1] We also agree with the majority in the application of those general principles to the cases of the first three applicants and the finding of no violation of Article 6 §§ 1 and 3 (c) of the Convention in their regard. We regret, however, that we are unable to agree with the view of the majority that the fourth applicant's defence rights were violated on the facts of the present case. As regards this applicant, contrary to the majority, we find that application of the two-stage test which the Grand Chamber judgment goes to some lengths to clarify also leads to a finding of no violation.

2. There is no question, as the Court's case-law has consistently held, that public-interest concerns, including the fight against terrorism, cannot justify measures which extinguish the very essence of a suspect's or an accused person's defence rights.[2] That said, it would be a mistake to present the basic Convention issue at the heart of the four applicants' cases as being solely one of fixing the limits on the inroads that the security interests of the State may make into individual human rights, namely those of the four applicants in relation to their initial police interviews, followed by their prosecution, trial and conviction. That would be an excessively narrow focus which ignores the fact that the matters calling for Convention analysis in the present case directly involve the human rights of many other people than the four applicants. When confronted with circumstances such as those leading to the present applications, the Contracting States and then this Court are required to identify the appropriate relationship between the fundamental procedural right to a fair trial of persons charged with involvement in terrorist-type offences and the right to life and bodily security of the persons affected by the alleged criminal conduct. As the

1. We have, however, a slightly different view on the decisive importance to be given to the question of compliance with domestic law when it comes to analysing the existence of "compelling reasons" (see paragraph 258 of the judgment and paragraph 15 of the present opinion).

2. See, variously, *Brogan and Others v. United Kingdom*, judgment of 29 November 1988, Series A no. 145-B; *Heaney and McGuinness v. Ireland*, no. 34720/97, §§ 57-58, ECHR 2000-XII; *Jalloh v. Germany* [GC], no. 54810/00, § 97, ECHR 2006-IX; and *Aleksandr Zaichenko v. Russia*, no. 39660/02, § 39, 18 February 2010.

judgment of the Grand Chamber in the present case makes clear (at paragraph 251),

> "Article 6 should not be applied in such a manner as to put disproportionate difficulties in the way of the police authorities in taking effective measures to counter terrorism or other serious crimes in discharge of their duty under Articles 2, 3 and 5 § 1 of the Convention to protect the right to life and to bodily security of members of the public".

In addition, when recognising, in a more general context, that "[f]or the Court, it is a natural consequence of the forms taken by present-day terrorism that governments resort to cutting-edge technologies in preempting such attacks", the changed and changing nature of modern terror threats has already been identified as relevant.[3]

3. Articles 2 and 3 of the Convention, it hardly needs to be recalled, figure among the core rights of the Convention and cannot be derogated from under Article 15.[4] The Contracting States are under a positive obligation, firstly, to put in place a legal and administrative framework and, thereafter, to take all necessary concrete measures aimed at assuring the practical and effective, and not merely theoretical and illusory, protection of those core rights for all individuals coming within their jurisdiction. The Contracting States are thus duty-bound under the Convention to act, both preventively and repressively, with a view to diminishing the threats that terrorism at its current levels and in its current forms represents for the life and bodily security of each individual coming within their jurisdiction. This duty naturally extends to the criminal-justice system and the rules of evidence.

4. Unfortunately, when applying the general principles outlined in the Grand Chamber judgment, the majority focuses its analysis too narrowly on the purely procedural aspects of the fourth applicant's case, to the detriment of the wider-angled assessment of the overall picture, including the impact on the interests of other holders of Convention rights as explained above.

II. Recapitulation of the general principles

5. The Grand Chamber judgment in the present case confirms the test set out in the case of *Salduz v. Turkey*[5] for assessing whether a restriction on access to a lawyer is compatible with the right to a fair trial enshrined in Article 6 §§ 1 and 3 (c) and it clarifies that it is a test composed of two stages. In the first stage, the national courts and ultimately this Court must assess whether there were compelling reasons for the restriction of access.

3. *Szabó and Vissy v. Hungary*, no. 37138/14, § 68, 12 January 2016.
4. A very limited possibility to derogate from Article 2 is permitted by Article 15 in respect of deaths resulting from lawful acts of war.
5. *Salduz v. Turkey* [GC], no. 36391/02, ECHR 2008.

In the second stage, those courts must assess the impact of any restriction on the overall fairness of the proceedings and decide whether the proceedings as a whole were fair (paragraph 257 of the judgment). What is clear – albeit not explicitly stated in the judgment – is that the first stage relates exclusively to events occurring during the pre-trial phase of the criminal process. In contrast, the second stage involves an *ex post facto* analysis by the trial court and, if necessary, on appeal, both of pre-trial events and the conduct of the trial itself, not least how evidence garnered during the investigatory phase was subsequently treated. This, it seems to us, is an important point. As far as the first stage in the present case is concerned, whether the police were confronted by compelling reasons such that the right of access could be temporarily restricted for each of the four applicants is to be assessed by reference to circumstances characterised by extreme urgency and risk to human life. In contrast, the second-stage overall assessment of the fairness of the trial which followed and the admission of impugned statements, provided without legal assistance, is situated in an entirely different context, where questions relating to the legal basis for any restriction of defence rights or for the admission of evidence so obtained take on a wholly different importance.[6]

6. The Grand Chamber judgment outlines the criteria for determining whether there are compelling reasons for delaying access to legal advice and, crucially, explains that the lack of compelling reasons for restricting access to legal advice is not, in itself, sufficient to lead to a finding of violation of Article 6 of the Convention (paragraphs 258-260 of the judgment). The judgment points out that, in order to decide whether or not the right to a fair trial has been breached, it is necessary to view the proceedings as a whole, the Article 6 § 3 rights at issue in the instant case being specific aspects of the overall right to a fair trial rather than ends in themselves (paragraph 262 of the judgment). However, where there are no compelling reasons for restricting access to legal advice, national courts must apply a very strict scrutiny to their fairness assessment and the absence of compelling reasons will weigh heavily in the balance when assessing the overall fairness of the trial and may tip the balance in favour of finding a violation of Article 6 §§ 1 and 3 (c) (paragraph 265 of the judgment). Finally, the judgment provides a non-exhaustive list of factors, taken from the Court's well-established case-law, which should be taken into account to assess the impact of procedural failings at the pre-trial stage on the overall fairness of the criminal proceedings (paragraph 274 of the judgment).

7. This clarification of the general principles to be applied when assessing any restriction of the right of access to a lawyer is to be welcomed. *Salduz* is a milestone in the Court's case-law relating to Article 6

6. See below paragraphs 13-15 for why this distinct approach is of particular importance as regards the fourth applicant.

§§ 1 and 3 (c) of the Convention. However, the formulation of the key passage of the *Salduz* judgment in paragraph 55, which contains no less than four qualifying clauses – "as a rule", "unless it is demonstrated", "even where" and "in principle" –, while making it evident that the rule enunciated is not absolute, made it difficult to determine what the effect of the absence of compelling reasons was for the assessment of the overall fairness of the trial and the level of scrutiny required in the absence or presence of such reasons. In *Salduz* itself, no compelling reasons existed but the Grand Chamber nevertheless proceeded to examine the overall fairness of the applicant's trial.

III. The first stage of the *Salduz* test: the existence of compelling reasons in the case of the fourth applicant

8. The Grand Chamber judgment identifies one example of what could constitute compelling reasons for the purposes of the aforementioned test, namely the existence of an urgent need to avert serious adverse consequences for life, liberty or physical integrity (paragraph 259 of the judgment). The test laid down in the judgment (paragraph 258) for the existence of compelling reasons is a stringent one – restrictions of the right of access are only permitted in exceptional circumstances, they must be of a temporary nature, must be based on an individual assessment of the particular circumstances of the case and must have a basis in domestic law.

9. The Grand Chamber accepts that such a need existed at the time when the safety interviews of the first three applicants were conducted. The circumstances were clearly exceptional and the potential for additional and extensive loss of life was extremely high. London had experienced its worst ever terrorist attack two weeks previously and the undetonated devices found four days before the questioning of the fourth applicant took place (see paragraphs 14-15 and 138-142 of the judgment) pointed to the possibility of a further wave of terrorist attacks. All but one of the suspected perpetrators of this new attack were still at liberty and free to detonate other bombs, possibly successfully. The police were operating under enormous pressure and their overriding priority was, quite properly, to obtain as a matter of urgency information on any further planned attacks and the identities of those potentially involved in the plot so as to prevent further loss of life. The restriction of the first three applicants' right to a lawyer was temporary in nature, an individual assessment of their cases took place and there was a basis for the restriction in domestic law (paragraphs 186-198 of the judgment). The decision to restrict legal advice was subsequently reviewed by the trial judge and by the Court of Appeal in the course of the second stage of the *Salduz* test outlined above (paragraphs 65-95, 106-118 and 123-136 of the judgment).

10. An irregularity in the case of one of those applicants – Mr. Ibrahim – did not detract from the finding that compelling reasons existed. Instead, the judgment (at paragraph 278) puts this irregularity in the context of the police operation unfolding, referring, *inter alia*, to the number of persons who had been arrested, their detention in one police station, the need to avoid communication between the detainees as well as cross-contamination of forensic evidence. In the words of the judgment, "[t]he possibility of restricting access to legal advice in exceptional circumstances such as those arising in the present case recognises the unique and highly difficult conditions".

11. Applying these same criteria to the fourth applicant, we find it impossible to conclude that the police could not also in his case invoke compelling reasons to justify a temporary restriction of his right of access to a lawyer. The fourth applicant was asked to come to the police station to assist them as a potential witness (paragraph 139 of the judgment). When, some way into the interview, it looked as if he was in danger of incriminating himself, the normal rule, both under the applicable domestic police code of practice (Code C, which was one of several issued under the Police and Criminal Evidence Act 1984 ("the PACE") – see paragraphs 181-198 of the judgment) and under the Convention, was to treat him from that moment onwards as a suspect entitled to the usual rights of the defence, notably the rights to be cautioned and have access to legal advice as soon as practicable in order not to prejudice his position. This was not done. There is no doubt that the fourth applicant's complaints therefore called for particularly "anxious scrutiny", something which Court of Appeal recognised (paragraph 175 of the judgment).

12. Nonetheless, we respectfully disagree with the majority's conclusion (at paragraphs 299-300 of the judgment) that "the Government have not convincingly demonstrated, on the basis of contemporaneous evidence, the existence of compelling reasons in the fourth applicant's case" for restricting the fourth applicant's access to a lawyer during the initial police interview.

13. To start with, the events unfolding in London and the circumstances in which the police operation was taking place were as exceptional when the questioning of the first three applicants took place as they were when the fourth applicant was being interviewed on the evening of 27th July. The urgent need to avert serious adverse consequences for life, liberty or physical integrity, recognised by the majority in paragraph 276 of the judgment, was thus as real for the first set of applicants as it was for the fourth. There was a real fear that the failed bombers might return to complete their initial, failed attack. The fourth applicant was thought by the police to know where one of the suspected bombers – Mr Husain Osman – might have gone and quite possibly what Mr Osman's plans were (see paragraphs 15, 61 and 137-139 of the judgment). The police had a difficult

choice to make: whether, in the absence of other direct information from or connected with the suspected bombers – only one was in custody, but was not talking to the police; and the others were still at large –, to continue obtaining from the applicant information capable of saving lives and protecting the public or to comply with the applicable police code by cautioning the applicant, with the attendant risk of stopping the flow of valuable security information. The Supreme Court of the United States of America made a similar observation in the case of *New York v. Quarles*[7] when holding that there was a public-safety exception to the requirement that, prior to police questioning, suspects had to be informed of their constitutional rights to silence and to legal advice before their answers could be admitted into evidence at trial.

14. The fact that the procedural status of the fourth applicant was initially different to that of the first three − as he was brought to the police station as a witness and not a suspect – and that when he became a suspect it was with reference to a distinct crime cannot alter the objective assessment of that urgent need confronting the London Metropolitan Police on 27th July. In addition, the fourth applicant gave his witness statement in the early hours of 28th July and was arrested and cautioned later that morning, at which point, it should be recalled, he declined the assistance of a lawyer. In other words, the restriction of his right of access to a lawyer was also temporary. An individual assessment of how the police were to proceed in his case took place on the evening of 27th July when the police questioning him suspended the interview, as the fourth applicant was in danger of incriminating himself, and sought instructions from a superior officer who instructed the questioning to proceed.

15. Despite this, the majority (beginning at paragraph 258 of the judgment) attach considerable, indeed decisive, importance in the analysis of "compelling reasons" to the question whether the police decision not to caution him and grant access to a lawyer had a basis in domestic law. This question is, however, as we shall see, more appropriately a consideration to be examined in the context of the overall fairness of the proceedings (paragraphs 19, under (b), and 24-25 of this opinion and paragraph 274, under (b), of the judgment). As a result of this mistaken approach, the essential question is not posed in the Court's determination of whether there were compelling reasons with regard to the fourth applicant. That essential question is as follows: were the authorities justified in thinking at the relevant time that cautioning the witness as a suspect would have frustrated fulfilment of the urgent need to avert the serious consequences which would result from a successfully executed terrorist attack? This question of factual substance goes to the heart of the compelling-reasons analysis but is passed over by the majority, who prefer instead to concentrate on the procedural

7. 467 US 436 (1966) – quoted at paragraph 230 of the judgment.

issue which, although of central importance to the final conclusion, has its natural place in the second stage of the *Salduz* test. In the absence of consideration of the factual situation, at the time of the initial police interrogation, in relation to the urgent need to avert the feared consequences for the lives and bodily safety of the public, the majority's analysis of the existence or not of compelling reasons in the fourth applicant's case is distorted by prematurely attaching preponderant weight to the circumstance that the code of practice was not followed, while at the same time it is assumed that it was reasonably open to the police to resort to alternatives. Ironically, the alternative suggested in paragraph 299 of the judgment, namely holding a safety interview as provided for under the Terrorist Act, would precisely have required compelling – substantive - reasons to be present.

16. Furthermore, the main criticism made under this head (at paragraph 298 of the judgment) − that "the possibility of denying a suspect the procedural rights guaranteed by the code by declining to change his formal status [from witness assisting the police to suspect] when such a change had become appropriate was not set out in domestic law" – is somewhat divorced from reality. Requiring detailed regulation to the degree that the majority wish appears to be demanding of the Contracting States something approaching perfection. The PACE and the accompanying codes of practice are extremely detailed in themselves. The circumstances of the fourth applicant's case – which, like those of the other three applicants' cases, occurred prior to the Court's landmark judgment in *Salduz v. Turkey*, cited above – were extraordinary. The Convention does not expect lawmakers to foresee every eventuality. In the instant case, it was evident that the applicable police code did normally call for a caution and access to a lawyer when a witness began to turn himself into a suspect, as the reaction of the two interviewing police officers demonstrated (see paragraph 140 of the judgment). The superior police officer to whom they referred the matter made an individual assessment in the light of the particular circumstances of a failed and unresolved terrorist bomb attack, the content of that assessment, although it was not written down, being obvious to anyone on the basis of common sense. Crucially, the legislative framework provided safeguards as regards the fairness of any subsequent use in evidence of statements obtained during police questioning.

17. As indicated previously, non-compliance with the applicable police code of practice cannot obliterate the objective assessment of the dangerousness and volatility of the circumstances which the police and general public were facing. We are not suggesting that such a failure to follow the national requirements on police questioning of suspects should have had no effect on the Article 6 §§ 1 and 3 (c) analysis which the trial and appeal courts were obliged to undertake. But, as indicated above, the legal consequences of that failure fell to be assessed, in our view, during the

second stage of the assessment when determining the overall fairness of the fourth applicant's trial. This is also, it should be added, the way in which the applicable domestic law approached the matter. As is clear from the trial judge's summing-up to the jury (paragraph 169 of the judgment), breach of the code did not, as a matter of domestic law, lead to the automatic rejection as evidence of a written statement made by a witness who is later a defendant. Rather, the admissibility of that evidence was to be assessed by the trial judge in the context of the *voir dire* on the basis of the very clear provisions of sections 76(2) and 78 PACE. Any other approach to the first stage assessment of compelling reasons is liable to render this first stage of the *Salduz* test devoid of purpose.

18. In conclusion on this point, we consider that there were indeed "compelling reasons", at that crucial time in the investigation of the failed bomb attack, for the police not to caution the fourth applicant and to delay temporarily his access to legal advice on the basis of an individual assessment of the specific facts before them. Whether the subsequent use of the statement thereby obtained from the applicant rendered unfair his trial in the criminal proceedings brought against him is another matter to be addressed in the context of the second-stage assessment of the overall fairness of the proceedings. As the Grand chamber judgment itself says (at paragraph 274),

> "complaints concerning a failure to respect the express or implied Article 6 rights at the investigation stage in criminal proceedings will often crystallise at trial, when the evidence obtained is admitted."

IV. The second stage of the *Salduz* test: assessment of the overall fairness of the proceedings concerning the fourth applicant

19. The factors to be taken into consideration when assessing the fairness of the fourth applicant's trial and appeal as a whole are set out in a non-exhaustive list in paragraph 274 of the judgment:

> "(a) Whether the applicant was particularly vulnerable, for example, by reason of his age or mental capacity.
>
> (b) The legal framework governing the pre-trial proceedings and the admissibility of evidence at trial, and whether it was complied with; where an exclusionary rule applied, it is particularly unlikely that the proceedings as a whole would be considered fair.
>
> (c) Whether the applicant had the opportunity to challenge the authenticity of the evidence and oppose its use.
>
> (d) The quality of the evidence and whether the circumstances in which it was obtained cast doubt on its reliability or accuracy, taking into account the degree and nature of any compulsion.

(e) Where evidence was obtained unlawfully, the unlawfulness in question and, where it stems from a violation of another Convention Article, the nature of the violation found.

(f) In the case of a statement, the nature of the statement and whether it was promptly retracted or modified.

(g) The use to which the evidence was put, and in particular whether the evidence formed an integral or significant part of the probative evidence upon which the conviction was based and the strength of the other evidence in the case.

(h) Whether the assessment of guilt was performed by professional judges or lay jurors, and in the case of the latter the content of any jury directions.

(i) The weight of the public interest in the investigation and punishment of the particular offence in issue.

(j) Other relevant procedural safeguards afforded by domestic law and practice."

20. Our inability to agree with the conclusion of our colleagues in the majority as regards the fairness of the admission of the fourth applicant's initial statement to the police as evidence at his trial is based on two grounds.

21. Firstly, as indicated previously, we consider that the police could rely on the existence of compelling reasons to temporarily restrict the fourth applicant's Article 6 rights. As a result, unlike the majority, who deny the existence of compelling reasons in his regard and thereby alter considerably the burden of proof to be discharged by the Government, we will assess the overall fairness of the trial without the very strict level of scrutiny which follows from the absence of such compelling reasons (paragraph 265 of the judgment). Nevertheless, given the importance of fair trial rights, we consider that the respondent Government, in the context of this overall assessment of fairness, still have to demonstrate that the rights of the defence were not irretrievably prejudiced by the initial, temporary restriction on access to legal advice; and the failure to comply with the police code of practice and the factors listed above will be examined with that in mind.

22. Secondly, we consider that if the circumstances relating to the fourth applicant are examined in the light of those different factors, it becomes apparent that application of the general principles so clearly set out in the judgment in the instant case must lead to a finding of no violation. Once again, we stress that we have no disagreement with the majority as regards the second stage of the *Salduz* test as confirmed and clarified in the *Ibrahim and Others* case; we disagree as regards its application to the facts of the fourth applicant's case.

23. We will now continue to examine the factors listed above.

(a) Whether the applicant was particularly vulnerable, for example, by reason of his age and mental capacity

24. The fourth applicant, unlike applicants in some previous cases before the Court,[8] cannot be regarded as particularly vulnerable by reason of his age or mental capacity or for any other reason. Indeed at no point has it been suggested that the fourth applicant was particularly vulnerable, either by virtue of age, circumstances or mental capacity. The trial judge pointed out that he was an intelligent young man, employed in a solicitor's firm (paragraph 171 of the judgment). Although he was questioned as a witness until the early hours of 28th July, there was nothing particularly unusual or lengthy about that initial session excepting the question mark over his exact procedural status. The appeal court specifically looked at the issue of vulnerability in connection with sentencing (paragraph 177 of the judgment).

(b) The legal framework governing the pre-trial proceedings and the admission of evidence at trial and whether it was complied with; where an exclusionary rule applied, it is particularly unlikely that the proceedings as a whole would be considered fair

(j) Other relevant procedural safeguards afforded by domestic law and practice

25. As regards these two factors, it is worth recalling the chamber's conclusion (paragraph 215 of the chamber judgment):

> "[T]here was a clear legislative framework in place to govern the admissibility, in any criminal proceedings subsequently brought, of evidence obtained during police questioning. In addition to the prohibition in section 76 PACE on admitting into evidence a confession obtained by oppression or one which was likely to be unreliable, the trial judge had discretion under section 78 PACE to refuse to admit evidence which he considered would have an adverse effect on the fairness of the proceedings (see paragraphs 152-154 above [now paragraphs 199-210 of the Grand Chamber judgment]). The legislation was carefully applied by the trial judge in deciding the fourth applicant's challenge to the admissibility of his witness statement ..."

26. It was established by the trial judge at the *voir dire* that nothing had been said or done by the police officers that could have rendered the witness statement unreliable. Given, furthermore, that the applicant had freely adopted the witness statement after he had been cautioned and received legal advice, the trial judge found that there was no basis to exclude the statement under either section 76 or 78 PACE (paragraph 159 judgment). There may have been a departure from the code of practice, and this departure was deliberate, given the urgent need prevailing, but can that amount to concluding that "the decision to question the fourth applicant as a

8. See, for example, *Adamkiewicz v. Poland*, n° 54729/00, §§ 70 and 89, which involved use in evidence of a confession to police by a minor who had been denied access to a lawyer.

witness had no basis in domestic law" (paragraph 302 of the judgment)? We think not.

(d) The quality of the evidence and whether the circumstances in which it was obtained cast doubt on its reliability or accuracy, taking into account the degree and nature of any compulsion

(e) Where evidence was obtained unlawfully, the unlawfulness in question and, where it stems from a violation of another Convention Article, the nature of that violation

27. These two factors can also be examined jointly.

28. The applicant had not been arrested and had voluntarily gone to the police station on July 27th 2007. He could have left at any time. There was no coercion or compulsion during the interview, unlike in Salduz and other cases. This was clearly established as a fact by the trial judge (paragraph 159 of the judgment), confirmed implicitly by the Court of Appeal (paragraph 175 of the judgment) and is conceded by the majority in its judgment (paragraph 306 of the judgment). The continuation of the interview without cautioning the applicant and without offering him the assistance of a lawyer was not the product of a systematic practice, but was rather prompted by specific imperatives in the interests of public safety, arising in an unforeseen manner in the exceptional circumstances of the case.

29. While it is clear that the statement was obtained in breach of the applicable police code – the fourth applicant was not cautioned at the appropriate moment –, this irregularity was not overlooked but was taken into account by the national courts, notably the Court of Appeal (which noted that "the way the police behaved is undoubtedly troubling" – see paragraph 175 of the judgment), before they nonetheless concluded that, overall, the fourth applicant had received a fair trial. The Grand Chamber judgment reiterates the Court's previous recognition that, subject to an exception in relation to any evidence obtained by torture or other ill-treatment proscribed by Article 3 of the Convention, failure to comply with domestic-law rules is not of itself constitutive of "unfairness" for the purposes of Article 6 of the Convention (at paragraph 254):

> "[I]t is not the role of the Court to determine, as a matter of principle, whether particular types of evidence, including evidence obtained unlawfully in terms of domestic law, may be admissible. ... [T]he question which must be answered is whether the proceedings as a whole, including the way in which the evidence was obtained, were fair..."

30. In any event, while the fourth applicant was not immediately informed of procedural rights normally available to suspects under domestic law as well as under the Convention, we would not, as the majority does (at paragraphs 299 and 306 of the judgment), express the consequences of this

domestic-law irregularity in pejorative terms of his having been "misled" during police questioning.

(c) Whether the applicant had the opportunity to challenge the authenticity of the evidence and oppose its use

(f) In the case of a statement, the nature of the statement and whether it was promptly retracted or modified

(h) Whether the assessment of guilt was performed by professional judges or lay jurors, and in the case of the latter the content of any jury directions

31. We will examine these interrelated factors together.

32. Although, from the moment he was arrested at the close of his initial interview, the fourth applicant has had the opportunity to challenge the authenticity of what he said in his statement, including at his trial and before this Court, he has never done so. At no stage in the domestic proceedings did he seek to advance any other version of events than the one given to the police during his initial interview (see notably paragraphs 149-152 and 168 of the judgment). We take this to be a very important aspect of the case.

33. The fourth applicant waited until his trial before objecting to the use of his initial statement. Up until then, after having received legal advice, he had been positively relying on the statement as a means of showing his lack of criminal intent and criminal action (see the observations on this point in the chamber judgment, paragraphs 219-221). Following the initial interview, it was open to the fourth applicant to retract his statement made on that occasion on the grounds he subsequently raised at trial and before this Court. At no point has he explained why he felt unable to challenge it at an earlier stage.

34. The national courts at two levels of jurisdiction thoroughly examined his arguments regarding the inadmissibility of the statement, but rejected them. The trial judge gave careful directions to the jury regarding the conditions in which the initial statement had been obtained, drawing the jurors' attention to the fourth applicant's arguments as to the flawed nature of that statement and telling them to ignore it if they felt that it had not been freely given or was unreliable. We confess to having some difficulty in understanding the criticism contained in paragraph 310 of the judgment to the effect that "the trial judge's directions left the jury with excessive discretion as to the manner in which the statement, and its probative value, were to be taken into account". This criticism seems to be at odds with the role of the jury in common-law criminal-justice systems and to misconceive the sense of the directions themselves. On the first point, the Court's Article 6 case-law requires an assessment of whether sufficient safeguards were in place to avoid any risk of arbitrariness and to enable the accused to understand the reasons for his conviction. Such procedural safeguards may include, for example, directions or guidance provided by the presiding judge

to the jurors on the legal issues arising or the evidence adduced, and precise, unequivocal questions put to the jury by the judge, forming a framework on which the verdict is based or sufficiently offsetting the fact that no reasons are given for the jury's answers.[9] We find it difficult to contend that these requirements were not met in the instant case. More specifically, this Court has recognised "the jury's role [in English trial law] as the ultimate arbiter of fact".[10] It is not the Court's task to standardise the legal systems in Europe by imposing any given model of jury trial or given degree of involvement of citizens in the administration of justice.[11] On the second point, the directions to the jury were, in ordinary language, telling the jurors that they should treat the fourth applicant's initial statement with caution and disregard it if they felt that, though true, it was unreliable or had been obtained unfairly (by "trickery", as the fourth applicant had argued – paragraph 169 of the judgment). It is difficult to see the shortcoming in such directions.

(g) The use to which the evidence was put, and in particular whether the evidence formed an integral or significant part of the probative evidence upon which the conviction was based and the strength of the other evidence in the case

35. Contrary to the suggestion of the majority judgment, the fourth applicant's conviction was not substantially based on his initial statement (see paragraph 307 of the judgment). While it could be said to have played an important part in the prosecution case, its importance was significantly conditioned by the fourth applicant's decision not to retract it but rather to repeat and rely on it after he had been arrested and received legal advice, as well as his decision to remain silent at his trial, giving no evidence to undermine, contradict or explain the evidence provided by the prosecution. In any event, there was considerable other incriminating evidence linking the fourth applicant to the suspected bomber, Mr Osman, including notably: CCTV footage of the fourth applicant together with the suspected bomber and, on another occasion, with one of his co-accused (Mr Wahbi Mohammed); finger-print evidence that the fourth applicant was aware who Mr Osman was and what he was wanted for by the police; mobile telephone evidence of the fourth applicant's having contacted another of his co-accused (Mr Abdul Sherif) as well as the suspected bomber; mobile telephone cellsite anaylsis consistent with the suspected bomber's having made calls from the fourth applicant's flat and with the latter's having met Mr Sherif to collect the passport used by the suspected bomber; the oral testimony of Mr Sherif that the fourth applicant had asked him for and

9. See, amongst others, *Taxquet v. Belgium* [GC], no. 926/05, § 92, ECHR 2010-VI.
10. *Gregory v. the United Kingdom*, 25 February 1997, § 44, *Reports of Judgments and Decisions*, 1997-I.
11. *Taxquet*, cited above, § 83.

obtained from him that passport; the oral evidence of the by-then convicted bomber himself, Mr Osman, who confirmed the truth of the fourth applicant's initial statement (all this is adverted to at paragraph 308 of the judgment, with references back to the relevant paragraphs in the summary of the facts). That the initial statement provided the basis on which the police first suspected and then charged the fourth applicant (something relied on by the majority at paragraph 309 of the judgment) does not mean that its inclusion in the evidence submitted at trial led to his defence rights being irretrievably prejudiced. As the examination of the other factors in the non-exhaustive list provided by the Grand Chamber judgment indicates, that is not the case.

(i) The weight of the public interest in the investigation and punishment of the particular offences in issue

36. As explained at the outset of this opinion, this is, to our mind, a consideration to which the majority do not attach sufficient weight. The atrocities perpetrated in recent years in different Council of Europe member states amply demonstrate the key part that logistical and other support plays in the commission of modern-day terrorist offences involving, as they do, indiscriminate mass murder. What follows from this is, firstly in time, urgent action by the police to limit to the maximum the continuing imminent danger to the public once a terrorist attack has occurred or is under way (primarily an issue of "compelling reasons") and, thereafter, the need to prosecute wherever possible, in proceedings where fair trial rights are respected, those reasonably suspected of being part of a support network of a terrorist group. When it comes to seeking the appropriate relationship between the various human rights at stake when dealing with the issues connected with terrorist attacks of the kind in issue in the present case, there is a risk of "failing to see the wood for the trees" if the analysis is excessively concentrated on the imperatives of criminal procedure to the detriment of wider considerations of the modern State's obligation to ensure practical and effective human rights protection to everyone within its jurisdiction. Human rights protection in a democracy entails that, even when the authorities are confronted with indiscriminate attacks on innocent people going about the ordinary business of living their lives, the legitimate aim of securing the right to life and bodily security of the public cannot justify recourse to unfair and unjust means of repression. The basic object of Article 6 under its criminal head is to eliminate the risk of innocent persons being convicted. With this in mind, a basic tenant of the Court's case-law, as stated previously, is that public-interest concerns, including the fight against terrorism, cannot justify measures which extinguish the very essence of a suspect's or an accused person's defence rights.[12] A parallel

12. See the case-law cited in footnote 2.

consideration, however, is that neither can the imperatives of criminal procedure extirpate the legitimacy of the public interest at stake, based as it is on the core Convention rights to life and to bodily safety of other individuals.

V. Conclusion

37. Our conclusion as to whether the fourth applicant's case discloses a denial of his fair trial rights may be summed up as follows. An exceptional situation of danger to the public existed when the fourth applicant was giving his initial statement to the police. Suspected bombers were still on the loose. At the time of the initial interview, there were "compelling reasons" in the *Salduz* sense, and in the sense confirmed and clarified in the Grand Chamber judgment, for exceptionally qualifying the normal domestic and Convention rule of access to legal assistance from the outset of police questioning as a suspect. Thereafter public policy required that those persons who had provided logistical and financial support for terrorists should also be prosecuted wherever possible. As far as the incidence of the admission of the initial statement on the overall fairness of the fourth applicant's trial is concerned, sufficient counter-balancing safeguards existed in the legislative framework and were available to him during the course of the criminal proceedings, including before and at the trial and on appeal. What the applicant had said in his initial statement to the police was not obtained by coercion or compulsion. The statement was never objected to by him as being untrue. It was not retracted by him at any point in the pre-trial stage of the proceedings, as it could have been on, for example, the various occasions when he was subsequently seen by the police. On the contrary, on all those occasions, and after having received legal advice, he confirmed his initial statement and relied on it in his defence. Apart from this initial statement to the police, there was other strong incriminating evidence against him on the basis of which he was found guilty by the jury, including the oral testimony of the suspected (and, by then, convicted) bomber himself, Mr Osman. The fourth applicant has never suggested that there was any other explanation for the facts regarding his contacts with Mr Osman, contacts proved by other – direct and reliable – evidence. As the Court of Appeal indicated, there was no evidence that the fourth applicant made his statement because he believed he was not going to be prosecuted and no unequivocal representation in this regard was made by those responsible for the conduct of the prosecution (see paragraph 176 of the judgment). The fact that the applicable police code of practice had not been followed in relation to his initial questioning as a suspect was weighed in the balance by the national courts, at trial and on appeal, in their detailed assessment of overall fairness; and careful directions were given to the jury by the trial judge, who drew the jurors' attention to the fourth applicant's

arguments on fairness and to the exceptional conditions in which the statement had been obtained.

38. Having regard to the general principles established in the Court's case-law on Article 6 §§ 1 and 3 (c), not least in *Salduz v. Turkey*, principles clarified in the instant case, the circumstances of the fourth applicant's case and the criminal proceedings conducted against him as a whole do not lead us to the conclusion that the admission of his initial statement to the police as evidence at his trial can be regarded as unfair or as having irretrievably prejudiced his defence rights. In our view, it certainly cannot be said that either the omission to enable the applicant to have access to legal advice at the moment in the initial police interview when he became a suspect or the subsequent admission in evidence of his initial statement extinguished the very essence of the defence rights which became available to him under Article 6 on being "charged with a criminal offence".

PARTLY DISSENTING OPINION OF JUDGE LEMMENS

I am happy to concur with the majority in the part of the judgment relating to the recapitulation and clarification of the general principles set out in the *Salduz* judgment (see *Salduz v. Turkey* [GC], no. 36391/02, ECHR 2008). I am also in agreement with the majority as far as the application of these principles to the case of the first three applicants is concerned.

To my regret, however, I am unable to follow the majority in their application of these principles to the case of the fourth applicant. On this point I have joined the relevant joint dissenting opinion.

Having found no violation of the Convention in respect of the fourth applicant, I have voted against awarding him the reimbursement of costs and expenses.

DISSENTING OPINION OF JUDGE SAJÓ

According to the judgment, it is not necessary to grant just satisfaction to the fourth applicant. I respectfully disagree, for the reasons given by Judges Karakaş, Lazarova Trajkovska and De Gaetano.

As I am of the opinion that there has been a violation in regard to the first three applicants, the same considerations apply in their case too.