Court of Appeal

Regina *v* Abdurahman (Ismail)

[2019] EWCA Crim 2239

2019 Dec 5, 17

Dame Victoria Sharp P, Garnham, Chamberlain JJ

Crime — Terrorism — Evidence — Defendant charged with offences arising from assistance allegedly given to terrorist offender — Statement obtained from defendant in circumstances involving breach of police procedures — Statement admitted in evidence against defendant at trial — Defendant convicted — European court subsequently finding violation of defendant's right to fair trial — Whether conviction safe

The defendant was charged with a number of offences arising from assistance allegedly given by him to a terrorist offender. He was initially interviewed by the police as a witness, and so was neither cautioned nor accompanied by a legal representative. During that interview the police officers who were conducting it had consulted a senior officer as to whether, in view of what the defendant had said, a caution should, in accordance with Code C of Police and Criminal Evidence Act 1984 procedures, be given but the senior officer, advised that a caution should not be given, a view taken at a time when the bomber had yet to be apprehended. The defendant provided a witness statement setting out his account of events, following which he was arrested, cautioned and informed of his right to legal advice. At his trial, the defendant applied to have the witness statement excluded from evidence either on the basis that it was a confession made in circumstances likely to render any confession unreliable pursuant to section 76(2) of the 1984 Act, or in the exercise of the court's discretion under section 78 of that Act. The judge rejected that submission, and a further submission that the prosecution should be stayed as an abuse of process. The defendant was convicted, which conviction was upheld on appeal. Subsequently, the Grand Chamber of the European Court of Human Rights found that the proceedings had violated the defendant's right to a fair trial, contrary to article 6 of the Convention for the Protection of Human Rights and Fundamental Freedoms, since there had been no compelling reason for restricting the defendant's right to access to legal advice so that there had been a presumption of irretrievable prejudice which had not been rebutted by the United Kingdom Government. Following that decision, the Criminal Cases Review Commission referred the conviction to the Court of Appeal on the grounds that there was a real possibility that the conviction would not be upheld in the light of the conclusions of the Grand Chamber. The main ground of appeal was that, while a finding by the European court of a violation of article 6 did not invariably lead to the quashing of a conviction, the present case did not fall within either of the two categories of cases in which a conviction might nevertheless be held to be safe, which were where the European court had operated under a misapprehension as to domestic law or procedure or when the evidence was overwhelming.

On the appeal—

Held, (1) that the judgment of the Grand Chamber was to be approached on the basis that (i) the question whether there had been a violation of article 6 of the Convention, was different to the question before the domestic court on appeal under section 2(1) of the Criminal Appeal Act 1968, namely whether the conviction was unsafe, (ii) nevertheless those two questions involved a degree of overlap, and in every case the safety of the conviction depended on the kind of breach and the nature and quality of the evidence in the case, (iii) in determining that issue the court had to take into account any decision of the European court, (iv) the court would usually follow any clear and constant line of decisions of the European court, but might depart if that line of decision was inconsistent with some fundamental substantive or procedural aspect of domestic law or overlooked or misunderstood some argument or point of principle, but (v) such guidance was not to be viewed as a straitjacket and it was not necessary for the domestic court to conclude that an established line of authority involved an egregious oversight or misunderstanding before declining to follow it (paras 110).

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R v Dundon [2004] EWCA Crim 621; [2004] UKHRR 717, CA, *R (Dowsett) v Criminal Cases Review Commission* [2007] EWHC 1923 (Admin), DC, *Manchester City Council v Pinnock (Secretary of State for Communities and Local Government intervening*) [2011] 2 AC 104, SC(E), *R (Kaiyam) v Secretary of State for Justice* [2015] AC 1344, SC(E) and *R (Hallam) v Secretary of State for Justice* [2019] 2 WLR 440, SC(E) applied.

(2) Dismissing the appeal, that, on analysis, the reasoning of the Grand Chamber in the present case had depended critically upon a presumption of irretrievable prejudice which had represented a significant development of human rights law rather than the application of a clear and constant line of decisions; that, furthermore, the reasoning of the Grand Chamber had also demonstrated a misunderstanding of domestic criminal procedure or of its application to the facts of the case; that, on the evidence. and contrary to the conclusion reached by the Grand Chamber, there had indeed been compelling reasons for restricting the defendant's access to legal advice given the need to obtain information as to the whereabouts of an individual who had detonated a bomb capable of killing many people; that examining the other evidence in the case and its probative value independently of the defendant's witness statement, the other evidence which supported the prosecution case had been devastating, even on the assumption that the Grand Chamber was correct in concluding that the fairness of the trial had been irretrievably prejudiced; and that, accordingly, the defendant's conviction was safe (post, paras 111–124, 126).

APPEAL against conviction

On 4 February 2008 in the Crown Court at Kingston-upon-Thames, before Judge Worsley QC and a jury, the defendant, Ismail Abdurahman, was convicted of assisting an offender with intent to impede his apprehension or prosecution, contrary to section 4(1) of Criminal Law Act 1967) and of four counts of failing to give information about acts of terrorism, contrary to section 38B(2) of the Terrorism Act 2000. He was sentenced to ten years' imprisonment. On 21 November 2008 the Court of Appeal (Latham LJ, Openshaw and Burnett JJ) dismissed his appeal against conviction but reduced his sentence to one of eight years' imprisonment. On the defendant's application to the European Court of Human Rights on the grounds that the proceedings before the domestic courts violated his right to a fair trial under article 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, the Fourth section of the European Court of Human Rights, sitting as a Chamber, declared on 16 December 2014 that the application was admissible but held (by six votes to one) that there had been no violation of article 6. However, on 13 September 2016 the Grand Chamber of the European Court of Human Rights held (by 11 votes to six) that there had been a violation of article 6 and awarded costs to the defendant, but dismissed the remainder of his claim for just satisfaction. On a reference made by the Criminal Cases Review Commission on 6 February 2019 the defendant appealed against conviction on the grounds that, while a finding by the European Court of Human Rights of a violation of article 6 did not invariably lead to the quashing of a conviction, his case did not fall within either of the two categories of cases in which a conviction might nevertheless be held to be safe, which were where the European court had operated under a misapprehension as to domestic law or procedure or when the evidence was overwhelming.

The facts are stated in the judgment of the court, post, paras 5–17.

John King (instructed by *Carters Solicitors*) for the defendant.
Louis Mably QC (instructed by *Crown Prosecution Service, Appeals Unit*) for the Crown.

The court took time for consideration.

17 December 2019. **DAME VICTORIA SHARP P** handed down the following judgment of the court.

Introduction

1 On 4 February 2008 in the Crown Court at Kingston-upon-Thames, before Judge Worsley QC and a jury, the appellant, Ismail Abdurahman, was convicted of assisting an offender with intent to impede his apprehension or prosecution (contrary to section 4(1) of Criminal Law Act 1967) and of four counts of failing to give information about acts of terrorism (contrary to section 38B(2) of the Terrorism Act 2000). He was sentenced to ten years' imprisonment on the same day. On 21 November 2008, the Court of Appeal (Latham LJ, Openshaw and Burnett JJ) dismissed his appeal against conviction but reduced his sentence to one of eight years' imprisonment: *R v Sherif* [2008] EWCA Crim 2653; [2009] 2 Cr App R (S) 33.

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2 Mr Abdurahman submitted an application to the European Court of Human Rights ("the Strasbourg Court"), alleging that the proceedings before the domestic courts violated his right to a fair trial under article 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention"). On 16 December 2014, the Fourth section of the Strasbourg Court, sitting as a Chamber, declared that his application was admissible but held (by six votes to one) that there had been no violation of article 6: *Ibrahim v United Kingdom* CE:ECHR:2014:1216JUD005054108; 61 EHRR 9. The case was, however, referred to the Grand Chamber, which on 13 September 2016 held (by 11 votes to 6) that there had been a violation of article 6 in Mr Abdurahman's case and awarded him costs, but dismissed the remainder of his claim for just satisfaction: see CE:ECHR:2016:0913JUD005054108; The Times, 19 December 2016.

3 On 6 February 2019, the Criminal Cases Review Commission ("CCRC") decided to refer Mr Abdurahman's conviction to the Court of Appeal. It did so because it considered that there was a real possibility that the conviction would not be upheld in the light of "new evidence", namely the conclusions of the Grand Chamber of which the Court of Appeal was required by section 2 of the Human Rights Act 1998 ("HRA") to take account.

4 In those circumstances, Mr John King, who appeared for Mr Abdurahman, submits that the conviction is unsafe and should be quashed. Mr Louis Mably QC, who appears for the Crown, submits that the conviction remains safe notwithstanding the conclusions of the Grand Chamber and invites us to dismiss the appeal.

The material facts

5 On 7 July 2005, three suicide bombers detonated bombs on the London Underground and a fourth on a London bus. The bombs exploded and 52 people were killed. Two weeks later, on 21 July 2005, three bombs were detonated on the London underground and a fourth on a London bus. On 23 July 2005, a fifth bomb was discovered abandoned in a bin. Each of the five devices was carried in a rucksack. Inside the rucksacks were triacetone triperoxide (a high explosive), light bulbs, batteries, wires and plastic containers. Although four of the devices were detonated, in each case the main charge, consisting of liquid hydrogen peroxide and chapatti flour, failed to explode.

6 The four who detonated their bombs were Mukhtar Ibrahim, Hussain Osman, Yassin Omar and Ramzi Mohammed. They were each arrested, charged with conspiracy to murder, convicted after a contested trial and sentenced to life imprisonment with a minimum term of 40 years. The man responsible for abandoning the fifth bomb, Manfo Asiedu, pleaded guilty to conspiracy to cause an explosion and was sentenced to 33 years' imprisonment.

7 Immediately following the attempted bombings, Hussain Osman remained in London, then travelled to Brighton and back to London, before taking the Eurostar from London to Paris on 26 July 2005. He then travelled to Rome, where he was arrested on 30 July 2005 and subsequently extradited to the United Kingdom. The offences with which Mr Abdurahman was charged arise out of assistance he is said to have given to Mr Osman after the failed attack and whilst the latter was at large in London.

8 On 25 July 2005, the police became aware that Mr Abdurahman might be harbouring Mr Osman and mounted a surveillance operation around his home in South-East London. At around 5.30 pm on 27 July 2005, Mr Abdurahman was approached by police officers on his return from work and agreed to accompany them to a police station to assist them with their inquiries. At around 6.15 pm, officers began to question him. At this stage of the investigation he was believed to be and was treated as being a potential witness, not a suspect. He was not arrested; he was not cautioned; he was not informed of his right to legal advice or his right to remain silent; he was not provided with or offered the opportunity to obtain his own lawyer; and he was not given regular breaks. The questioning was also not recorded.

9 By around 7.15 pm, the officers questioning the Mr Abdurahman determined that, because of the answers he had given during initial questioning, there were grounds to suspect that he had committed a criminal offence. They concluded that the questioning should be stopped and Mr Abdurahman cautioned and informed of his right to free legal advice in accordance with Code of Practice C under the Police and Criminal Evidence Act 1984 ("PACE"). They informed a senior police officer. The senior officer instructed the questioning officers not to arrest or caution Mr Abdurahman and to continue to question him as a witness. There is no record of this decision or the reasons for it and the senior officer did not give evidence at trial. The officers continued to question Mr Abdurahman as a witness. At around 12.10 am on 28 July 2005, Mr Abdurahman was taken to point out an address where he believed Mr Osman lived. The questioning then recommenced. At around 1.30 am on the same morning, the officers conducting the questioning began recording information provided by Mr Abdurahman in a draft written witness statement.

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This statement was completed at around 5.00 am and signed by Mr Abdurahman ("the First statement").

10 The content of the First statement may be summarised as follows. Mr Abdurahman had become friends with Mr Osman in 1999 but had lost contact with him the following year. 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. At Mr Abdurahman's stop, Mr Osman had decided to alight with him on the pretext of wishing to speak about something. As they walked towards Mr Abdurahman's home, Mr Osman had told Mr Abdurahman that he (Osman) was in trouble with the police. He claimed to have stolen some money and to have escaped from police custody. When they arrived at Mr Abdurahman'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 three of the men sought by the police. Mr Osman 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, Mr Abdurahman 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, Mr Abdurahman had begun to realise that he was telling the truth. He became frightened and wanted Mr Osman out of his home. Mr Osman then asked to stay with Mr Abdurahman for two nights and, fearing for his personal safety if he refused, Mr Abdurahman acceded to the request.

11 Mr Abdurahman went on to describe an injury to Mr Osman's thigh, which Mr Osman said was incurred while escaping after his bomb had failed to explode. Mr Osman explained how he had pressed the button to activate his bomb but nothing had happened. He gave 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. Mr Osman showed Mr Abdurahman photographs of the other bombers in a national newspaper which he had brought with him and gave their names. The officers conducting the interview showed Mr Abdurahman a number of photographs and he confirmed the identities of three of the males photographed based on the information provided by Mr Osman. Mr Abdurahman also explained that Osman had mentioned a fifth bomber who had not detonated his bomb. He did not know the identity of this person. He explained that Mr Osman had made a few calls from his mobile phone, but had spoken in Eritrean.

12 Mr Abdurahman then explained that, on the next day, conversation with Mr Osman had been limited. However, Mr Osman had told Mr Abdurahman 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 Mr Abdurahman said that he should help himself. On the morning of 26 July, Mr Osman had packed a bag and told Mr Abdurahman that he was going to catch a Eurostar train to Paris from Waterloo train station. He had left for the station at around 8.00 am and about an hour later had called Mr Abdurahman to say that he was on a train. Mr Abdurahman had then switched off his mobile telephone so that Mr Osman could not contact him any further.

13 Mr Abdurahman 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 First 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.

14 Once the First statement had been given, a senior police officer ordered Mr Abdurahman's arrest. A caution was administered and he was informed of his right to free legal advice, which he at first declined. He then sought and received legal advice prior to his later interviews. Each of the subsequent interviews took place in accordance with the PACE Codes of Practice.

15 On 30 July 2005, Mr Abdurahman was interviewed under caution with his legal representative. He refused to answer further questions, but provided a further prepared statement ("the Second statement"). In that, he said that he had no prior knowledge of the events of 21 July 2005 and deplored them. When stopped on 27 July 2005, he had agreed to assist the police to the best of his ability. In that regard, he referred to his First statement and made certain minor corrections to it in respect of matters he had overlooked due to tiredness when he signed the First statement. He added this:

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"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."

16 On 1 August 2005 Mr Abdurahman was interviewed again. He stated that he had been assisting the police since he was first approached by them but declined to answer further material questions. He was interviewed again on 2 August 2005 and stated that he had played no part in the events, was not and would never be a terrorist and refused to answer any further material questions. He was interviewed for the last time on 3 August 2005 in which he stated that everything he knew was contained in his previous statements.

17 On 3 August 2005, Mr Abdurahman was charged with assisting an offender contrary to section 4(1) of the Criminal Law Act 1967 and with four counts of failing to give information about acts of terrorism contrary to section 38B(2) of the Terrorism Act 2000.

The trial

18 Mr Abdurahman was tried, along with four others, who were also charged with offences relating to the provision of assistance to the would-be bombers and/or the failure to disclose information relating to the attempted attack. By the time of the trial, the would-be bombers had all been convicted.

19 The prosecution evidence was, in summary, as follows:

(a) CCTV footage showing Mr Abdurahman and Mr Osman at Clapham Junction Station on 23 July 2005.

(b) CCTV footage showing Mr Abdurahman and Mr Osman at Vauxhall station on 23 July 2005.

(c) CCTV footage showing Mr Abdurahman and Mr Osman walking toward the Mr Abdurahman's flat on 23 July 2005.

(d) Mobile telephone cell site analysis consistent with Mr Osman making calls at Mr Abdurahman's flat.

(e) CCTV footage showing Mr Abdurahman meeting co-defendant Wahbi Mohammed and collecting from him an object (a video camera) said to have been used to film the would-be bombers' "martyrdom" videos.

(f) Evidence of telephone contact between Mr Abdurahman and Mr Sherif, allegedly for the purpose of collecting the latter's passport for Mr Osman and for which Mr Abdurahman had given no explanation despite the fact that the two had not met for some years prior to the telephone contact.

(g) Mobile telephone cell site analysis consistent with Mr Abdurahman having met Mr Sherif to collect the passport.

(h) Footage from a police surveillance camera showing Mr Osman leaving Mr Abdurahman's flat on 26 July 2005, in the company of Mr Abdurahman, en route to Waterloo station.

(i) A newspaper report on the attempted bombings, with pictures of the bombers (including Mr Osman), found in Mr Abdurahman's flat with the latter's fingerprints on it (though not on the pages relating to the bombing).

(j) Telephone records indicating that Mr Osman had spoken to Mr Abdurahman twice by mobile telephone on 26 July (after taking the Eurostar from Waterloo Station) and had attempted to telephone him twice on 27 July 2005 from Italy.

(k) Mr Osman's fingerprints recovered from a glass in Mr Abdurahman's home, along with Mr Osman's train ticket from Brighton and the keys to a vehicle he had abandoned.

(l) Oral testimony from Messrs Osman and Sherif that Mr Abdurahman had received Mr Sherif's passport to give to Mr Osman.

(m) Mr Abdurahman's First statement, Second statement and police interviews, along with evidence from the questioning officers.

20 The defence case, in summary, was as follows:

(a) Mr Abdurahman was a working man who had never been in trouble with the authorities before.

(b) No extremist material had been found in his flat.

(c) The meeting with Mr Osman at Clapham Junction was a chance meeting.

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(d) The image quality on newspaper and television reporting during Mr Osman's stay with the Mr Abdurahman was of very poor quality and the Mr Abdurahman did not recognise Mr Osman. Police officers had failed to recognise Mr Osman in Waterloo Station on the morning of his departure.

(e) Mr Abdurahman did not believe Mr Osman was a terrorist until he was approached by the police.

(f) Picking up the video camera was an innocent errand.

(g) Mr Abdurahman had not collected the passport.

21 Mr Abdurahman chose not to give evidence himself. He admitted, through his counsel, that he had collected the video camera and given it to Mr Osman. He also admitted that, on 25 July 2005 at around 8.45pm, he had attended the ticket office at Waterloo Station. His counsel argued that he had not collected the passport and that the contrary evidence of Messrs Osman and Sherif was self-serving and false.

22 Mr Abdurahman's counsel made three applications in relation to the First statement evidence at trial.

23 First, he submitted that the First statement, photographs and subsequent police interviews should be excluded under sections 76 or 78 of PACE on the ground that there had been a deliberate breach of PACE Code C. He submitted that Mr Abdurahman had been induced to make the First statement on the pretence (created and continued by the police) that he was a witness, not a suspect, and because he was tired when the statement was signed, having been questioned all night.

24 The judge held a voir dire, at which the two police officers who had questioned Mr Abdurahman gave evidence and were cross-examined. In a ruling on 3 October 2007, the judge said this:

> "I have very clearly in mind the very high burden of proof upon the Crown in respect of an application made under section 76. I find as a fact that there is no evidence of oppression of Mr Abdurahman at the time that he was at the police station. I have considered with care all the matters put forward by Mr King but I cannot find that there is anything that was done or said in all the circumstances of the taking of the witness statement and the subsequent interview of Mr Abdurahman as a witness which renders in any way the confession, as it is said to be, unreliable as a result of any matters which took place. I bear in mind the cross-examination of the two officers who gave evidence before me, I bear in mind the submissions made by Mr King but my overall conclusion is that I should look at all the circumstances in this case, I find that whatever breach occurred, as I find it did in respect of the failure to caution Mr Abdurahman as a suspect at a time when he made his witness statement, that thereafter he freely adopted that statement at a time when he had been cautioned and when he had been arrested and had legal advice.
>
> "I've examined with care all the submission made but I do not accept that, either under section 76 or under section 78, I should exclude this statement."
>
> "Mr King has advanced that there may be a breach of the right to a fair trial under article 6.3 of the European Convention of Human Rights in respect of the position of Mr Abdurahman. I do not accept that there was such a breach and I highlight that of course the arguments carefully laid before me are arguments which, if he wishes, Mr King is entitled to put before the jury. In all those circumstances, I come to the conclusion that this statement and the interview relating to it are admissible in evidence before any jury."

25 Secondly, there was an application to edit certain passages of the jury's copies of the First statement to show those passages as qualified or withdrawn by the Second statement. The application was refused in a separate ruling on 15 October 2007 because the circumstances in which the corrections had been made were relevant to show the extent to which Mr Abdurahman had adopted the First statement.

26 Thirdly, Mr Abdurahman applied for the prosecution to be stayed on the grounds that the proceedings were an abuse of process. The grounds for that application can be seen from the judge's ruling rejecting it on 5 November 2007:

> "Mr King has put before me a very full and helpful skeleton argument in support of his application. The short point which he makes and rehearses is this, that it is common ground that Mr Abdurahman was questioned as a witness at a time when

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those officers questioning him believed that he should be cautioned. As a result of their concern, officers Stuart and Vernon [the questioning officers] consulted with Detective Superintendent Boucher, who was one of the senior officers in charge of this serious investigation, requesting advice as to whether Mr Abdurahman should be treated as a suspect. The police officers who were interviewing him believed that the stage may have come when he was incriminating himself. The message received back from high command was that Mr Abdurahman should continue to be treated as a witness and so it was that long and detailed witness statement was taken from Mr Abdurahman on 28 July 2005 between 1.30 in the morning and 5.00 that morning.

"The defence submission is that Mr Abdurahman was tricked into giving an account to the police which can probably be characterised as a confession. I have already indicated in an earlier ruling that what Mr Abdurahman said could indeed be regarded by a jury as a confession to his involvement in these events. The defence submission is that, having been tricked into giving a witness statement, for Mr Abdurahman later to be treated as a suspect and prosecuted is so inherently unfair that the court should exercise its residual discretion to stay the proceedings."

27 The judge, relying on *R v Abu Hamza* [2006] EWCA Crim 2918; [2007] QB 659, held that there would only have been an abuse of process if the police had made a clear and unequivocal representation to the appellant that he would not be prosecuted. He continued:

"I conclude that there was no unequivocal representation given by those with the conduct of the investigation or prosecution of the case that Mr Abdurahman would not be prosecuted. Even if there was in Mr Abdurahman's mind an assurance, namely by way of treating him as a witness at this early stage, that he would not be prosecuted, I find that he has not acted on that representation to his detriment. I part company with Mr King where he submits that I should draw the shutters down on the evidence at the conclusion of the taking of the witness statement. It seems to me that that, with great respect to Mr King, is an unrealistic position to adopt. 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 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 I agree with the Crown's submission that to this day he adopts effectively that which he had said to the police."

The judge concluded as follows:

"I come to the very clear conclusion, bearing in mind all the submissions made by Mr King, that this is not an abuse of process and is certainly not a case where I even come remotely near saying that it could be unfair for him to be tried."

28 In his directions to the jury, the trial judge said this about the First statement:

"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

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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."

29 On Mr Abdurahman'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."

30 On 4 February 2008, Mr Abdurahman was convicted on all counts and sentenced to a total of ten years' imprisonment.

The Court of Appeal's decision in 2008

31 Mr Abdurahman appealed against both conviction and sentence. He submitted that the trial judge had erred in not excluding the first statement, photographs and police interviews under sections 76 or 78 of PACE. This followed from the admitted substantial and deliberate breaches of the Code. It also followed from the trial judge's reading of the phrase "in the circumstances at the time" in section 76(2)(b) of PACE as including the Code-compliant interview under caution, conducted two days after the taking of the First statement, in which the Second statement was given. This, it was said, was an error in law. The trial judge was also said to have erred in holding that the First statement had been freely adopted, given that he had said in the latter that he had come to believe that Mr Osman was one of the would-be bombers, whereas in the Second statement he had said that he did not believe that, until stopped by the police. In the alternative, it was argued that the judge erred in not excluding those parts of the First

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statement which were later contradicted by the Second statement. Finally, it was said that the abuse of process should have led to a stay of the prosecution.

32 The Court of Appeal dismissed the appeal against conviction, saying this, at paras 38–39:

> "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 21 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 section 78 of the Act can be said to be perverse or affected by any error of law.
>
> "39. That leaves the argument that the judge was wrong to refuse to stay the proceedings as an abuse of process. 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, in particular at para 54. That was not the situation here."

33 The appeal against sentence was, however, successful. The court said this at para 47:

> "The assistance that he 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."

It may be noted that the principal evidence of the "help and information" given to the police was the First statement. The total sentence was reduced from 10 to 8 years' imprisonment.

Article 6 and the Strasbourg case law prior to Ibrahim

34 Article 6 of the Convention provides in relevant part as follows:

> "1. In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interests of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice."
>
> "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,

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if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require …"

35 Seven general principles of relevance to this case may be drawn from the Strasbourg case law before *Ibrahim v United Kingdom* (2014) 61 EHRR 9.

36 First, article 6 requires that "access to a lawyer should be provided from the first interrogation of a suspect by police, unless it is demonstrated in the light of the particular circumstances of each case that there are compelling reasons to restrict this right": *Salduz v Turkey* [GC] CE:ECHR:2008:1127JUD003639102; 49 EHRR 19, para 55.

37 Second, even where compelling reasons are demonstrated, the admission in evidence of incriminating statements made without access to a lawyer must not unduly prejudice the rights of the accused: ibid.

38 Third, the question whether to admit a pretrial statement made without legal assistance is a matter for Regulation by national law and the national courts; and the Strasbourg Court's only concern is to examine whether the proceedings have been conducted fairly: *Gäfgen v Germany* [GC] CE:ECHR:2010:0601JUD002297805; 52 EHRR 1, para 162. Where a pretrial statement has been obtained as a result of treatment in breach of article 3, its admission will render the proceedings automatically unfair irrespective of the probative value of the statement and irrespective of whether it was decisive in securing the conviction: *Gäfgen v Germany*, para 166. However, outside this special category of case, the Strasbourg Court's evaluation of the fairness of the proceedings is a holistic one, which includes consideration of the way in which the evidence was obtained, having regard to whether the rights of the defence have been respected, but also to the interest of the public and the victims in seeing crime properly prosecuted and, where necessary, to the rights of witnesses: *Schatschaschwili v Germany* CE:ECHR:2015:1215JUD000915410; 63 EHRR 14, para 101. The weight of the public interest in the investigation and punishment of the particular offences in question may be taken into consideration, though not so as to extinguish "the very essence of an applicant's defence rights": *Jalloh v Germany* [GC] CE:ECHR:2006:0711JUD005481000; 44 EHRR 32. Article 6 should not be applied in such a manner as to put disproportionate difficulties in the way of the police in taking effective measures to counter terrorism or other serious crimes (in which capacity they are fulfilling the positive duty of the state under article 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: *Sher v United Kingdom* CE:ECHR:2015:1020JUD000520111; 63 EHRR 24, para 149).

39 Fourth, in deciding whether the admission of a statement made without access to a lawyer is compatible with article 6, the Strasbourg Court will examine: (a) the general legislative framework applicable and any safeguards it contains (*Salduz v Turkey*, para 56); (b) the quality of the evidence, including whether the circumstances in which it was obtained cast doubt on its reliability or accuracy (*Panovits v Cyprus* CE:ECHR:2008:1211JUD000426804, para 82; *Zaichenko v Russia* CE:ECHR:2010:0218JUD003966002, para 57); (c) whether the statement was promptly retracted and the admissions made in it consistently denied, particularly once legal advice had been obtained (*Bandaletov v Ukraine* CE:ECHR:2013:1031JUD002318006, para 67, in which the Fifth section drew a contrast between the facts of that case in which "the applicant did not retract or change his initial statements at any point of the pretrial investigation or the trial" and *Çimen v Turkey* CE:ECHR:2009:0203JUD001958202, in which the applicant had repeatedly denied the contents of the incriminating statement made before he had access to legal advice); (d) the procedural safeguards applied during the criminal proceedings, in particular whether the accused was given the opportunity to challenge the authenticity of the evidence and of opposing its admission in evidence (*Panovits v Cyprus*, para 82; *Zaichenko v Russia*, para 57); and (e) the strength of the evidence in the case (*Salduz v Turkey*, para 57; *Zaichenko v Russia*, paras 58–59).

40 Fifth, the admission of statements made by the accused before he was afforded legal representation does not, in and of itself, give rise to a breach of article 6, even in the absence of compelling reasons to restrict the right to legal representation. This proposition can be derived from the court's holistic assessment of the fairness of the proceedings in *Salduz v Turkey* at paras 57–62. But (by analogy with the position where there is no good reason for the failure of a prosecution witness to attend trial), the lack of compelling reasons may "tip the balance" in favour of a breach of article 6: *Schatschaschwili v Germany* [GC], para 113.

41 Sixth, article 6 requires that a person who is being questioned by the police, but who comes to be suspected of having committed an offence, is informed of his right to a lawyer and of his right to silence and privilege against self-incrimination: *Zaichenko v Russia*, para 52; *Schmid-Laffer v Switzerland* CE:ECHR:2015:0616JUD004126908, paras 29 and 39.

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42 Seventh, where a suspect has not been informed of these rights, the court must examine whether, notwithstanding the failure, the proceedings as a whole were fair: *Schmidt-Laffer*, paras 36–40. The analysis at para 39 shows that the matters taken into account will include the importance of the statement made in relation to the other evidence in the case. (The judgment is available in French only; the statement in that case was only one element of the evidence and it was said to be of "faible importance".)

The judgment of the Fourth section of the Strasbourg Court

43 Mr Abdurahman's application to the Strasbourg Court was considered together with those of three other applicants: Messrs Ibrahim, Mohammed and Omar, three of the four would-be 21/7 bombers. It was considered in the first instance by the court's Fourth section sitting as a Chamber composed of Judges Ziemele, Hirvelä, Nicolaou, Bianku, Kalaydjieva, Mahoney and Wojtyczek.

44 Having reviewed the law, the court considered that the critical question in Mr Abdurahman's case, when establishing whether there had been a violation of article 6, was whether he had suffered "undue prejudice": para 214.

45 At para 215, the court considered the general legislative framework and found it "significant that there was a clear legislative framework in place to govern the admissibility, in any criminal proceedings subsequently brought, of evidence obtained during police questioning". This included the prohibition in section 76 of PACE on admitting evidence that was obtained by oppression or was unreliable and the general discretion under section 78 of PACE to exclude evidence. It was relevant that this legislative framework had been "carefully applied by the trial judge".

46 The court examined the quality of the evidence and the circumstances in which it was obtained at para 216. It considered it significant that the contents of the First statement showed that the police interview had been directed at gathering evidence about others, which was

> "of key importance to the public safety issues at stake at this stage in the police investigation, as it provided intelligence to the police as to the nature of the plot and the identities and whereabouts of some of the central participants".

47 At para 217, it was noted that the first statement, although it became self-incriminating some time into the interview, also contained exculpatory statements, in particular those which emphasised Mr Abdurahman's ignorance of Mr Osman's involvement in the bombings. In any event, most of the factual elements of the account there given could be and were corroborated by surveillance records, mobile phone data and cell-site records and the evidence of Mr Osman himself. Moreover, although the First statement contained evidence that he had helped Mr Osman by providing shelter and clothing, it did not mention that he had met Mr Sherif to collect the passport that had facilitated Mr Osman's flight to the continent.

48 At para 218, the court made the point that Mr Abdurahman was not coerced. He was not forced to incriminate himself but was free to leave at any time. So, the concerns identified in the court's case law (in particular in the *Salduz v Turkey* case) about potentially coercive conditions of police interrogation and detention did not arise. There was nothing to indicate that the First statement was unreliable.

49 The court at paras 219–220 placed heavy emphasis on the fact that the statement was not retracted or disavowed, whether promptly or at all. It said this:

> "219. Throughout the police investigation and the criminal proceedings, the applicant sought to rely on the fact that he had voluntarily offered early assistance to the police to mitigate his actions (see also *Bandaletov*, cited above, paras 27 and 61). In his prepared statement read out on 30 July 2005 after consultation with his solicitor, he emphasised the valuable assistance that he had given (see para 111 above). He made the same point in a police interview on 1 August (see para 112 above). In his appeal against sentence, he successfully relied on the early assistance provided to seek a reduction in the term of imprisonment he had been sentenced to serve. The Court of Appeal considered the matter of pre-arrest assistance to the police to be relevant to the sentencing exercise and in the applicant's case it led to a two-year reduction in sentence on appeal (see paras 130–132 above).
>
> "220. It is also significant that as soon as the applicant was arrested and cautioned, he was offered legal advice, although at that time he declined it (see para 110 above). He was not interviewed again until two and a half days later, by which time he

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> had availed himself of his right to legal assistance. During this period, he had ample opportunity to reflect on his defence, with the benefit of legal advice, in order to choose how he wished to proceed. He could have chosen at that stage to retract the witness statement, relying then on the arguments which he now advances. Instead he chose to adopt his witness statement and build upon it, clarifying some factual details and emphasising once more his desire to assist the police and his ignorance as to Mr Osman's role in the attempted bombings (see para 111 above and *Bandaletov*, cited above, paras 17–18, 23, 26 and 67; and compare and contrast *Lutsenko*, cited above, paras 10 and 51). The decision not to retract the witness statement once he had received legal advice was an important factor in the trial judge's finding that the statement was reliable and that it would not be unfair to admit it or an abuse of process to continue with the trial (see paras 118, 123 and 128 above). By converse implication, had the applicant retracted the statement after having received legal advice, this would have weighed heavily in the balance against its admission. The court accordingly rejects the fourth applicant's claim to have been presented with a fait accompli once the statement had been taken (see para 188 above). It is also significant in this respect that, while he did challenge the admissibility of the statement at trial, he has failed to explain why he felt unable to challenge it at an earlier stage."

50 At para 222, the court noted that there been a number of procedural opportunities at trial to ensure the fairness of the proceedings. Unlike in *Panovits v Cyprus* and *Zaichenko v Russia,* the judge had given detailed reasons for his conclusion that there would be no unfairness if the statement were admitted.

51 At para 223, the court said this:

> "Finally, and most importantly, a great deal of other incriminating evidence was placed before the jury as proof of the charges against the fourth applicant (see para 121 above). CCTV footage showed him in the company of Mr Osman at Clapham Junction train station, Vauxhall train station and walking to the fourth applicant's home. Cellsite analysis showed the contact which had taken place between the two men and demonstrated the presence of Mr Osman in the fourth applicant's home. It also corroborated the prosecution allegation that the fourth applicant had met Mr Sherif to collect a passport for Mr Osman. A fingerprint showed that Mr Osman had been in contact with a newspaper, containing a report of the bombings together with photographs, found in Mr Osman's flat. There was oral evidence from Mr Sherif as to his contact with the fourth applicant in connection with Mr Osman's escape after the bombings and Mr Osman gave evidence which largely reflected the contents of the fourth applicant's statement (see para 125 above). All this evidence was of itself clearly incriminating and tied the fourth applicant to Mr Osman's attempt to hide from the police and to flee the United Kingdom after the failed attacks."

52 The court concluded at para 224 that there was no violation of article 6, looking at a number of factors cumulatively: in particular, Mr Abdurahman's adoption of his statement after having received legal advice, the counterbalancing safeguards contained in the legislative framework and available at trial with a view to ensuring the fairness of the proceedings, including the trial judge's ruling on admissibility, and the strength of the other prosecution evidence. Together, these factors meant that there was no undue prejudice caused to Mr Abdurahman's right to a fair trial and therefore no violation of article 6.

53 The court also found that there had been no violation of article 6 in the cases of Messrs Ibrahim, Mohammed and Omar.

54 Judge Kalaydjieva dissented. The greater part of her dissenting opinion is concerned with the cases of the first three applicants. So far as concerns Mr Abdurahman, she noted that, having found that Mr Abdurahman had been deliberately questioned without a proper caution against self-incrimination, the majority had considered it sufficient that this "did not give rise to undue prejudice to his defence rights" and queried whether this approach was appropriate.

The judgment of the Grand Chamber of the Strasbourg Court

55 The case was referred to the Grand Chamber, composed as usual of 17 judges. Of these, only Judge Mahoney had been party to the Chamber decision. The Grand Chamber gave judgment on 13 September 2016.

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56 At para 228, it explained that some Council of Europe states automatically exclude statements obtained in the absence of a lawyer and without notification of the right to legal advice. In others, however, "the admission of the statement or the weight to be attributed to it is, at least to some extent, a matter for judicial discretion".

57 At paras 250–251, the Grand Chamber noted that what constitutes a fair trial must depend on the circumstances of the individual case. At para 252, it emphasised the importance of not diluting the content of the Convention rights in the face of the threat of terrorism but also accepted that a balancing exercise should be conducted between the individual's rights and the interests of the public at large, subject to the condition that public interest concerns cannot justify measures which extinguish the very essence of the right to a fair trial. At para 254, the Grand Chamber said this:

> "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 para 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, para 95; and *Bykov*, cited above, para 89)."

There was, however, an exception in the case of evidence obtained as a result of treatment contrary to article 3 of the Convention. In that case, admission into evidence renders the proceedings unfair irrespective of the probative value of the statements and irrespective of whether their use was decisive in securing the conviction.

58 At para 257, the Grand Chamber summarised the *Salduz v Turkey* test for restricting access to legal advice:

> "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."

59 At para 258, the Grand Chamber identified the first question as "what constitutes compelling reasons for delaying access to legal advice". In that regard, the existence of a basis in domestic law for doing so was relevant, but the reasons must be assessed on a case-by-case basis. At para 259, it said this:

> "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, para 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 para 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 paras 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 paras 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."

60 At paras 260–262, the Grand Chamber set out and rejected a submission made on behalf of the first three applicants that *Salduz v Turkey* should be seen as laying down a "bright line rule"

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that a lack of compelling reasons for restricting access to legal advice was sufficient to found a violation of article 6. At para 263, it went on to consider the effect of the absence of compelling reasons to the assessment of overall fairness. At paras 264–265, it said this:

> "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 para 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 para 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 paras 1 and 3(c) (see, for a similar approach with respect to article 6 paras 1 and 3(d), *Schatschaschwili*, cited above, para 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*." (Emphasis added.)

61 The underlined passage represents an extension of the previous case law in this area. In *Schatschaschwili v Germany*, the Grand Chamber had noted (in the context of non-attendance of a witness) that the absence of good reasons for non-attendance was "a very important factor" which "may tip the balance in favour of a finding of breach of article 6". In *Ibrahim v United Kingdom*, the Grand Chamber fashioned a new presumption that, in the absence of compelling reasons for restricting access to legal advice, the admission of a statement made before the accused was afforded access to such advice gives rise to irretrievable prejudice. The presumption can be rebutted, but it is for the contracting state to "demonstrate convincingly" why the conclusion of "irretrievable prejudice" should not be drawn. If it cannot demonstrate that, there will be a violation of article 6.

62 At paras 266–269, the Grand Chamber considered the privilege against self-incrimination. At paras 270–273, it considered the entitlement to notification of the right to a lawyer and the right to silence and privilege against self-incrimination. At para 273, it said this:

> "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, paras 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, para 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."

63 Thus, the presumption of "irretrievable prejudice" (established for the first time in para 265 of the Grand Chamber's judgment) becomes even more difficult to rebut in a case where the suspect has not been notified of his right to a lawyer and his right to silence and privilege against self-incrimination.

64 In considering the fairness of the proceedings as a whole, the Grand Chamber set out at para 274 a non-exhaustive list of factors to 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 pretrial 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

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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."

65 The Grand Chamber then moved on to apply these principles to the facts of the cases of the four applicants before it. In the case of the first three applicants, it found at paras 275–279 that the decision to restrict access to legal advice had been taken in accordance with a detailed statutory regime and in circumstances where the need to stop further terrorist attacks supplied "compelling reasons" temporarily to deny access to legal advice. At paras 280–294, it found that, in the case of the first three applicants, the trial had been fair, placing reliance on the safeguards in sections 76 and 78 of PACE (see para 282), the ability to challenge the statements before the jury (see para 283) and Court of Appeal (see para 284), the overwhelming evidence of guilt (see paras 285–[291), the trial judge's detailed and careful summing-up (see para 292) and the strong public interest in the investigation and punishment of terrorist offences (see para 293). The Grand Chamber thus concluded at para 294 that there had been no violation of the article 6 rights of the first three applicants.

66 The structure of the Grand Chamber's consideration of Mr Abdurahman's case was as follows. At paras 298–300, the Grand Chamber considered whether there were "compelling reasons" to justify restriction of Mr Abdurahman's access to a lawyer. It noted at para 299 that the decision to continue questioning him after he had become a suspect had the consequence that he was "misled as to his procedural rights" and that the decision to continue questioning the applicant had been taken outside any legal framework and the reasons for it not recorded. It contrasted this with the decision to restrict the access of the first three applicants to a lawyer. At para 300, it said this:

"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."

67 The Grand Chamber then noted at para 301 that, in the absence of compelling reasons:

"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."

In the light of the foregoing analysis, the word "exceptionally" here must be taken to reflect both the presumption of irretrievable prejudice in a case where there are no "compelling reasons for restricting access to legal advice" and the added force given to that presumption in a case where the accused has not been informed of his right to a lawyer and of his right to silence and privilege against self-incrimination. The remainder of the Grand Chamber's analysis should be seen through this prism.

68 At para 303, the Grand Chamber noted that, unlike in the case of the first three applicants, the decision to continue to question Mr Abdurahman once it had become clear he was a suspect "had no basis in domestic law and was contrary to the guidance given in the applicable code

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of practice". This was a point that had already been made in reaching the conclusion that there were no "compelling reasons" for restricting access to legal advice.

69 At para 304, the Grand Chamber noted that the admissibility of the First statement had been governed by sections 76 and 78 of PACE and that the judge had conducted a voir dire in which he heard evidence from the police officers responsible for questioning Mr Abdurahman. The trial judge had also taken account of the fact that, once he had the benefit of legal advice, Mr Abdurahman freely adopted his First statement and indeed based his defence on it. The Grand Chamber then said this:

> "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."

70 It is important to understand, when reading this passage, that—at this stage of the analysis—the Grand Chamber had already decided that there were no compelling reasons for restricting Mr Abdurahman's access to legal advice. As noted above, it had done so in large part because of the absence of evidence, or written reasons, from the senior police officer (see para 299). It was now considering the different question whether, despite the absence of such reasons, the trial was none the less fair. In considering that question, the same point—the absence of evidence, or written reasons, from the senior police officer—again appears to have been determinative, or at least highly significant.

71 The Grand Chamber returned to the point at para 305. It noted that Mr Abdurahman had been able to challenge the First statement before the jury and that he was able to renew his argument that it should not have been admitted before the Court of Appeal. It recorded that the Court of Appeal had "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". The Grand Chamber then said this:

> "However, as noted above … 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."

72 At para 306, the Grand Chamber noted, accurately, that the trial judge had found that there had been no oppression of Mr Abdurahman at the police station; and that it was "noteworthy" that he did not claim in later interviews after consultation with his lawyer that the First statement was incorrect or had been taken in circumstances that amounted to coercion. It noted also that Mr Abdurahman had not sought to retract his First statement and indeed based his defence on it at trial. It also said, however, that the "direct consequence" of the actions taken by the police was that "the applicant was misled as to his fundamental procedural rights during questioning".

73 The Grand Chamber then went on, at paras 307–308, to recite the other evidence on which the prosecution was based. At para 309, however, it said this:

> "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."

74 It can be seen from this passage that the conclusion that the First statement had played "a central position" in the prosecution case was based on an assessment of the extent to which it had led the police to discover other evidence, rather than on a comparative analysis

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of the probative value of the First statement when compared with that of the other prosecution evidence.

75 At para 310, the Grand Chamber noted that the trial judge had summarised Mr Abdurahman's challenge to the First statement and had instructed the jury to disregard it if they thought it might have been obtained by something said or done which was likely to render it unreliable. It continued:

> "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."

76 The word "discretion" is not obviously apt to describe the exercise of judgment which the jury had to undertake. But a comparison with the French text (where the equivalent word is "latitude") suggests that what the Grand Chamber was saying was that it was, in article 6 terms, wrong to leave to the jury the question whether to take the First statement into account.

77 At para 311, the Grand Chamber concluded as follows:

> "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 paras 1 and 3(c) in the case of the fourth applicant."

78 The Grand Chamber then went on to deal with Mr Abdurahman's claim for just satisfaction under article 41 of the Convention. Mr Abdurahman had claimed very substantial sums by way of pecuniary and non-pecuniary loss arising from the breach of his article 6 rights (£1,196,750 pecuniary damages for past and future loss of earnings and £1m for non-pecuniary damage): see para 313. As the UK Government pointed out at para 314, these claims were based on the contention that there was a causal link between the violation of article 6 and the conviction. At para 315, the Grand Chamber said this:

> "It does not follow from the court's finding of a violation of article 6 paras 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 para 202 above). It therefore rejects his claim."

79 So far as Mr Abdurahman's case is concerned, six of the 17 members of the court (Judges Hajiyev, Yudkivska, Lemmens, Mahoney, Silvis and O'Leary) would have found no violation of article 6 in Mr Abdurahman's case. They endorsed the Grand Chamber's "clarification" of the general principles to be applied when assessing whether any restriction of the right of access to a lawyer, but disagreed with the majority in relation to the application of those principles in Mr Abdurahman's case. At para 12, they expressed their disagreement with the majority's conclusion that the Government had not shown "compelling reasons" for restricting Mr Abdurahman's access to legal advice. At para 13, they said this:

> "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

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being interviewed on the evening of 27 July. The urgent need to avert serious adverse consequences for life, liberty or physical integrity, recognised by the majority in para 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 paras 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."

80 At para 14, the dissenters pointed out that the restriction on Mr Abdurahman's access to a lawyer had been "temporary". At para 15, they said this:

> "Despite this, the majority (beginning at para 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 (paras 19, under (b), and 24–25 of this opinion and para 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 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 para 299 of the judgment, namely holding a safety interview as provided for under the Terrorist Act [sic], would precisely have required compelling—substantive—reasons to be present."

At paras 15–17, the dissenters went on to conclude that the breach of Code C ought to have been taken into account at the second stage of the analysis (consideration of the overall fairness of the trial), rather than at the stage of considering whether there were "compelling reasons" for restricting access to legal advice.

81 At para 19, the dissenters applied the factors set out at para 274 of the Grand Chamber's decision. It disagreed with the Grand Chamber's findings on this aspect for two reasons: first, because there were indeed "compelling reasons", the factors fell to be applied without the "very strict level of scrutiny which follows from the absence of such compelling reasons" (see para 21); second, because the application of the general factors must lead to a finding of no violation (para 22). As the Court of Appeal had found, Mr Abdurahman was not particularly vulnerable; on the contrary, he was an intelligent young man (para 24). Sections 76 and 78 of PACE supplied a clear legislative framework governing the admissibility of the First statement, which had been applied by the trial judge (paras 25–26). Mr Abdurahman had gone to the police station voluntarily and could have left at any time; the irregularity in continuing to question him was not overlooked by the Court of Appeal, which concluded that his trial had been fair; and, in any event, while Mr Abdurahman was not informed of his rights, it would be wrong to say he had been "misled" (paras 27–30). The dissenters then said this at paras 32–34:

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"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 paras 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, paras 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 para 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. [Fn: See, amongst others, *Taxquet v Belgium* [GC], CE:ECHR:2010:1116JUD000092605, ECHR 2010-VI, para 92] 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'. [Fn: *Gregory v the United Kingdom* CE:ECHR:1997:0225JUD002229993, para 44, *Reports of Judgments and Decisions*, 1997-I.] 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. [Fn: *Taxquet*, cited above, para 83.] 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—para 169 of the judgment). It is difficult to see the shortcoming in such directions."

82 At para 35, the dissenters considered the importance in terms of probative value of the First statement when compared with the other evidence in the proceedings. They said this:

"Contrary to the suggestion of the majority judgment, the fourth applicant's conviction was not substantially based on his initial statement (see para 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

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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 cell site analysis 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 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 para 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 para 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."

83 Finally, at para 36, the dissenters recorded their conclusion that the majority had given too little weight to the public interest in the investigation and punishment of terrorist offences. They said this:

"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. [Fn: See, variously, *Brogan v United Kingdom* CE:ECHR:1988:1129JUD001120984; (1988) 11 EHRR 117, *Heaney v Ireland* CE:ECHR:2000:1221JUD003472097; (2000) 33 EHRR 12, paras 57–58, *Jalloh v Germany* CE:ECHR:2006:0711JUD005481000; (2006) 44 EHRR 32; 20 BHRC 575, para 97, and *Zaichenko v Russia* CE:ECHR:2010:0218JUD003966002; [2010] ECHR 185, para 39.] A parallel 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."

The CCRC's reference and the parties' submissions

The CCRC's reference

84 The CCRC's findings were summarised in its reference to this court, pursuant to section 9 of the Criminal Appeal Act 1995, as follows:

"The CCRC has decided that there is a real possibility that Mr Abdurahman's conviction will be quashed if referred back to the Court of Appeal. The reasons for this decision are set out in more detail below but can be summarised as follows:

"• There is new evidence for the purposes of the Act. This is the decision of the Grand Chamber of the European Court of Human Rights ('ECtHR') which found that Mr Abdurahman's article 6 rights were breached by the way in which he was dealt with by the police when interviewed as a witness.

"• Mr Abdurahman had incriminated himself in that interview; the resulting 'confession' statement was then found to be admissible by the trial judge (a decision previously upheld by the Court of Appeal).

"• After the matter had been considered by the Court of Appeal, the ECtHR found that Mr Abdurahman's trial was 'irretrievably prejudiced' by the police decision not

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to caution him and to restrict his access to legal advice. This is in contrast to his co-appellants, who were treated as suspects and cautioned.

"• The decisions of the ECtHR, where they involve breaches of Convention rights, must be 'taken account of', by statutory provision and case law, except in limited circumstances.

"• The ECtHR decision raises a real possibility that the confession statement will now be regarded by the Court of Appeal as inadmissible. The admission into evidence of the confession statement prejudiced the remaining case against Mr Abdurahman and the manner in which his defence was conducted thereafter.

"• Without his confession statement, and the subsequent prepared statement, there is not a compelling case against Mr Abdurahman (dealt with in detail at paras 83 to 89 below). As a consequence, there is a real possibility that the Court of Appeal would now quash Mr Abdurahman's conviction because of:

"• The breach of his article 6 rights as determined by the ECtHR. This decision does not come within the 'special circumstances' allowing the domestic court not to 'take account of' the same;

"• Without the confession and the prepared statement as described below, the remaining circumstantial evidence against him would not support a conviction."

Procedural matters

85 Following receipt of the reference, the Registrar of Criminal Appeals granted a representation order to the solicitors now instructed on 12 February 2019 with a view to their identifying and instructing counsel to draft grounds of appeal within 28 days. We shall not burden this judgment with a detailed chronology of the ensuing correspondence between them and the Registrar. It is striking, however, that grounds of appeal were not provided until 17 November 2019. The explanation given, that further papers were required from the Crown Court, seems to us to be unsatisfactory. This was a case which had already been the subject of detailed judgments by the Chamber and Grand Chamber of the Strasbourg Court. Counsel instructed had appeared at trial, in the Court of Appeal and in the Strasbourg Court. The CCRC's referral invited reconsideration of the conviction in the light of the judgment of the Grand Chamber. There was no proper justification for the delay.

86 Over six months before the grounds of appeal were lodged, the Registrar had directed that the CCRC's reference should stand as the grounds of appeal. In any event, Mr King requires leave under section 14(4B) of the Criminal Appeal Act 1995 to pursue any ground not related to a reason given by the CCRC for making the reference.

Mr Abdurahman's grounds of appeal

87 The grounds of appeal advanced by Mr King on behalf of Mr Abdurahman in writing, and amplified in his skeleton argument and in oral argument, may be summarised as follows. Whilst a judgment of the Strasbourg Court finding that article 6 has been violated does not invariably lead to the quashing of a conviction, the circumstances in which it will not are "few and far between", particularly where the judgment is that of "a substantial majority in the Grand Chamber". Reliance is placed on *R v Togher* [2001] 3 All ER 463, [30] (Lord Woolf CJ); *R (Anderson) v Secretary of State for the Home Department* [2002] UKHL 46; [2003] 1 AC 837 at [18] (Lord Bingham); and *R (Dowsett) v Criminal Cases Review Commission* [2007] EWHC 1923 (Admin) at [24] (Laws LJ).

88 Mr King submitted that two categories of case law have been identified in which domestic appellate courts have held that findings of a violation of article 6 do not make the conviction unsafe: first, where the Strasbourg Court has been operating under a misapprehension as to domestic law or procedure; second, where the evidence against the defendant was overwhelming: *R v Horncastle* [2009] EWCA Crim 964; [2010] 2 AC 373 at [11] (Lord Phillips); *R v Dundon* [2004] EWCA Crim 621, [2004] UKHRR 717, para 15 (Rose LJ). This case falls into neither category.

89 As to the first, Mr King submitted that the Strasbourg Court had a very detailed appreciation of the procedural position in English law. In the case of the first three applicants, it placed emphasis on the statutory framework governing safety interviews. The contrast with the lack of any legal framework governing the decision taken in Mr Abdurahman's case was striking. The Strasbourg Court was entitled to place emphasis on the lack of evidence, or written reasons, from the senior police officer who ordered that the questioning continue. The reasons were relevant to admissibility: *R v Walsh* (1990) 91 Cr App R 161. The Strasbourg Court was entitled to consider that trial judge's direction to the jury was that it gave it too much latitude, because

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(unlike the conventional directions on bad character and silence) the conventional direction given in relation to a disputed confession did not specifically direct the jury not to convict wholly or mainly on the basis of the First statement.

90 Mr King also sought to advance a separate complaint that the jury direction given by Judge Worsley had been at variance with the conventional direction as it appears in the Crown Court Compendium.

91 So far as the other procedural safeguards are concerned, Mr King relied on *Cadder v HM Advocate (HM Advocate General for Scotland intervening)* [2010] UKSC 43; [2010] 1 WLR 2601 at [50] (Lord Hope) as authority for the proposition that procedural safeguards are incapable of removing the disadvantage suffered by an accused if a statement made before he has had access to legal advice is admitted against him.

92 Mr King relied on the reasoning of the majority of the Grand Chamber to submit that the First statement should not have been admitted. In any event, the trial judge had fallen into error in saying that, in his Second statement, he had "freely adopted" the First. In fact, Mr King submitted, the Second statement had in a crucial respect contradicted the First. Anyway, relying on *R v McGovern* (1991) 92 Cr App R 228, the unfairness in the process by which the First statement had been taken tainted the Second statement. It was also relevant that Mr Abdurahman had been questioned for almost 12 hours through the night.

93 As to the other evidence, Mr King accepted that there was a wealth of evidence showing that Mr Osman had stayed with Mr Abdurahman, but almost no evidence to contradict the case advanced in his Second statement, and at trial, that he did not believe Mr Osman was one of the 21/7 bombers until he was stopped by the police. Apart from the First statement, the only evidence of that was his fingerprints on the newspaper found at his flat, but those were not found on the pages containing Mr Osman's photograph. In that regard, it was material that Mr Osman had not been recognised by the surveillance officers who tracked him to Waterloo Station. Although it is true that Mr Abdurahman's co-accused, Mr Sherif, and Mr Osman both gave disputed evidence that Mr Abdurahman had collected Mr Osman's passport from Mr Sherif, this was self-serving evidence which, in the case of Mr Osman, came from a convicted bomber.

94 Finally, Mr King relied on the Grand Chamber's finding at para 309 that the First statement had "provided the police with the framework around which they subsequently built their case". He submitted that the circumstances in which the First statement had been taken tainted not only that statement itself but also the other evidence to which police had been led by its contents.

Submissions for the Crown

95 For the Crown, Mr Mably QC made five points. First, as a matter of principle, a finding of a violation of article 6 by the Strasbourg Court or by a domestic court does not automatically lead to a conclusion that a conviction is unsafe. Second, whether a conviction is unsafe depends on the nature of the breach and the facts of the case. Third, in Mr Abdurahman's case, the trial was not unfair having regard to the compelling reasons for continuing to interview Mr Abdurahman and the procedural safeguards applicable thereafter, to which the Grand Chamber failed to give sufficient weight. Fourth, the finding of the Grand Chamber that there had been a violation of article 6 did not constitute or entail a finding that the conviction was unsafe or even that the First statement should not have been admitted. Nor did it entail a finding that, in the light of the other evidence, the conviction could not be justified. The Strasbourg Court did not address the question whether the conviction was safe, leaving that to the national authorities (ie the CCRC and this court). Fifth, even if the Grand Chamber's judgment did compel the conclusion that the First statement should not have been admitted, the other evidence in the case was overwhelming. It established the factual basis for the assistance given by Mr Abdurahman to Mr Osman, in most cases incontrovertibly. Those facts also gave rise to a very strong inference of a guilty state of mind. Finally, the evidence of Messrs Sherif and Osman was "devastating" to Mr Abdurahman's case. For all these reasons, the conviction was safe.

96 Mr Mably stopped short of submitting that we should depart from the conclusion of the Grand Chamber that there had been a violation of article 6. He was, however, heavily critical of aspects of its judgment in respects we shall consider in more detail below. Those criticisms, he said, should inform our conclusion on the issue before us (the safety of the conviction), which was not the same as the issue before the Grand Chamber.

The status to be accorded to the decision of the Grand Chamber

97 Decisions of the Strasbourg Court are not binding in domestic law. Section 2 of the Human Rights Act 1998, however, provides as follows:

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"(1) A court or tribunal determining a question which has arisen in connection with a Convention right must take into account any … (a) judgment, decision, declaration or advisory opinion of the European Court of Human Rights … whenever made or given, so far as, in the opinion of the court or tribunal, it is relevant to the proceedings in which that question has arisen."

The obligation on a domestic court determining a question which has arisen in connection with a Convention right is, therefore, to "take into account" judgments of the Strasbourg Court, but only "so far as… relevant to the proceedings in which that question has arisen".

Supreme Court authority on the interpretation of section 2 of the Human Rights Act 1998

98 In *R (Alconbury Developments Ltd) v Secretary of State for the Environment, Transport and the Regions* [2001] UKHL 23; [2003] 2 AC 295, Lord Slynn said this at para 26:

"Your Lordships have been referred to many decisions of the European Court of Human Rights on article 6 of the Convention. Although the Human Rights Act 1998 does not provide that a national court is bound by these decisions it is obliged to take account of them so far as they are relevant. In the absence of some special circumstances it seems to me that the court should follow any clear and constant jurisprudence of the European Court of Human Rights. If it does not do so there is at least a possibility that the case will go to that court, which is likely in the ordinary case to follow its own constant jurisprudence."

99 In *R (Anderson) v Secretary of State for the Home Department* [2002] UKHL 46; [2003] 1 AC 837, Lord Bingham at para 18 cited the latter as authority for the proposition (which is not strictly to be found in it) that:

"While the duty of the House under section 2(1)(a) of the Human Rights Act 1998 is to take into account any judgment of the European Court, whose judgments are not strictly binding, the House will not without good reason depart from the principles laid down in a carefully considered judgment of the court sitting as a Grand Chamber."

100 Lord Bingham returned to the issue in *R (Ullah) v Special Adjudicator* [2004] UKHL 26; [2004] 2 AC 323, where at para 20 he said, citing Lord Slynn's observation in Alconbury, that: "While [Strasbourg] case law is not strictly binding, it has been held that courts should, in the absence of some special circumstances, follow any clear and constant jurisprudence of the Strasbourg court."

101 In *R v Horncastle* [2009] UKSC 14; [2010] 2 AC 373, the Supreme Court rejected the submission that it was bound to a clear statement of principle by the Strasbourg Court. At para 11, Lord Phillips (giving the judgment of a seven-justice panel) said this:

"The requirement to 'take into account' the Strasbourg jurisprudence will normally result in the domestic court applying principles that are clearly established by the Strasbourg court. There will, however, be rare occasions where the domestic court has concerns as to whether a decision of the Strasbourg court sufficiently appreciates or accommodates particular aspects of our domestic process. In such circumstances it is open to the domestic court to decline to follow the Strasbourg decision, giving reasons for adopting this course. This is likely to give the Strasbourg court the opportunity to reconsider the particular aspect of the decision that is in issue, so that there takes place what may prove to be a valuable dialogue between the domestic court and the Strasbourg court. This is such a case."

The decision which the Supreme Court decided not to follow was that of a Chamber of the Strasbourg Court, rather than the Grand Chamber; and the reference to "dialogue" should be read in that context.

102 In *Cadder v HM Advocate (HM Advocate General for Scotland intervening)* [2010] UKSC 43; [2010] 1 WLR 2601, the Supreme Court had to consider whether to overturn a Scottish conviction based in part on a statement made before he had been given access to legal advice. The occasion for the appeal was the decision of the Grand Chamber in *Salduz v Turkey*. Lord Hope (with whom Lord Mance, Lord Rodger, Lord Kerr and Lord Dyson agreed) cited *R v Horncastle* before noting

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at para 46: "In this case the court is faced with the unanimous decision of the Grand Chamber. This, in itself, is a formidable reason for thinking that we should follow it."

103 In *Manchester City Council v Pinnock* [2010] UKSC 45; [2011] 2 AC 104, however, the Supreme Court made clear that domestic courts are not bound even by decisions of the Grand Chamber. Lord Neuberger, giving the judgment of a panel of nine justices, said this at para 48:

> "This court is not bound to follow every decision of the European court. Not only would it be impractical to do so: it would sometimes be inappropriate, as it would destroy the ability of the court to engage in the constructive dialogue with the European court which is of value to the development of Convention law: see eg *R v Horncastle* [2010] 2 AC 373. Of course, we should usually follow a clear and constant line of decisions by the European court: *R (Ullah) v Special Adjudicator* [2004] 2 AC 323. But we are not actually bound to do so or (in theory, at least) to follow a decision of the Grand Chamber. As Lord Mance pointed out in *Doherty v Birmingham City Council* [2009] AC 367, para 126, section 2 of the 1998 Act requires our courts to 'take into account' European court decisions, not necessarily to follow them. Where, however, there is a clear and constant line of decisions whose effect is not inconsistent with some fundamental substantive or procedural aspect of our law, and whose reasoning does not appear to overlook or misunderstand some argument or point of principle, we consider that it would be wrong for this court not to follow that line."

104 In *R (Chester) v Secretary of State for Justice* [2013] UKSC 63; [2014] AC 271, Lord Mance (with whom Lord Kerr, Lord Hughes and Lord Hope agreed) differentiated between Chamber and Grand Chamber decisions. He said this at para 27:

> "In relation to authority consisting of one or more simple chamber decisions, dialogue with Strasbourg by national courts, including the Supreme Court, has proved valuable in recent years. The process enables national courts to express their concerns and, in an appropriate case such as *R v Horncastle* [2010] 2 AC 373, to refuse to follow Strasbourg case law in the confidence that the reasoned expression of a diverging national viewpoint will lead to a serious review of the position in Strasbourg. But there are limits to this process, particularly where the matter has been already to a Grand Chamber once or, even more so, as in this case, twice. It would have then to involve some truly fundamental principle of our law or some most egregious oversight or misunderstanding before it could be appropriate for this court to contemplate an outright refusal to follow Strasbourg authority at the Grand Chamber level."

105 Lord Mance soon attenuated that statement, however. In *R (Kaiyam) v Secretary of State for Justice* [2014] UKSC 66; [2015] AC 1344, he and Lord Hughes (with whom Lord Neuberger, Lord Toulson and Lord Hodge agreed) said this at para 21:

> "The degree of constraint imposed or freedom allowed by the phrase 'must take into account' is context specific, and it would be unwise to treat Lord Neuberger MR's reference to decisions 'whose reasoning does not appear to overlook or misunderstand some argument or point of principle' or Lord Mance JSC's reference to 'some egregious oversight or misunderstanding' as more than attempts at general guidelines, or to attach too much weight to his choice of the word 'egregious', compared with Lord Neuberger MR's omission of such a qualification."

106 In *R (Hallam) v Secretary of State for Justice* [2019] UKSC 2; [2019] 2 WLR 440, this statement was expressly endorsed by Lord Mance (at para 72), with whom Lord Lloyd-Jones agreed (at para 113), and Lord Wilson (at para 89). It was implicitly applied by Lord Hughes (who, at para 126, was prepared to re-assess from first principles an assumption made in a decision of the Grand Chamber based on a line of Strasbourg authority that was "constant" but not "clear").

Authority on the relevance of a finding by the Strasbourg Court of breach of article 6 to the safety of a conviction

107 In *R v Togher* [2001] 3 All ER 463, the Court of Appeal had to consider whether, the effect on the safety of a conviction of a finding by a domestic court that a trial had been unfair for the purposes of article 6. At para 30, Lord Woolf CJ said this: "we consider that if a defendant has been denied a fair trial it will almost be inevitable that the conviction will be regarded as unsafe."

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108 *R v Dundon* [2004] UKHRR 717 was a court-martial case where the judge advocate had been a serving military officer, a circumstance which the Strasbourg Court had held gave rise to a breach of the article 6 requirement for an "independent and impartial tribunal". The Court of Appeal (Rose LJ, VP; Douglas Brown and Newman JJ) said this at para 15:

> "In many cases, breach of an article 6 right will result in the quashing of a conviction as unsafe. But that is not necessarily the result in all cases (see per Lord Woolf CJ *R v Togher* [2001] 1 Cr App R 457, 468, para 30; *R v Lambert* [2002] 2 AC 545 at para 18 per Lord Slynn and para 43 per Lord Steyn; and *Mills v HM Advocate* [2002] 3 WLR 1597, paras 18–23 per Lord Steyn and paras 53 and 55 per Lord Hope; see also *Ashton & Webber* [2002] EWCA 2782). In every case the outcome depends on the kind of breach and the nature and quality of the evidence in the case. Just and proportionate satisfaction may, in an appropriate case, be provided, for example, by a declaration of breach or a reduction in sentence, rather than the quashing of a conviction. Breach arising from delay may have such a consequence (see *Attorney General's Reference (No 2 of 2001)* [2004] 2 WLR 1). And there may be other exceptional cases in which a conviction may not be unsafe, for example if there has been unfairness because of a legal misdirection but the evidence is overwhelming (see *Lambert* above) or, possibly, if the trial is unfair because of inadequate prosecution disclosure on a peripheral issue but compelling evidence of guilt makes the conviction safe."

We do not read this passage as purporting to give an exhaustive list of examples of cases where a violation of article 6 does not entail that the conviction is unsafe.

109 In *R (Dowsett) v Criminal Cases Review Commission* [2007] EWHC 1923 (Admin), the Divisional Court heard a challenge to a decision of the CCRC not to refer a case to the Court of Appeal where the conviction had been held by the Strasbourg Court to give rise to a breach of article 6. Mitting J (with whom Laws LJ agreed) concluded, on the basis of statements of Lord Slynn and Lord Clyde in *R v Lambert* [2001] UKHL 37; [2002] 2 AC 545, that "not every breach of article 6 will make a conviction unsafe. The nature of the breach and the facts of the case must in every case be analysed": para 16. Laws LJ added this at para 24:

> "While any breach of article 6 is plainly a cause of concern, and instances of such breaches in cases where the conviction is nevertheless safe may be few and far between, in this area one would not expect to see a rigid rule with no exceptions but a case by case approach with much emphasis laid on the gravity and effect of a particular violation."

The application for judicial review was dismissed.

Our approach to the judgment of the Grand Chamber in this case

110 In the light of these authorities, the approach we have applied is as follows:

(a) The question we are required to determine is not the same as that before the Strasbourg Court. Our function is determined by section 2(1) of the Criminal Appeal Act 1968 as amended: to determine whether the conviction is "unsafe". We are not directly concerned with the question before the Strasbourg Court, which was whether the proceedings before the domestic courts involved a violation of article 6. The Grand Chamber itself recognised this when it said at para 315 that it did not follow from the finding of violation of article 6 that Mr Abdurahman had been wrongly convicted.

(b) There is, however, a considerable overlap between the issues relevant to the safety of the conviction and those relevant to the question whether there has been a violation of the article 6 right to a fair trial. In every case, the safety of the conviction will depend on the kind of breach and the nature and quality of the evidence in the case: *R v Dundon*, para 15; *R (Dowsett) v Criminal Cases Review Commission*, paras 16 and 24.

(c) In assessing (i) whether there has been a breach of article 6, (ii) if so, what kind of breach and (iii) the nature and quality of the evidence, we are bound by section 2 of the 1998 Act to "take into account" of any decision of the Strasbourg Court.

(d) In doing so, we should "usually" follow any "clear and constant line of decisions" of the Strasbourg Court. It might, however, be right to depart even from a "clear and constant" line of decisions if (i) it is inconsistent with some fundamental substantive or procedural aspect of our law or (ii) its reasoning appears to overlook or misunderstand some argument or point of principle: *Pinnock*, para 48.

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(e) But this should be viewed as guidance rather than a straitjacket. The degree of constraint the Strasbourg jurisprudence imposes is context-specific. Even where the Grand Chamber has endorsed a line of authority, it is not necessary for the domestic to court to conclude that it involved an "egregious" oversight or misunderstanding before declining to follow it: *R (Kaiyam) v Secretary of State for Justice* [2015] AC 1344, para 21; *R (Hallam) v Secretary of State for Justice* [2019] 2 WLR 440, paras 79, 82, 113.

111 In our judgment, the "context" relevant to the degree to which the Grand Chamber's judgment constrains us here includes the following:

(a) The Grand Chamber's judgment turned on its conclusion that there were no "compelling reasons" for restricting access to legal advice in Mr Abdurahman's case. That factual finding was, obviously, particular to this case, rather than part of the court's "clear and constant" jurisprudence. It was also a finding with which a considerable number of Strasbourg judges (a majority of the Fourth section and a substantial minority of the Grand Chamber) disagreed. Just as the unanimity of the Grand Chamber's judgment in *Salduz v Turkey* was material to the Supreme Court's decision to follow that decision in the *Cadder* case, so the marked lack of unanimity in this case is material here.

(b) As is plain from a comparison between the decisions of the Fourth section and the Grand Chamber, the latter's reasoning also depended critically on the application of a strong presumption of irretrievable prejudice in a case where (i) there were no "compelling reasons" for denying access to legal advice and (ii) the suspect has not been notified of his right to a lawyer and his right to silence and privilege against self-incrimination. This presumption was an artefact of the Grand Chamber's decision in this case: see esp. at paras 265 and 273. In this respect, it represents a significant development of existing Strasbourg case law, albeit one on which the Grand Chamber was apparently unanimous, rather the application of a "clear and constant line of decisions".

(c) In considering whether the strong presumption was rebutted in this case, the Grand Chamber's reasoning was heavily dependent on the view that, because of the absence of evidence from the senior police officer as to his reasons for ordering that the interview should continue, or of any written record of those reasons, neither the trial judge nor the Court of Appeal was able to scrutinise them properly: see esp. at paras 304–305. We would respectfully observe, however, that is opaque to us why this factor—which had already been taken into account at paras 299–300 in concluding that the Government had failed to show "compelling reasons" for restricting Mr Abdurahman's access to legal advice—remained relevant once the focus moved to the question whether, *despite that failure*, the proceedings overall were fair. There is a separate point of importance. The Crown accepted from the outset that continuing the interview breached PACE Code C and that the breach was the result of a deliberate decision, not merely a slip. *R v Walsh* (on which Mr King relied) shows that bad faith on the part of the police can, in principle, be relevant to admissibility. But, as can be seen from the excerpts set out at paras 24 and 26 above, no such case was advanced before the trial judge (nor indeed before the Court of Appeal in 2008). The case advanced on the application to exclude the First statement and on the application to stay the proceedings for abuse of process was that Mr Abdurahman had been tricked into giving the First statement. The evidence relevant to that was that of the questioning officers, who were in a position to say what they had, and had not, said to Mr Abdurahman before he was cautioned. The evidence of the senior police officer was not relevant to the question whether Mr Abdurahman had been misled. In other words, it was immaterial to the issues the court was being invited to consider. Had Mr Abdurahman wished to allege any further "bad faith" on the part of the officers concerned (including the senior police officer) it would have been open to him to do so. As the name of the senior police officer was known, he could have invited the prosecution to tender him as a witness. None of this occurred and no complaint was made about the absence of evidence from the senior police officer either before the trial judge or before the Court of Appeal in 2008. It is to be noted that the domestic procedures available (but not invoked here by Mr Abdurahman) were apt to cater for and decide any allegation of bad faith. In any event, as we have said, the applications proceeded on the prosecution's concession that the breach of PACE Code C was deliberate. Given the way the applications were framed on Mr Abdurahman's behalf at trial, we find it impossible to understand why the Grand Chamber regarded the absence of evidence from the senior police officer as significant. This latter point seems to us to qualify as a "misunderstanding" of domestic procedure or of its application to the facts of this case. It is not necessary, in the light of *R (Kaiyam) v Secretary of State for Justice* and *R (Hallam) v Secretary of State for Justice*, to characterise it as "egregious", but it was certainly significant, given the great

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importance attached by the Grand Chamber, at a number of points in their judgment, to the absence of evidence as to the reasoning of the senior police officer.

(d) The conclusion drawn by the majority of the Grand Chamber that the First statement had occupied "a central position" in the prosecution case was, as we have noted, based on an assessment of the extent to which it had led the police to discover other evidence, rather than on a comparative analysis of the probative value of the First statement when compared with that of the other prosecution evidence. The logical consequence of this is not spelled out, but it appears to be that—in article 6 terms—fairness required the exclusion not only of the First statement but also of all the real evidence which came to the notice of the police by things said in that statement. If so, this represents a very significant extension—sub silentio—of the "fruit of the poisonous tree" doctrine. The previous case law of the Strasbourg Court makes clear that the admission at trial of evidence obtained unlawfully (including in particular real evidence discovered on the basis of an improperly conducted interview) is *not* necessarily unfair, save in the special case where the unlawfulness in question is treatment contrary to article 3 of the Convention: *Gäfgen v Germany* [GC], para 165. In this respect, English law, where "facts discovered as a result even of a coerced confession are (subject always to the court's discretionary power under section 78(1) to exclude evidence) admissible in evidence", marches in step with the Convention: *HM Advocate v P* [2011] UKSC 44; [2011] 1 WLR 2497, para 33 (Lord Brown) and nothing in the Supreme Court's decision in the *Cadder* case (which in any event predates *HM Advocate v P*) is inconsistent with this. In the present case, the case for excluding the items of real evidence discovered by the police as a result of things said by Mr Abdurahman in interview was even weaker, because the circumstances in which the First statement were taken disclosed no unlawful act on the part of the police and (as the trial judge and Court of Appeal found) no coercion. It is also important to note that, when an analysis of the other evidence was undertaken by the majority in the Fourth section (at para 223) and by the six dissenters in the Grand Chamber (at para 35 of their opinion), they all reached the conclusion that the probative value of the other evidence was substantial.

(e) There is, in our view, force in the criticism made by the dissenters at para 34 of their opinion that the Grand Chamber's conclusion that the trial judge's directions had given the jury an "excessive discretion" (i e too much latitude) was "at odds with the role of the jury in common-law criminal-justice systems".

Conclusions on the safety of the conviction

112 In the light of the foregoing analysis, these are our conclusions on the safety of the conviction.

113 The question for us is whether Mr Abdurahman's conviction was "unsafe", not whether the proceedings which led to it violated article 6. We recognise, however, that the issues relevant to the former question overlap to a considerable extent with those relevant to the latter. In reaching our view on those issues, we have paid close attention to the conclusions reached by the Grand Chamber. We are not, however, bound to accept those conclusions.

114 We conclude, in agreement with the Fourth section and the minority in the Grand Chamber, that there were indeed "compelling reasons" for restricting access to legal advice. In this respect, we agree with the Court of Appeal's observation in 2008 that "Abdurahman was providing information about Osman which could have been of critical importance in securing his arrest, which was the priority at that time". That conclusion could properly be drawn from the evidence before the court (including that of the police officers who had interviewed Mr Abdurahman), despite the lack of direct evidence from the senior police officer who had given the instruction. It is difficult to conceive of more compelling reasons than the need to obtain information about the whereabouts of an individual who had already detonated a bomb capable of killing and maiming large numbers of people and who it was believed, for good reason, may be planning imminently to detonate more.

115 We are unable to attach any significance to the absence of evidence from the senior police officer for the reasons we have given in para 111(c) above. In the circumstances, and given that it was accepted that the breach of PACE Code C had been the result of a deliberate decision, we cannot see how the absence of evidence from the senior police officer could properly be regarded as contributing to the unfairness of the trial.

116 We turn now to consider the position if, contrary to our view, there were no "compelling reasons" for restricting Mr Abdurahman's access to legal advice. On the Strasbourg authority prior to the Grand Chamber's decision in this case, we would not have applied any presumption, let alone a strong presumption, of irretrievable prejudice. This is because, as the Strasbourg authorities set out at paras 38–40 and 42 above make clear, the assessment of the fairness of the proceedings is a multifactorial and holistic one. The difficulty with a strong presumption

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of the kind applied by the Grand Chamber is that, once the conclusion is drawn that there are no "compelling reasons" for restricting the right of access to legal advice, and irrespective of the *degree* of unfairness caused by the admission of the statement in question, the cards are stacked against the contracting state. The Grand Chamber's strong presumption would apply in a case where the statement in question had been obtained by serious oppression in just the same way as it applies in this case, where there was no oppression. As the later parts of the Grand Chamber's judgment shows, the application of such a strong presumption has the potential effectively to determine the outcome of a case and has the potential to undermine the multifactorial, holistic approach to overall fairness which the previous Strasbourg authorities have repeatedly espoused.

117 We do not, however, need to form a final view on the question whether a strong presumption of irretrievable prejudice should apply in a case where there are no compelling reasons for restricting access to legal advice. Even if (as the majority of the Grand Chamber thought) there were no such reasons, and a presumption of irretrievable prejudice applied, it would in our judgment clearly be rebutted on the facts of this case.

118 This case is very different from those in which statements have been obtained by coercion. In our judgment, it would be a misuse of language to say that Mr Abdurahman was under compulsion to say what he did. He agreed voluntarily to assist the police with their inquiries. He was free to leave whenever he wanted. Like the dissenters in the Grand Chamber, we also consider it a mischaracterisation to say that he had been "misled" as to his procedural rights. Judge Worsley found, after hearing evidence, that there had been no unequivocal representation given by those with the conduct of the investigation or prosecution of the case that Mr Abdurahman would not be prosecuted. The breach of PACE Code C consisted in an omission to caution and inform him of his right to legal advice at the point when it became clear that he was beginning to incriminate himself.

119 We also note the importance placed by the Strasbourg authorities on whether a statement admitted in evidence was "promptly retracted or modified" (see factor (f) at para 274 of the Grand Chamber's judgment). Like the Fourth section and the minority of the Grand Chamber, we place substantial weight on the fact that, after he had received legal advice, Mr Abdurahman not only did not retract his First statement but:

(i) in his Second statement, affirmed the truth of its essential elements (albeit asserting that he had not believed Mr Osman to be involved with the 21/7 bombings);

(ii) having done so, went on positively to rely on the First statement as part of his defence at trial; and

(iii) relied on it again before the Court of Appeal in support of his appeal against sentence (to demonstrate that he had assisted the police). Points (i) and (ii) were central to the decision of Judge Worsley not to exclude the statement under sections 76 or 78 of PACE. The voir dire he held also allowed for the examination of evidence as to the conditions in which the statement had been given, which enabled him to find that there had been no oppression and that Mr Abdurahman had not been expressly misled. Like the Court of Appeal in 2008, we can find no error of law or approach in his decision to admit the First statement. For the reasons we have given, nothing in the reasoning of the majority of the Grand Chamber persuades us to the contrary. Having reached that finding, we agree with the Fourth section and with the minority of the Grand Chamber that the regime created by sections 76 and 78 of PACE constituted a substantial procedural safeguard, as did the supervisory jurisdiction of the Court of Appeal; and that these were material to the overall fairness of the proceedings.

120 Unlike the majority of the Grand Chamber, we would not place weight, at this stage of the analysis—ie once it is accepted that there were no compelling reasons for restricting access to legal advice—on the absence of evidence or written reasons from the senior police officer, both for the reason we have given at para 115] above and because we do not see how that absence could be relevant to the question whether, in the absence of compelling reasons for restricting access to legal advice, the trial was none the less fair.

121 We do, however, place considerable weight on the other evidence in the case. It is true that some of this was discovered by following leads generated by the contents of the First statement. But that would not make it inadmissible in English law. Nor, once admitted, would it give rise to a violation of article 6, applying the "clear and constant" jurisprudence of the Strasbourg Court prior to the judgment of the Grand Chamber in this case (as to which see para 111(d) above). If and to the extent that the Grand Chamber's decision suggests the contrary, its finding would represent a significant extension the "fruits of the poisonous tree"

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doctrine, which—for the reasons set out by the Supreme Court in *HM Advocate v P*—would be unwarranted and undesirable.

122 When examining the safety of the conviction, the correct approach, in our view, is to examine the other evidence and to assess its probative value when viewed independently of the First statement. As to that, there is very little we can add to the analyses of the Court of Appeal in 2008, the Fourth section and the minority of the Grand Chamber. In addition to the Second statement (in which Mr Abdurahman affirmed the essential elements of the First statement), there was CCTV footage of him together with Mr Osman and (on another occasion) with Mr Mohammed, fingerprint evidence, telephone records showing that he had contacted Mr Sherif, cell site analysis consistent with Mr Osman having made calls from his flat and with Mr Abdurahman having met Mr Sherif to collect the passport used by Mr Osman, oral testimony of Mr Sherif that Mr Abdurahman had asked him for and obtained from him that passport and the oral evidence of Mr Osman (by then convicted) to the same effect.

123 We do not accept Mr King's characterisation of this evidence as going only or mainly to the fact of Mr Abdurahman's association with Mr Osman, rather than to the former's knowledge of the latter's involvement in the 21/7 bombings. That is, in our view, to leave out of account the inferences that could be drawn from the other evidence. Mr Abdurahman had not mentioned his involvement in the transfer of Mr Osman's passport in the First statement. The evidence about it came entirely from other sources. But that evidence, taken with the fingerprint, the telephone records and the cell site analysis formed the foundation for an inference that he knew why Mr Osman was seeking to flee abroad. We agree with Mr Mably that, looking at the matter in the round, the inference was irresistible. Then, there is the evidence of Messrs Sherif and Osman. That evidence, which supported the prosecution case against Mr Abdurahman, was indeed "devastating", as Mr Mably submitted, if the jury accepted it as true. If it were necessary for us to do so, we would conclude that, leaving aside the First statement, the evidence in this case was overwhelming.

124 Given the basis of the CCRC's reference, we have sought to analyse the safety of the conviction through the lens of article 6 of the Convention, taking into account the reasoning of the Grand Chamber and indicating the extent to which we are, and are not, constrained by that reasoning. However, even on the assumption that the Grand Chamber was correct that the fairness of the trial was "irretrievably prejudiced", the conclusion we have recorded at para 123 above would in our judgment be sufficient to compel the dismissal of this appeal. That is because, as Mr Mably submitted, the Grand Chamber itself recognised, at para 315, that its conclusion on fairness did not entail that Mr Abdurahman was wrongly convicted. Moreover, it is clear on the domestic authorities (especially *R v Lambert* and *R v Dundon*) that a conviction may be regarded as safe where the evidence against the appellant is overwhelming, even though the trial has been unfair for the purposes of article 6.

125 Finally, it is necessary to address Mr King's complaints about the directions given by Judge Worsley to the jury about the First statement. As we have said, Mr King complained both that the direction did not conform to the standard direction in cases of disputed confessions and that the standard direction was itself deficient. We can deal with these points briefly. First, these complaints do not fall within the scope of the CCRC's reference, so leave would be required to advance them. Second, both of these criticisms could and should have been advanced before the Court of Appeal in 2008. That is a sufficient reason to refuse leave. Third, and in any event, although the direction given did not match precisely the standard direction now to be found in the Crown Court Compendium, that fact alone provides no proper basis for impugning the fairness of the direction when given, in 2007. The effect of the direction (set out in full at para 27 above) was that the jury should "take into account" the statement if and only if they were sure that: (i) 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 (ii) it was true. We can discern no error or unfairness in that. Fourth, Mr King's suggestion that the jury should also have been directed not to convict "wholly or mainly" on the basis of the First statement (by analogy with the directions given in relation to bar character and silence) was wholly unsupported by authority and, in our view, wrong. The regime created by sections 76 and 78 constitutes a substantial safeguard against the admission of unreliable evidence. The direction given by the judge was a further safeguard, ensuring that the jury directed their mind to the reliability and truth of the First statement. If (and only if) they were sure of those things, what they drew from the statement was a matter for them.

126 For all these reasons, we conclude that Mr Abdurahman's conviction was not unsafe. The appeal is therefore dismissed.

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Appeal dismissed.

PHILIP RIDD, Solicitor

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