

**BEFORE HM CORONER FOR INNER SOUTH LONDON:**

**IN THE MATTER OF AN INQUEST INTO THE DEATH OF:**

**JEAN CHARLES DE MENEZES**

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**SKELETON SUBMISSIONS ON BEHALF OF: ANDREW, ZAJ, TROJAN 84,  
RALPH, C3, C5, C6, C7, SAM (C9), C11, TERRY, VIC (D3), D4, D9, D10,  
WILLIAM (D11).**

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1. The coroner has requested written submissions as to the nature of verdicts to be left to the jury.
2. It is understood that the family of Mr De Menezes does not seek any ‘traditional short form’ verdict in relation to any of the above named officers. The CO19 officers listed above adopt and endorse in their entirety the submissions advanced on behalf of C2 and C12.
3. In addition, the following general submissions are made for the assistance of the coroner:
  - a. The general approach to narrative / short form verdict.
  - b. The law relating to and approach to leaving ‘unlawful killing’ on the basis of murder.
  - c. The approach to any narrative relating to the factual issues between ‘Alan’ and ‘Inspector ZAJ’.
  - d. The approach to any narrative relating to Trojan 84.

**'Short form' or 'narrative' verdict?**

4. This is a case in which a traditional short form verdict, together with some form of *Middleton* narrative, is entirely appropriate. There can be no objection to leaving to the jury the combination of a traditional short form verdict and a narrative.
5. The only appropriate short form verdicts to leave to the jury are 'lawful killing' and 'open'.
6. Unlawful killing should not be left to the jury on the basis of murder or gross negligence manslaughter in relation to any police officer. It is understood that the only basis upon which the family asks for a verdict of unlawful killing to be left to the jury in relation to C2 and C12 is upon the basis of murder.

**The law: 'unlawful killing' on the basis of murder.**

7. To kill another intending to kill him or to do him grievous bodily harm is, subject to the statutory defences, murder. It makes no difference that the killer is a soldier or police officer acting in the course of duty: *R. v. Clegg* [1995] 1 AC 482.
8. Accepting here that Officers C2 and C12 had the requisite intent to kill, the relevant defence is under common law and s.3(1) of the Criminal Law Act 1977:

"A person may use such force as is reasonable in the circumstances in the prevention of crime or in effecting or assisting in the lawful arrest of offenders or suspected offenders or of persons unlawfully at large."

9. The defence has to be evaluated according to the subjective belief of the alleged offender: even if he was mistaken, did he at the time believe (or may he have believed) that he / another was under threat of imminent attack? The court is reminded of the classic pronouncement of the law on self defence as set out in *Palmer v R* [1971] AC 814, where Lord Morris said:

'In their Lordships' view the defence of self-defence is one which can be and will be readily understood by any jury. It is a straightforward conception. It involves no abstruse legal thought. It requires no set words by way of explanation. No formula need be employed in reference to it. Only common sense is needed for its understanding. It is both good law and good sense that a man who is attacked may defend himself. It is both good law and good sense that he may do, but may only do, what is reasonably necessary. But everything will depend upon the particular facts and circumstances. Of these a jury can decide. It may in some cases be only sensible and clearly possible to take some simple avoiding action. Some attacks may be serious and dangerous. Others may not be. If there is some relatively minor attack it would not be common sense to permit some action of retaliation which was wholly out of proportion to the necessities of the situation. If an attack is serious so that it puts someone in immediate peril then immediate defensive action may be necessary. If the moment is one of crisis for someone in imminent danger he may have to avert the danger by some instant reaction. If the attack is all over and no sort of peril remains then the employment of force may be by way of revenge or punishment or by way of paying off an old score or may be pure aggression. There may not longer be any link with a necessity of defence. Of all these matters the good sense of a jury will be the arbiter ... If there has been attack so that defence is reasonably necessary it will be recognised that a person defending himself cannot weigh to a nicety the exact measure of his necessary defensive action. If a jury thought that in a moment of unexpected anguish a person attacked had only done what he honestly and instinctively thought was necessary that would be most potent evidence that only reasonable defensive action had been taken.'

10. Before leaving unlawful killing to the jury a coroner must conclude that there is some evidence upon which a reasonable jury, properly directed, could be sure (to the criminal standard) of the relevant elements of murder: the *Galbraith* test.

11. For ease of reference the relevant passage from *R v Galbraith* [1981] 73 Cr. App 124, at p127 is set out:

“(1) If there is no evidence that the crime alleged has been committed by the defendant there is no difficulty – the judge will stop the case. (2) The difficulty arises where there is some evidence but it is of a tenuous character, for example, because of inherent weakness or vagueness or because it is inconsistent with other evidence. (a) Where the judge concludes that the prosecution evidence, taken at its highest, is such that a jury properly directed could not properly convict on it, ***it is his duty***<sup>1</sup>, on a submission being made, to stop the case. (b) Where however the prosecution evidence is such that its strength or weakness depends on the view to be taken of a witness's reliability, or other matters which are generally speaking within the province of the jury and where on one possible view of the facts there *is* evidence on which the jury could properly come to the conclusion that the defendant is guilty, then the judge should allow the matter to be tried by the jury.”

12. There is a duty, not a discretion, to withdraw a verdict from the jury where the evidence is such that a properly directed jury could not reach that conclusion.

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<sup>1</sup> My emphasis.

13. Clear authority for this proposition is provided by *R v HM Coroner for Exeter & East Devon, ex p Palmer*, unreported, decided on 10.12.97, which approved the Coroner adopting, in effect, a similar approach to that taken in a criminal trial under *Galbraith*.

14. The Coroner's duties are summarised by Lord Woolf MR at p18 of the transcript:

"The Coroner's duty is only to leave to the jury those verdicts which it would be safe for the jury to return. He is under a duty not to leave to a jury a verdict which it would be unsafe for them to return. To that extent he acts as a filter to avoid injustice."

15. That echoed and summarised his observations at p17:

"In a difficult case, the Coroner is carrying out an evaluation exercise. He is looking at the evidence before him as a whole and saying to himself, without deciding matters which are the province of the jury, 'Is this a case where it would be safe for the jury to come to the conclusion that there had been an unlawful killing?' If he reaches the conclusion that, because the evidence is so inherently weak, vague or inconsistent with other evidence, it would not be safe for a jury to come to the verdict, then he has to withdraw the issue from the jury. In most cases there will only be a single proper decision which can be reached on any objective assessment of the evidence. Therefore one can either say that there is no scope for *Wednesbury* unreasonableness or there is scope, but the only possible proper decision which a reasonable coroner would come to is either to leave the question to the jury or not, as the case may be."

16. The reason for the need for the Coroner to act as a "filter to avoid injustice" was set out by Collins J in *R (Anderson & others) v HM Coroner for Inner North London* [2004] EWHC 2729 at paras 21 and 22:

"21. An inquest is not concerned to attach and is indeed expressly prohibited from attaching civil or criminal liability to anyone in particular. It is concerned only to determine who the deceased was and how, when and where the deceased came by his death. However, a finding of unlawful killing will almost inevitably be regarded as a condemnation of the actions of one or a number of easily identifiable persons. It is presented in the media and regarded generally as a positive finding that that person or persons between them have been guilty of a criminal offence, in this case manslaughter...

22... it must be borne in mind that the safeguards applicable to a trial of anyone charged with a criminal offence are not in place...The absence of any opening or closing speeches at inquests means that the need for clarity in a summing-up becomes all the more important. That is not to say that a summing-up should be subjected to a close analysis or that the absence of a particular form of words or indeed of particular directions will necessarily be fatal. But the jury must know clearly what they must find as facts in order to justify any verdict, especially one which decides that a criminal offence has caused the death..."

17. In *R (Sharman) v HM Coroner for Inner North London* [2005] EWHC 857 Leveson J set out ingredients for the various verdicts in a shooting case where self-defence was the issue, endorsed the view that the need for the coroner to act as such a filter was 'vital' and stated that a verdict of unlawful killing in a police shooting case is tantamount to a verdict of murder.

"13. It was not in issue in this inquest that if Mr Sharman **may have believed** that he or his fellow officer was under imminent threat of being shot with a sawn-off shotgun, unlawful killing was not made out. Thus, assuming that there was sufficient evidence for the jury to consider, the proper way to articulate the ingredients of the possible verdicts is:

- i. unlawful killing: a finding beyond reasonable doubt that the firearm was not discharged in the belief that one of the officers was under imminent threat of being shot with a sawn-off shot gun;
- ii. lawful killing: a finding, on the balance of probabilities, that Chief Inspector Sharman believed, albeit mistakenly, that he or Constable Fagan was under imminent threat of being shot with a sawn-off shot gun;
- iii. open verdict: a rejection of the proposition that Chief Inspector Sharman may have believed that he or Constable Fagan was under imminent threat of being shot with a sawn-off shot gun but an inability to conclude beyond reasonable doubt that such was not the case.

14. I have put the matter in that way in order to formulate the test which must be considered by the coroner in deciding whether to leave the verdict of unlawful killing. It is whether there is sufficient evidence upon which the jury could safely come to the conclusion beyond reasonable doubt that the firearm was not discharged in the belief that one of the officers was under imminent threat of being shot with a sawn-off shot gun."

18. See also the decision of the Court of Appeal in *Sharman* in refusing permission to appeal. Buxton LJ echoed the test propounded by Lord Woolf MR in *Palmer* as being:

"Is this a case where it would be safe for the jury to come to the conclusion that there had been an unlawful killing?"

He went on to state that it was necessary for the coroner, in deciding whether to leave the matter to the jury:

"...to look at the whole of the circumstances to see whether there was a realistic chance of it being possible to establish, *beyond reasonable doubt*, that the officers did not have the belief alleged."

19. In *Bubbins v UK* [2005] 41 EHRR 24 at paragraphs 138 – 139 of the decision, the court said this:

“138. The Court sees no reason to doubt that Officer B honestly believed that his life was in danger and that it was necessary to open fire on Michael Fitzgerald in order to protect himself and his colleagues. It recalls in this respect that the use of force by agents of the State in pursuit of one of the aims delineated in paragraph 2 of Article 2 of the Convention may be justified under this provision where it is based on an honest belief which is perceived, for good reasons, to be valid at the time but subsequently turns out to be mistaken. To hold otherwise would be to impose an unrealistic burden on the State and its law-enforcement personnel in the execution of their duty, perhaps to the detriment of their lives and the lives of others (see *McCann and others; Andronicou and Constantinou v Cyprus; Brady v UK*).

139. It would also add in this connection that, detached from the events at issue, it cannot substitute its own assessment of the situation for that of an officer who was required to react in the heat of the moment to avert an honestly perceived danger to his life ...”

20. In *R (Bennett) v HM Coroner for Inner South London* [2006] EWHC 196 (Admin), Collins J supported the test set out by Leveson J in *Sharman* and said this about leaving ‘unlawful killing’ to the jury in the case of a police shooting:

“While the coroner’s rules make it clear that any verdict, including of course unlawful killing, cannot identify any individual or individuals, in a case such as this – indeed in many if not most cases where police action has caused a death – there will be only one or a very few identifiable persons responsible. They are thus branded, and some organs of the media do not help by describing such a verdict in terms which convey that that person or those persons have been found guilty of murder. I am bound to say that I seriously wonder whether the time has not come to abolish the verdict of unlawful killing altogether. If the court or jury is not satisfied that the killing was lawful, it can say so, and others can then investigate, or will have before investigated, whether there is sufficient evidence to justify any criminal proceedings.”

21. The test for unlawful killing as articulated by Leveson J in *Sharman* would apply to this case as follows: a finding beyond reasonable doubt that Officers C2 and / or C12 did not believe that they (and others) were in imminent danger at the time they discharged their weapons.

22. The force used in self defence/defence of another is to be ‘reasonable in the circumstances’. In the current inquest the issue is this: if Officers C2 and 12 honestly believed there was an imminent threat of the subject detonating at the time at which they fired the fatal shots, unlawful killing is not made out.

23. The sole question required to be answered is: is there any / sufficient evidence to disprove to the criminal standard the officers' assertions as to their belief, at the time of firing, that they were or may have been in imminent danger of serious injury? If the answer is no, unlawful killing cannot properly be left to the jury.
24. Submissions on the facts will be made by counsel for C2 and C12. The officers named above support the submission that there is no evidence to support the assertion that C2 and C12 did not honestly believe that the subject was about to detonate a bomb, with the intention of murdering all those around him.
25. The officers named above echo the assertion agreed with by Trojan 84 (Day 19, p 126) that "the last thing any firearms officer wants to do is discharge a firearm, let alone kill somebody".

**Narrative verdicts - the law.**

Middleton

26. The House of Lords in *Middleton* (paras 35 - 37) decided that the following changes to traditional *Jamieson*<sup>2</sup> inquests are required in order to render an inquest Article 2 compliant:
- a. The investigation into the death must examine 'by what means *and in what circumstances*' the deceased came by his death.
  - b. Traditional short form verdicts will suffice in some cases.
  - c. In some cases a change of approach will be called for. In such cases it is for the coroner to decide how best to elicit the jury's conclusion(s) on the central 'issue or issues'.

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<sup>2</sup> *R v Coroner for North Humberside and Scunthorpe, Ex p Jamieson* [1995] QB 1.

27. The coroner has a wide discretion as to the means of eliciting the jury's conclusions on the central factual issue(s):

“...it must be for the coroner, in the exercise of his discretion, to decide how best, in the particular case, to elicit the jury's conclusions on the central issue or issues... It would be open to parties appearing or represented at the inquest to make submissions to the coroner on the means of eliciting the jury's factual conclusions and on any questions to be put, but the choice must be that of the coroner and his decision should not be disturbed by the courts unless strong grounds are shown.

37 The prohibition in rule 36(2) of the expression of opinion on matters not comprised within sub-rule (1) must continue to be respected. But it must be read with reference to the broader interpretation of 'how' in section 11(5)(b)(ii) and rule 36(1) and does not preclude conclusions of fact as opposed to expressions of opinion”

28. Paragraphs 37 and 38 of Lord Bingham's speech in *Middleton* make clear that:

- a. the prohibition in rule 36(2) of the Coroners' Rules 1984 on matters not comprised within 36(1) must continue to be respected;
- b. juries do not enjoy the power to determine the reasonable precautions, if any, whereby the death might have been avoided; and
- c. that power is expressly reserved to the coroner under Rule 43.

29. Paragraphs 28 and 44 – 46 of *Middleton* are often overlooked. Guidance as to the nature of issues to be left to the jury can be gleaned from a reading of these paragraphs. The House of Lords approved *Jamieson* (para 28) as an orthodox analysis of the Coroners' Act and Rules, emphasising the function of an inquest as a fact-finding exercise. The House of Lords did not overrule the Court of Appeal's finding that:

'For a coroner to take into account today the effect of the Human Rights Act 1998 on the interpretation of the Rules is not to overrule *Jamieson's* case by the back door. In general the decision continues to apply to inquests, but when it is necessary so as to vindicate article 2 to give in effect a verdict of neglect, it is permissible to do so'.

30. The upholding of ‘*Jamieson’s case*’ relates, it is submitted, to issues of causation. In *Jamieson* and subsequent cases, it was made clear that in order for a verdict of neglect to be returned there must be a direct causal connection between the alleged wrongful act / omission and the death. No change was made to this by the House of Lords’ decision. The suggested questions / issues that a jury might consider, as set out in paragraph 36 of *Middleton* serve to underline this point.

31. Indeed, the House of Lords appeared to accept that the jury should be entitled to return findings of individual and / or systemic failure only where the same was causative of the death. The relevant ‘issue’ or ‘question’ in *Middleton* was whether there was a failure to recognise the risk of suicide and take precautions to prevent the same. However, it is clear in that case that there was a causal connection between that failure and the death. There is no suggestion that the omission in that case would have to have been recorded if there had been no causal connection with the death. In that case the Coroner could have made recommendations pursuant to rule 43.

32. *McCann v UK* is cited in paragraphs 14 and 31 of *Middleton* as an example of an inquest in which it was appropriate simply to leave verdicts of ‘lawful killing’, ‘unlawful killing’ and ‘open’. In paragraph 14 of the judgment, referring to *McCann*, the court held as follows:

“It was clear from the outset when and where the deceased had died, and that they had been shot by the soldiers. The central question was whether the soldiers had been justified in shooting and killing the deceased. On this issue the **coroner** directed the jury in some detail, giving illustrations of conduct which would amount to unlawful killing, and leaving to the jury three verdicts which he regarded as reasonably open to them (para 120): these were unlawful killing (unlawful homicide), lawful killing (justifiable reasonable homicide) or an open verdict. The jury could thus indicate, by returning an open verdict, their inability to decide or, by choosing one or other of the remaining verdicts, express their judgment on the central, and very important, issue. Although criticism was made of the adequacy of the inquest proceedings as an investigative mechanism, the Court concluded that the alleged shortcomings in the proceedings had not substantially hampered the carrying out of a thorough, impartial and careful examination of the circumstances surrounding the killings: para 163.”

33. Consonant with paragraphs 36 to 38 of *Middleton*, if there were evidence that any act and / or omission caused or contributed to Mr de Menezes’ death, it may be

appropriate for the jury to be asked to determine if there were any acts or omissions or defects in the system which contributed to him ultimately being shot.

34. However, where the central issue in the case is whether individual and / or systemic issues caused or contributed to the death **but** there is no evidence of the same then the coroner is under a duty to withdraw that issue from the jury. It is submitted that, the Coroner is under the same duty to withdraw narrative questions from the jury if there is no evidence to support allegations of failings and causation as he is with regard to short form verdicts.

35. If, however, there are failures which did not cause or contribute to the death the coroner will contribute to the satisfaction of the adjectival obligation to investigate by making a report pursuant to rule 43.

*Interpretation of Middleton requirements.*

36. There is no decided authority which concludes that the jury's findings are required as to any issues which are not causally related to the death. None of the European authorities even comes close to concluding that conclusions must be reached as to factual matters / issues which are not causally related to the death of an individual.

37. The coroner is reminded of the comments of Pill LJ in *R (Scholes) v Secretary of State for the Home Department* [2006] EWCA Civ 1343 (at paragraph 70) – post *Middleton* - as to the functions of a jury in an inquest:

“... As a fact finding tribunal, the jury is well established and valued for its part in the administration of justice in England and Wales. As such, it operated effectively in this case. Questions on factual issues will sometimes be helpful. However, the value of a jury's views as a tool for assessing and improving procedures is in my view limited in circumstances where further investigation of policies and administrative procedures, as distinct from facts, is required. Reliance on a jury's contribution by way of answering a questionnaire, however well intentioned, may be inappropriate. Some of the jury's answers in the present case illustrate the limitations of the procedure. I should wish to repeat the reservations I expressed in *Sacker v West Yorkshire Coroner* [2003] 2 All ER 278, at paragraphs 24 to 27.”

38. At paragraphs 24 and 25 of *R (Sacker) v HM Coroner for West Yorkshire* [2003]

EWCA Civ 217 Pill LJ made the following observations in the Court of Appeal:

“24...While the decisions of the ECHR do include references, for example, to "the identification and punishment of those responsible for the deprivation of life" (*Keenan v United Kingdom* (2001) 33 EHRR 913) and to the "widest exposure possible" of a series of failings by public bodies and servants (*Edwards*, paragraph 83), the emphasis is upon the provision of an effective investigation appropriate to the circumstances of the death, its form differing with the circumstances. Flexibility is required (*Jordan, Edwards*), for example as between the procedure where there have been alleged killings or infliction of treatment contrary to Article 3 of the Convention (torture and inhuman or degrading treatment) and other failings by the authorities (*Z v United Kingdom* (2001) 34 EHRR 97), all cases referred to in *Middleton*. Vindication of Article 2 in system cases such as the present is surely in effective measures to prevent repetition.

25. Considered in that context, it is relevant that the function of and the procedures at an inquest are circumscribed in the Coroners Rules 1984, by, for example the limited matters to which under Rule 36 the proceedings and evidence may be directed, the provision in Rule 40 that "no person shall be allowed to address the Coroner or the jury as to the facts" and the provisions of Rule 42 already cited. These limitations are recognised in the propositions stated in this Court in *Jamieson* and, to some extent, in *Middleton* itself. I have no doubt that Coroners are very conscious of them. I do respectfully question whether, given present procedures, an inquest is the appropriate forum in which to consider the issue of systemic neglect, for the purpose of vindicating Article 2, in cases such as the present.

26. I acknowledge the importance of giving the beginnings of justice to the bereaved, the expression used in *Middleton* (paragraph 62), as a function of the inquest. However, the evidence called and the scrutiny it is given are necessarily limited. The constraints upon any debate at the inquest upon systems of management and systems of work, whether in prisons, hospitals or the workplace, including the prohibition on addressing the Coroner or the jury as to the facts, are such as to be likely to render the remedy ineffectual or worse.

27. The Court does not know the full effect of the Coroner's action under Rule 43 but that action would appear, in present circumstances, to be a stronger affirmation of the right to life, with its requirement of effective investigation into a death. Moreover, given the context in which they operate, the Coroner's jury are ill-equipped to identify and particularise the systemic neglect which they may believe to be present or even to decide whether they should particularise..."

39. Further, in paragraph 38 of *Middleton* Lord Bingham emphasised that it is the combined roles of jury and coroner as arbiters of fact and maker of recommendations respectively which, together with a thorough investigation of the circumstances, serves to satisfy the adjectival obligation to investigate. He stated as follows:

“Under the 1984 Rules the power is reserved to the coroner to make an appropriate report where he believes that action should be taken to prevent the recurrence of fatalities similar to that in respect of which the inquest is being held. Compliance with the Convention does not require that this power be exercisable by the jury, although a coroner's exercise of it may well be influenced by the factual conclusions of the jury. In England and Wales, as in Scotland, the making of recommendations is entrusted to an experienced professional, not a jury. In the ordinary way, the procedural obligation under article 2 will be most effectively discharged if the coroner announces

publicly not only his intention to report any matter but also the substance of the report, neutrally expressed, which he intends to make.”

40. It is accepted that part of the function of an inquest is to ensure that dangerous practices and procedures are identified and to ensure that steps are taken to prevent future like deaths. The jury, however, has a specific role to play within the wider function of the inquest. That role *remains* clearly defined by rules 36 and 42 of the Coroners Rules 1984, read in the context of the changes required in *Middleton* and as interpreted by the Court of Appeal in *Scholes*.
41. If not causative of or contributory to his death the issue of the appropriateness of any alleged failures will not fall within the scope of s11(5) Coroners Act 1983 which deals with ‘how and in what circumstances Mr de Menezes died’ but rather falls within the jurisdiction of Rule 43 which deals specifically with the prevention of possible similar fatalities. Per Pill LJ in *Scholes*. [70] – [72].
42. The power of the Coroner to make recommendations under rule 43 remains an integral part of the overall function of an inquest.
43. The ambit of the inquest has been wide. It has incorporated matters which go far beyond the matters required to be investigated in order to determine ‘by what means and in what circumstances’ Mr de Menezes came by his death. No criticism is made of this. The inquest has ensured that every stage of the circumstances which culminated in his death has been open to scrutiny by the public and by his family. Simply because an issue has been rightly aired and / or explored in a public forum does not mean that questions must be put to the jury in relation to the same.
44. The procedural obligation under Article 2 is satisfied by a combination of:
  - a. A thorough investigation of facts, systems and procedures through eye witness and expert evidence.

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<sup>3</sup> Or Rule 36 of Coroners Rules 1984

- b. The power to make recommendations pursuant to Rule 43.
- c. The conclusions of the jury as to the central factual issues.

45. It should be borne in mind that the fact that counsel for the de Menezes family has asked a lot of questions about a particular issue does not render it 'central'.

**Narrative relating to issues concerning 'Alan' and ZAJ.**

46. It is noted that the family seek a determination of the conflicts of evidence between Alan, Inspector ZAJ and ANDREW, as to whether Alan communicated DAC McDowell's intentions for the firearms team.

47. The telephone schedule shows that Alan made a telephone call to Inspector ZAJ at 0517 on 22.07.05. The content of the telephone call is disputed.

48. It will be submitted that this is not a 'central factual issue' which needs to be determined by the jury for a number of reasons:

- a. Any failure on the part of Alan to ask ZAJ to deploy a team immediately to Scotia Road cannot be said to have caused or contributed in any way to Mr de Menezes' death.
- b. Whatever Alan said to ZAJ during the course of the telephone call, the Orange Team was probably at NSY by about 0540 and certainly by 6am at the latest.
- c. Thus the content of the telephone call is superseded by the fact that the Orange Team was in a position to leave NSY by 0600, subject to an order to do so by any member of the command team.

- d. In any event, despite the inordinate amount of coverage that this issue has received during the course of the inquest, any failure to deploy the Orange or any other team prior to 0933 is irrelevant. Mr de Menezes came out of the communal door at Scotia Road at 0933, at which point there were sufficient resources from the Black / Green combined team to carry out an interception, if ordered to do so.
  - e. Further, by the time the Black / Green team was ordered to 'get behind' the surveillance team, they were in a position to do so. It follows that the fact that a team (of whatever colour) was not deployed earlier has no causal or contributory bearing on Mr de Menezes' death.
49. Insofar as it is considered appropriate to leave any question on this matter to the jury, it is hoped that they will be reminded of the evidence of Inspector ZAJ (Day 10, p183) to the effect that:
- a. A conversation requiring deployment is unlikely to have taken place in 1 minute, 23 seconds.
  - b. There is no reason whatsoever for ZAJ not to have deployed a team if he had been asked.
50. Further:
- a. The entry made by Alan in his notes re the 0505 call makes no mention of requiring a team to be deployed to Scotia Road. Alan has given inconsistent accounts re: timing; deployment; to whom he spoke at 0505.

- b. Alan has no recollection of being told that the team were on the way to NSY at 0517. No challenge has been made to the fact that the Orange team had been asked to deploy by that time.
- c. Alan in fact made 2 calls to DI Whiddett (noted by DI Whiddett). The first was some time after 0405 and the second at 0505. DI Whiddett stated (Day 10, p32 and 111) that Alan did not give him any details or instructions regarding strategy. DI Whiddett made his way to Scotland Yard. It is unlikely that Alan would not give DI Whiddett details or instructions regarding strategy but instruct deployment of a firearms team to Scotia Road.

**Factual issues relating to 'Trojan 84'.**

51. Having now received submissions from the family it appears that no criticism is made of any of Trojan 84's actions / decisions.

52. In advance of receiving from the family any suggested narrative regarding Trojan 84, the following submissions are made:

53. Briefings / orders:

- a. The fact that the officers were informed that hollow point ammunition had been authorised and could be taken cannot be criticised. It is a fact that it had been authorised. It is a fact that the operation concerned a potential suicide bomber and that a critical shot was a possibility.
- b. There is nothing in the evidence of Trojan 84 or any of the individual firearms officers to support any assertion made by Mr Mansfield (Day 19, p50) that "officers, particularly those who fired, have concertinaed everything together and thought: we are being told we have to deliver a critical shot". This assertion is wholly unsupported by the evidence.

- c. Indeed, the individual firearms officers have each stated that they did not believe that a critical shot had been ordered.
- d. Reference to 'unusual tactics' was entirely appropriate. The delivery of a critical shot pursuant to an order from the command team was something that neither the MPS nor any other force had ever undertaken.
- e. It was, however, entirely appropriate to ensure that officers were fully aware that this operation concerned a failed suicide bomber and that there was a real possibility that an order for a critical shot might have to be given. It was also proper that officers were told that the command team were aware of the likelihood of a critical shot having to be taken in the event of ordering a conventional intervention, in the event that the subject was non-compliant.

54. Location of firearms team: Relevant evidence regarding communication between Chief Inspector Esposito and Trojan 84 as to the location of the firearms team is as follows.

a. Questions to Mr Esposito from Mr Hough: Day 17, p 93

Q. I appreciate that, but when you have actually relayed the instruction, does he then tell you where they are?

A. He says they are in Stockwell -- he says that they are there at Stockwell.

Q. This is quite important, so we will take it in stages.

A. I understand there was a delay because Trojan 84, when I was speaking to him on the phone and the order comes in from the DSO, the person to be stopped going down the tube, Trojan 84 informs me, "We are in position". What then happened was that -- sorry, my understanding of what happened was that the surveillance people said, "The person is now getting off the bus". It's at that point, and this again is my understanding, that Trojan 84 realises that there is another bus across the other side of the junction, and the subject is actually getting off of that bus, which puts them about 50 or 60 yards behind that bus.

Q. Okay, let us take that in stages. You relay the instruction from Commander Dick?

A. Yes.

Q. What you hear -- forget for the moment what you have heard later -- from him is him saying that they are at Stockwell?

A. As that is relayed to me, and I relay it to him, he just says something like, "We are not in a position to do it". At that moment it's a very fast-moving situation, so I just turn to the DSO and I say, "They are not in a position to do it".

Q. But he didn't say how far away they were, or when they might be in a position to do it?

A. No, I just naturally assumed that they are then making their way immediately towards that location, because that's what they would do, that's what their training says that they do; they then go forward to the interception. However, I am still waiting for the order from the DSO as to what they want CO19 to do.

b. Questions to Mr Esposito from Ms Leek: Day 18 p40 et seq:

What we want to establish is what happened after the open line at 9.59 commenced with Trojan 84. If we can look at your interview, which is at page 308 of the exhibits bundle, I think you say this about what happens once you have got Trojan 84 on the mobile, it's about halfway down the page: "I remember speaking to Commander Dick in relation to options..." So once you have got him on the phone, you have got an open line but you are also speaking to Commander Dick?

A. Yes.

Q. It's not a matter of getting straight on the phone and saying, "Carry out this interception", or anything along those lines: "I remember speaking to Commander Dick in relation to options. Now exactly what we talked about, what had been going through my head is, is it possible to stop the bus, is it viable to stop that bus ..." We know at this point that the bus is between Brixton and Stockwell, and at this point firearms officers are behind surveillance, behind the bus, some way behind surveillance, I think we heard?

A. Yes.

Q. "... should we try and get ahead of the bus and put somebody on the bus in order to do an interception..."

A. They are all options that I was thinking about and considering.

Q. Absolutely, quite rightly so: "... should we continue to follow the bus to wait for the subject to get off and then do an interception on it there and weighing all that up and also taking into consideration where the firearms team was..." So do we take it from that that Trojan 84 is telling you at this point exactly where they were?

A. He was giving me updates as to the location.

Q. He is not telling you whether or not they're in a position to do anything, because there's no order to do anything?

A. No ... where they are.

Q. Right. "The option that was best placed was to continue with surveillance, continue to follow whilst the firearms team caught up and get ready into a position to do an interception." But at that point no order is given?

A. No.

Q. What you are trying to establish is the location of the firearms team in relation to where Mr de Menezes is?

A. Yes, that's correct.

c. Questions to Trojan 84 from Mr Hough: Day 18 p 167:

Q. Were you giving him fairly precise advice, where you had got to on the road?

A. I don't know what else I would have been talking to him about at that point. It must have been feeding back exactly where we were.

Q. Would you have said that you were close to Brixton Town Hall or any other particular landmarks?

A. I am pretty sure I would have done, yes, sir.

d. Questions to Trojan 84 from Mr Hough: Day 18 p 170

Q. Before those two instructions were given to you and relayed out, in the minute or two before that, had you told Mr Esposito where you were on Stockwell Road?

A. Yeah, I am sure I did, sir.

Q. What kind of words did you use or would you have used to tell him where you were?

A. I would have been using reference points along the road that -- I mean, again, I probably made the assumption he was looking at a map or looking at the screen or something, but trying to give him road names, reference points. We had a bus in front of a bus stop, so I would have said bus stop or whatever. I am sure I was relaying that, although I was conscious of the fact that he would have been concentrating and maybe discussing and listening to everything that was going on in that control room, so I tried to minimise what I was saying because I knew he would be concentrating on discussions.

e. Questions to Trojan 84 from Ms Leek: Day 19 p 123

Q. I don't for a moment want to underplay your role, but from that point, is your role really passing information to Trojan 80 as to your location, and passing information and instructions from Trojan 80 and the DSO to your team?

A. Yes, ma'am.

Q. That is what you did as far as you were able to?

A. Yes, ma'am.

55. There is no basis for any suggestion that Trojan 84 was doing anything other than giving those in the command team the location of the firearms officers. He was not in a position to know the precise location of the subject. Any decision as to how the subject was to be dealt with was a decision for the command team, based on what they knew of the location of the firearms team, the subject and any other available resources.

56. It will be submitted that there is no evidence to support a finding of any omission or failing on the part of Trojan 84, still less of any such finding having a causal connection with Mr de Menezes' death.

57. No submissions are currently made as to the position regarding any of the other firearms officers on the ground.

**14 November 2008**

**SAMANTHA LEEK**

**5 ESSEX COURT  
TEMPLE**