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Case Nos: IPT/24/125/H
IPT/24/174/H
IPT/24/263/H

IN THE INVESTIGATORY POWERS TRIBUNAL

Date: 22 November 2024

Before :

LORD JUSTICE SINGH (PRESIDENT)
MRS JUSTICE FARBEY

- -

Between :

VARIOUS CLAIMANTS

Claimants

- v -

(1) SECURITY SERVICE **Respondents**
(2) SECRET INTELLIGENCE SERVICE
(3) GOVERNMENT COMMUNICATIONS HEADQUARTERS

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- -

Pete Weatherby KC, Anna Morris KC and Mira Hammad (instructed by **Hudgell Solicitors and Slater + Gordon UK Ltd**) appeared on behalf of the **Claimants**
Neil Sheldon KC and Matthew Hill (instructed by the **Treasury Solicitor**) appeared on behalf of the **Respondents**
Joanne Clement KC and Paul Skinner appeared as Counsel to the Tribunal

Hearing date: 5 November 2024

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JUDGMENT

Lord Justice Singh:

This is the judgment of the Tribunal.

Introduction

1. These claims arise out of the Manchester Arena bombing on 22 May 2017. Twenty-two innocent people, including children and young people, lost their lives as a result of a suicide bombing. Many others were seriously injured. Our sympathies go to all those who were affected by this atrocity and their families.

2. The bomber (Salman Abedi) died in the explosion. His brother (Hashem Abedi) was subsequently tried and convicted of twenty-two murders on the basis of joint enterprise. He is serving a life sentence.

3. At this entirely OPEN hearing the Tribunal had to consider two preliminary issues:

   (1) limitation; and

   (2) the appropriate legal test to be applied in cases of this kind under Articles 2 and 3 of the European Convention on Human Rights ("the ECHR" or "the Convention").

The Claimants

4. There are more than 300 claims before the Tribunal arising out of the bombing. The Claimants are represented by the Claimant Steering Group ("CSG"), comprising eight law firms. We have had a witness statement by Paul McClorry, of Hudgell Solicitors, filed on behalf of the Claimants.

5. By agreement between the parties and with the assistance of Counsel to the Tribunal ("CTT"), three lead Claimants have been identified:

   (1) the estate of Chloe Rutherford;

   (2) Eve Hibbert, by her mother, litigation friend and deputy, Sarah Gillbard; and

   (3) Lesley Callander.

6. Chloe Rutherford (born on 21 August 1999) was 17 years old at the time of her death in the incident. The claim is brought under Article 2 on behalf of the estate of Chloe Rutherford and her mother Lisa, her father Mark and her brother Scott.

7. Eve Hibbert (born on 9 October 2002) was 14 at the date of the incident and is now 21 years old. Eve does not have capacity to act because of the injuries she sustained. She is now largely wheelchair-bound and requires full-time care. A claim has been made under Article 2 and in the alternative under Article 3 of the ECHR.

8. Lesley Callander is the mother of Georgina Bethany Callander (born on 1 April 1999), who was 18 at the time of her death on 23 May 2017. Lesley Callander went to the venue to collect her daughter and witnessed the devastation and chaos there. She also

witnessed her daughter being administered CPR at various points on the night in question. She was later informed that her daughter had died. She has suffered psychiatric injury as a result of witnessing the immediate aftermath of the bombing.

Background

9. The Manchester Arena Inquiry was established under the chairmanship of a retired High Court Judge, Sir John Saunders. Volume 3 (Open) was published on 2 March 2023 (HC 1137). This was the final volume of the Inquiry's Report.

10. The Report noted that there had been earlier reviews by MI5 after the attack. Those reviews were the subject of an independent assessment by David Anderson QC (now Lord Anderson of Ipswich KC), which reported in December 2017. The Inquiry Report also noted that the Intelligence and Security Committee published its Report on 22 November 2018.

11. The Inquiry Report noted that it had at least three significant advantages over those previous investigations and reviews. First, it had more time. Secondly, it had the opportunity to hear evidence from front-line officers who had made key decisions at the relevant times. Thirdly, the Inquiry had been provided with additional documents which had not been uncovered at the time of the post-attack reviews.

12. In Part 24 of the Report, which was headed 'Preventing the Attack', the key findings were set out as follows:

> "Key findings
>
> - There was a significant missed opportunity to take action that might have prevented the Attack. It is not possible to reach any conclusion on the balance of probabilities or to any other evidential standard as to whether the Attack would have been prevented. However, there was a realistic possibility that actionable intelligence could have been obtained which might have led to actions preventing the Attack.
>
> - The reasons for this significant missed opportunity included a failure by a Security Service Officer to act swiftly enough.
>
> - The Inquiry has also identified problems with the sharing of information between the Security Service and Counter Terrorism Policing, although none of these problems is likely to have had any causative significance."

13. In a section headed 'Principal Missed Opportunity', the Inquiry was able to conclude that statements made by Witness J in evidence and Lord Anderson (during a BBC interview) had not presented "an accurate picture" because of these advantages which the Inquiry had over previous investigations and reviews.

14. In particular, the Inquiry considered two pieces of intelligence ("Piece of Intelligence 1" and "Piece of Intelligence 2"): see para 24.57 of the Inquiry Report and the fuller discussion at paras 24.61-24.66 and paras 24.67-24.81. The flavour of the Inquiry's conclusion on Piece of Intelligence 2 can be found at para 24.75:

> "If the investigative action I have identified had been taken, it is impossible to say on the balance of probabilities what the consequences would have been. Although I accept that SA demonstrated some security consciousness and that this might have affected the efficacy of the investigative action that I have identified, there was the real possibility that it would have produced actionable intelligence."

15. On 2 March 2023 the Director General of MI5, Ken McCallum, gave a public apology in response to the Manchester Arena Inquiry Report, which included the following:

> "The terrorist attack at the Manchester Arena was a terrible tragedy. The bomber killed 22 innocent people and harmed many others. My thoughts are with the families and friends of those killed, and with all those whose lives were changed by this appalling act of terrorism.
>
> Having examined all the evidence, the Chair of the Inquiry who has found that 'there was a realistic possibility that actionable intelligence could have been obtained which might have led to actions preventing the attack.' I deeply regret that such intelligence was not obtained. Gathering covert intelligence is difficult – but had we managed to seize the slim chance we had, those impacted might not have experienced such appalling loss and trauma. I am profoundly sorry that MI5 did not prevent the attack. …
>
> MI5 exists to stop atrocities. To all those whose lives were forever changed on that awful night: I am so sorry that MI5 did not prevent the attack at the Manchester arena."

16. It is of some significance that, at a time when inquests into the deaths resulting from the bombing were being held by the Coroner, Counsel to the Inquest provided an explanatory note dated 16 January 2019. This expressed the provisional view (at para 2(a)) that Article 2 of the ECHR was engaged. Mr Pete Weatherby KC emphasises that this was only a provisional view. Nevertheless, we consider that it has some significance in that it confirms that there was at least a reason to think that there might be a live issue under Article 2 of the ECHR as early as January 2019. This forms part of the important background as to the expedition with which things ought to have proceeded once the final volume of the Inquiry Report was published on 2 March 2023.

Procedural matters

17. These three claims were received by the Tribunal on 29 February 2024. Most of the other claim forms were lodged with the Tribunal in February 2024, although some were filed later, up to August 2024.

18. We have seen a schedule of particulars of claim for the three lead Claimants. Reference was made to an addendum to the Form T1, which was in the same terms for each claim. This set out the legal and factual basis for the claims under the Human Rights 1998 ("the HRA"). In each of the three claim forms, there was a claim for just satisfaction and costs.

19. On 1 August 2024 the Tribunal ordered there to be a hearing to consider two preliminary issues:

    (1) whether the claims have been brought within the time limit set out in section 67(5) of the Regulation of Investigatory Powers Act 2000 ("RIPA"), and if not, whether the Tribunal should extend time; and

    (2) whether the test for breach of Article 2 and/or Article 3 of the Convention in this context is that the relevant authorities knew or ought to have known at the time of the existence of a real and immediate threat to life or of Article 3 ill-treatment from the criminal acts of a third party and failed to take measures within their powers, which judged reasonably, might have been expected to avoid that risk.

20. In accordance with the normal practice of this Tribunal, and with the agreement of the parties, the Tribunal has considered these preliminary issues on the basis that the facts set out by the Claimants are true. It is unnecessary for present purposes to resolve disputed issues of fact, whilst it is recognised that there may well be such issues if the case were to proceed to a substantive hearing. It has also been possible to conduct the preliminary hearing entirely in OPEN.

Material legislation

21. The jurisdiction of the Tribunal is created by section 65 of RIPA. Under section 65(2) the Tribunal is the only appropriate tribunal for the purposes of section 7 of the HRA in relation to any proceedings under subsection (1)(a) of that section which falls within subsection (3) of section 65: see section 65(2)(a).

22. Subsection (3)(a) provides that proceedings fall within that subsection if they are proceedings against any of the intelligence services.

23. Accordingly, as is common ground, this Tribunal has exclusive jurisdiction in relation to the present claims since they are brought against the three intelligence services of the United Kingdom, principally against the Security Service (MI5).

24. Under section 67(1)(a) of RIPA, it shall be the duty of the Tribunal (a) to hear and determine any proceedings brought before them by virtue of section 65(2)(a), i.e. claims brought under section 7(1)(a) of the HRA.

25. Section 7(5) of the HRA provides that proceedings under subsection (1)(a) must be brought before the end of the period of one year beginning with the date on which the act complained of took place, or such longer period as the court or tribunal considers equitable having regard to all the circumstances. Since these claims are brought under section 7(1)(a) of the HRA, it is the provisions of section 7(5) of that Act which apply, although they are materially the same as those of section 67(5) of RIPA.

26. It is common ground before this Tribunal that the claims were brought out of time, since they were brought almost seven years after the date of the incident in May 2017. It is also common ground that the question of whether time should be extended is a question for this Tribunal to determine and not a matter for the parties.

Relevant principles on the limitation issue

27. There was no dispute between the parties as to the relevant principles which this Tribunal should apply in the exercise of its discretion whether to extend time. This Tribunal summarised those principles, in the context of a complaint made under section 65(2)(a) of RIPA, in *Al-Hawsawi v Security Service and Others* [2023] UKIP Trib 5; [2024] 1 All ER 671, at paras 62-63:

> "[62] The first point to note is that s 67(5) is closely modelled on s 7(5)(b) of the HRA. RIPA was brought into force on the same date as the HRA (2 October 2000) since they are properly to be regarded as part of a package which was designed to secure compatibility with the Convention rights in the context of the activities governed by RIPA: see *A v B (Investigatory Powers Tribunal: jurisdiction)* [2009] EWCA Civ 24, [2009] 3 All ER 416, [2010] 2 AC 1 (at paras [46]–[47]) (Dyson LJ). It is therefore appropriate to have regard to the principles which apply when a court is considering the power to extend time in s 7(5)(b) of the HRA.
>
> [63] When considering that provision the courts have held that it confers 'a wide discretion in determining whether it is equitable to extend time in the particular circumstances of the case': see *Rabone v Pennine Care NHS Foundation Trust* [2012] UKSC 2, [2012] 2 All ER 381, [2012] 2 AC 72 (at para [75]) (Lord Dyson JSC). As Lord Dyson also said in the same paragraph, it will often be appropriate to take into account factors of the type listed in s 33(3) of the Limitation Act 1980 as being relevant when deciding whether to extend time for a domestic law action in respect of personal injury or death. These may include (1) the length of the delay; (2) the reasons for the delay; (3) the extent to which, having regard to the delay, the evidence in the case is or is likely to be less cogent than it would have been; and (4) the conduct of the public authority after the right of claim arose."

28. We were also referred by Mr Weatherby to the judgment of Hill J in *ABC and Others v Derbyshire County Council and Another* [2023] EWHC 986 (KB), at para 230, where

she summarised the principles to be derived from the various authorities set out in *Solaria Energy UK Ltd v Department for Business, Energy and Industrial Strategy* [2020] EWCA Civ 1625; [2021] 1 WLR 2349, at paras 43-53:

> "(i) A court should not add to or qualify or put any gloss upon the words 'equitable having regard to all the circumstances' when considering the exercise of the discretion under s.7(5)(b).
>
> (ii) The language of s.7(5)(b) has an obvious resonance with the Limitation Act 1980, s.33(1). While it would not be right to incorporate all the circumstances to which the court is enjoined to have regard as set out in s.33(3), which are inclusive and not exclusive of 'all the circumstances', it would not make any sense to disregard them as having no relevance to the circumstances which the court should consider in exercising its discretion whether or not to extend time under these provisions of the HRA.
>
> (iii) It is desirable not to list the factors or to indicate which factor may be more important than another. It is for the court to examine, in the circumstances of each case, all the relevant factors and then decide whether it is equitable to provide for a longer period.
>
> (iv) It may be necessary in the circumstances of a particular case to look at objective and subjective factors; proportionality will generally be taken into account.
>
> (v) An absence of prejudice, so far as s.7(5)(b) is concerned is a highly material factor but is not of itself conclusive in favour of an extension of time being granted.
>
> (vi) It is necessary to consider whether here it would be proportionate to deny the claimant the right to bring an HRA claim.
>
> (vii) The burden is on the claimant to prove that there are circumstances which make it 'equitable' why the defendant should not be able to take advantage of the limitation provisions. However, it may be more appropriate to approach the question by an 'open ended examination of the factors that weigh on either side of the argument'.
>
> (viii) 'Equitable' must mean fair to each side.
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> (ix) While there is a significant public interest in public law claims against public bodies being brought expeditiously, expedition is less obviously necessary in a claim for a declaration in vindication of the claimant's human rights, upon which nothing else depends, or of a claim for damages. These are retrospective remedies, aimed at marking or compensating what has happened in the past."

29. We bear in mind all of those principles but remind ourselves that ultimately the statutory question for the Tribunal is what would be "equitable having regard to all the circumstances".

The parties' submissions on the limitation issue

30. On behalf of the Claimants Mr Weatherby accepts that the claims were brought outside the normal one-year time limit. He accepts that the acts complained of ended at the latest on the date of the incident on 22 May 2017. He submits, however, that no viable claim could have been filed with this Tribunal before the Claimants knew of the open report of the public inquiry chaired by Sir John Saunders, which was published on 2 March 2023.

31. He further submits that thereafter lawyers for the Claimants acted with reasonable expedition to take steps to prepare and file the claims.

32. He submits, in particular, that it would be equitable to allow the claims to proceed having regard to the following factors:

(1) The importance of the subject matter to the Claimants.

(2) The conduct of the Respondents up to the publication of the statement by the Director General of MI5 on 2 March 2023, acknowledging the failures found in the Report and their consequences.

(3) There would be no prejudice to the Respondents, given that all the relevant evidence was adduced before the Inquiry and this Tribunal will have available the transcripts of witness evidence given on oath. This would include where necessary CLOSED evidence, which of course the Claimants accept they would not be entitled to see.

(4) The Claimants have suffered trauma, including in consequence of the publication of the Inquiry Report, and there have been complexities in preparing the claims, having regard also to the parallel proceedings in relation to civil claims against other authorities. Further, time was needed in order to have appropriate funding arrangements in place.

(5) Although there is a significant public interest in claims being dealt with expeditiously, given the nature and seriousness of the atrocity and given that the claim is for recognition of a past violation of human rights, and for just satisfaction, expedition is less imperative than it would be in other contexts.

33. Finally, Mr Weatherby submits that questions as to the merits of the claims, including the merits of any claims for damages, should be left to the substantive stage of the proceedings and should not be determined at this preliminary stage.

34. On behalf of the Respondents Mr Neil Sheldon KC is neutral as to the question of whether the Tribunal should exercise its discretion to extend time but draws attention to several factors which the Tribunal may wish to consider.

35. First, the length of time after the incident before the claims were brought. These claims were made in February 2024 and other claims in June, July and August 2024. There had been no agreement with the Respondents on limitation, even though this had been made clear following an exchange of correspondence in May 2018.

36. Secondly, the passage of time will inevitably reduce the cogency of witness evidence. The Respondents accept that the process of gathering evidence and providing statements and oral evidence to previous investigations has mitigated the prejudice. On the assumption that the evidence-gathering process in these proceedings would not extend materially beyond that which has been undertaken in previous investigations, Mr Sheldon does not submit that the claims cannot be resolved fairly simply by virtue of the passage of time.

37. Thirdly, Mr Sheldon does not accept that the conduct of Respondents can be reasonably criticised. They have undertaken internal reviews to see what lessons can be learnt from this incident and there have been independent assessments both by Lord Anderson and the Intelligence and Security Committee of Parliament.

38. Further, Mr Sheldon submits that the Tribunal is entitled to have regard to the following factors:

    (1) The public interest in the claims continuing. He submits that it is highly unlikely that further information will be brought to light before the Tribunal given the rigorous and comprehensive assessment of all the relevant events by the earlier inquiry chaired by Sir John Saunders in particular.

    (2) The disadvantages to the public interest to the claims continuing. The Respondents have already spent considerable time and resources over many years fully cooperating with the various investigations that have been held. Should these claims proceed, the Respondents would inevitably have to divert some resources from their core functions. This is not just a question of budgets but senior figures would need to engage with the proceedings to give instructions, allocate resources, and provide further evidence.

    (3) The private interests of the Claimants in bringing the claims. The Respondents acknowledge that the Claimants seek vindication of their Convention rights and this is a legitimate and important objective. However, Mr Sheldon submits that it is also important to be clear as to what these proceedings can and cannot realistically achieve by way of remedy. In particular he submits that it is highly unlikely that there would be an award of damages, at least for pecuniary (compensatory) damages, since that could only be advanced on the basis of causation being established on a balance of probabilities.

    (4) In this context, he submits that, taking the findings of the Inquiry at their highest, they do not amount to "a direct causal link" between the missed opportunities that were identified and any pecuniary losses suffered by the Claimants. To the contrary, the Inquiry Chair was careful to make clear that the evidence was incapable of establishing causation to any legal standard, including the balance of probabilities.

(5) The underlying issues raised by the claim. Mr Sheldon submits that nature of the issues, notwithstanding the utter gravity of the attack and its consequences, is not "of the gravest possible kind", as it was in *Al-Hawsawi*.

(6) The merits of the claim. Mr Sheldon submits that the merits of the claim are relevant for the duration when considering limitation (see *Rabone v Pennine Care NHS Trust* [2012] UKSC 2; [2012] 2 AC 72, at para 79) and that in this case the merits are weak.

39. In this context Mr Sheldon submits that the Tribunal would be called upon to extend the principle laid down by the European Court of Human Rights in *Osman v United Kingdom* (1998) 29 EHRR 245 "well beyond" any existing interpretation or application of it. In particular, it would require the Tribunal to interpret the concept of "knew or ought to have known at the time" as encompassing "ought to have taken investigative action which might possibly have revealed additional information that could have led to the future identification" of a real and immediate risk.

The parties' submissions on the legal test

40. So far as the applicable legal test is concerned, the parties are agreed that it has been accurately formulated in the question posed by the Tribunal for these preliminary issues at this hearing.

41. Mr Sheldon submits, however, that the authorities to date do not support the conclusion which the Claimants would have to establish, he says by expanding the test "dramatically", to allow for a breach where, based on their knowledge at the time of the relevant act, State authorities failed to take steps that might have led to further knowledge being obtained that might then have led to additional measures or consequences that might have prevented a fatal (or near-fatal) attack. Mr Sheldon acknowledges that it would not be appropriate for the Tribunal to reach a concluded view on the merits at this preliminary stage but submits that the merits are capable of having some relevance as one of the circumstances to be taken into account in deciding whether it would be equitable to permit the claims to proceed.

42. Mr Weatherby does not accept Mr Sheldon's analysis of the authorities but his fundamental submission is that it is not appropriate for the Tribunal to enter into the merits of the legal test at this preliminary stage.

Principles on the award of just satisfaction

43. Before we set out our assessment of the limitation issue we should mention submissions we received arising from the fact that the claims include a claim for just satisfaction damages under section 8 of the HRA. Mr Sheldon submits that there is no realistic prospect of substantial damages being awarded in this case. Mr Weatherby does not accept that but his primary submission is again that the question of remedies, including what if any damages might be awarded, is not a suitable matter for this preliminary stage and should be left to be considered after a substantive hearing.

44. Important guidance was given in this context by Lord Bingham of Cornhill in *R (Greenfield) v Secretary of State for the Home Department* [2005] UKHL 14; [2005] 1 WLR 673, at para 19:

> "… First, the 1998 Act is not a tort statute. Its objects are different and broader. Even in a case where a finding of violation is not judged to afford the applicant just satisfaction, such a finding will be an important part of his remedy and an important vindication of the right he has asserted. Damages need not ordinarily be awarded to encourage high standards of compliance by member states, since they are already bound in international law to perform their duties under the Convention in good faith, although it may be different if there is felt to be a need to encourage compliance by individual officials or classes of official. Secondly, the purpose of incorporating the Convention in domestic law through the 1998 Act was not to give victims better remedies at home than they could recover in Strasbourg but to give them the same remedies without the delay and expense of resort to Strasbourg. This intention was clearly expressed in the White Paper Rights Brought Home: The Human Rights Bill (1997) (Cm 3782), para 2.6:
>
> …
>
> Thirdly, section 8(4) requires a domestic court to take into account the principles applied by the European court under article 41 not only in determining whether to award damages but also in determining the amount of an award. There could be no clearer indication that courts in this country should look to Strasbourg and not to domestic precedents. The appellant contended that the levels of Strasbourg awards are not 'principles' applied by the court, but this is a legalistic distinction which is contradicted by the White Paper and the language of section 8 and has no place in a decision on the quantum of an award, to which principle has little application. The court routinely describes its awards as equitable, which I take to mean that they are not precisely calculated but are judged by the court to be fair in the individual case. Judges in England and Wales must also make a similar judgment in the case before them. They are not inflexibly bound by Strasbourg awards in what may be different cases. But they should not aim to be significantly more or less generous than the court might be expected to be, in a case where it was willing to make an award at all."

45. As is apparent from that passage, section 8(3) of the HRA reflects the provisions of Article 41 of the Convention, although that article is not one of those set out in Sch. 1 to the HRA. Article 41 provides:

> "Just satisfaction
>
> If the Court finds that there has been a violation of the Convention … the Court shall, if necessary, afford just satisfaction to the injured party."

46. The relevant domestic and Strasbourg authorities, and the principles to be derived from them, were recently summarised by Whipple LJ in *R (AXO) v First-tier Tribunal (Social Entitlement Chamber)* [2024] EWCA Civ 226; [2024] 3 WLR 100, at para 106:

> "(i) The court will grant such relief or remedy for a breach of the Convention as is within its powers and which it considers to be just and appropriate, taking account of the principles developed by the ECtHR to afford just satisfaction to an injured party (section 8(1) of the HRA, *Greenfield* para 6).
>
> (ii) The focus of a claim under the ECHR is to uphold standards and vindicate rights, and not to obtain compensation (*Greenfield* para 9, *Van Colle* para 138, *D* in the Court of Appeal paras 65–68, *D* in the Supreme Court para 136, *Varnava GC* para 156).
>
> (iii) In deciding what remedy is necessary, the court will consider the loss or damage actually sustained as well as the 'overall context' in which the breach occurred (*Alseran* para 914, Practice Direction para 12).
>
> (iv) Damages for non-pecuniary loss will in principle be available for breaches of articles 2 and 3, which rank as the most fundamental provisions of the Convention (*Edwards* para 97).
>
> (v) Where damages are awarded to reflect non-pecuniary loss, the court will adopt a broad brush approach to assessment of damages to arrive at an award that is 'equitable' (*D* para 17, *Varnava GC* para 224).
>
> (vi) Non-pecuniary loss is sometimes referred to as 'moral damage' (*Varnava GC* para 224, *Sturnham* para 32), which concept includes mental or physical suffering (*Varnava GC* para 224, *Alseran* para 912, Practice Direction para 10)."

47. Our attention was drawn in this context to the Practice Direction on Just Satisfaction Claims issued by the President of the European Court of Human Rights on 28 March 2007, and amended on 9 June 2022, in accordance with Rule 32 of the Rules of Court.

48. At para 5, under 'General principles', the Practice Direction states that:

> "Just satisfaction is afforded under Article 41 of the Convention so as to compensate the applicant for the actual damage established as being consequent to a violation; in that respect, it may cover pecuniary damage; non-pecuniary damage; and costs and expenses (see below). Depending on the specific circumstances of the case, the Court may consider it appropriate to make an aggregated award for pecuniary and non-pecuniary damage."

49. Under the heading 'Pecuniary damage', the Practice Direction states the following, at paras 8-9:

> "8. The principle with regard to pecuniary damage is that the applicant should be placed, as far as possible, in the position in which he or she

would have been had the violation found not taken place, in other words, *restitutio in integrum*. This case involves compensation for both loss actually suffered (*damnum emergens*) and loss, or diminished gain, to be expected in the future (*lucrum cessans*).

9. It is for the applicant to show that pecuniary damage has resulted from the violations alleged. A direct causal link must be established between the damage and the violation found. A merely tenuous or speculative connection is not enough. The applicant should submit relevant evidence to prove, as far as possible, not only the existence but also the amount or value of the damage. …"

50. Under the heading 'Non-pecuniary damage', the Practice Statement states the following, at paras 10-13:

"10. The Court's award in respect of non-pecuniary damage serves to give recognition to the fact that non-material harm, such as mental or physical suffering, occurred as a result of a breach of a fundamental human right and reflects in the broadest terms the severity of the damage. Hence, the causal link between the alleged violation and the moral harm is often reasonable to assume, the applicants being not required to produce any additional evidence of their suffering.

11. It is in the nature of non-pecuniary damage that it does not lend itself to precise calculation. The claim for non-pecuniary damage suffered needs therefore not be quantified or substantiated, the applicant can leave the amount to the Court's discretion.

12. If the Court considers that a monetary award is necessary, it will make an assessment on an equitable basis, which above all involves flexibility and an objective consideration of what is just, fair and reasonable in all the circumstances of the case, including not only the position of the applicant as well as his or her own possible contribution to the situation complained of, but the overall context in which the breach occurred.

13. Exercising the discretion, the Court relies on its own relevant practice in respect of similar violations to establish internal principles as a necessary starting point in fixing an appropriate award in the circumstances of each case. Among factors considered by the Court to determine the value of such awards are the nature and gravity of the violation found, its duration and effects; whether there have been several violation of the protected rights; whether a domestic award has already been made or other measures have been taken by the Respondent State that could be regarded as constituting the most appropriate means of redress; any other context or case-specific circumstances that need to be taken into account."

51. Mr Sheldon submits that, while it is possible that, if a violation of the Convention is found by the Tribunal, there might be an award of non-pecuniary damages in order to mark that violation, there is no proper basis on which an award of pecuniary

(compensatory) damages could be made, because, taking the factual case for the Claimants as pleaded at its highest, it cannot be established that there is a direct causal link between any violation of the Convention and any loss claimed by reason of the injuries or deaths that were caused in the atrocity. He submits that a direct causal link would have to be proved on the usual civil standard, on a balance of probabilities, and that is precisely what the Inquiry Report found had not been shown. In support of his submission, Mr Sheldon relies not only on the above Practice Direction but also on the decisions of the Supreme Court in *R (Faulkner) v Secretary of State for Justice* [2013] UKSC 23; [2013] 2 AC 254, at para 82 (Lord Reed JSC); and the Court of Appeal in *Warsama v Foreign and Commonwealth Office* [2020] EWCA Civ 142; [2020] QB 1076, at paras 94-100.

Our assessment

52. We have had regard to all the circumstances of these cases, including the factors to which our attention has been drawn as summarised above.

53. We are particularly conscious of the importance of the rights concerned, in Articles 2 and 3 of the ECHR, which are the most important set out in the Convention. We are also conscious of the horrendous impact of the atrocity on the Claimants and their families. Any reasonable person would have sympathy for them. The grief and trauma which they have suffered, particularly where young children were killed, is almost unimaginable.

54. Nevertheless, we have reached the conclusion that, in all the circumstances, it would not be equitable to permit the claims to proceed.

55. It is important at this juncture to say a little more about the procedural history of these claims. Within the original one-year time limit, on 9 May 2018, Hudgell Solicitors wrote on behalf of one of their clients (not one of the present Claimants) to the Security Service. They expressly referred to the limitation period for an HRA claim but observed that this was very likely to expire before their clients' case had appreciably advanced. They therefore invited the Respondent to grant "a general amnesty whereby proceedings in respect of Human Rights Act claims are extended to a period of 3-years from the date of the incident, determinable on either party giving 3-months' notice of their intention to issue proceedings."

56. On 18 May 2018 the Government Legal Department replied on behalf of the Security Service to refuse the request for a "general amnesty", which was understood to be a request not to take a limitation point in relation to potential claims relating to breaches of Convention rights. The letter pointed out that section 7(5)(b) of the HRA provides for a limitation period longer than one year if the Court considers it equitable having regard to all the circumstances. It continued that, should any material claim be brought more than one year after the acts complained of, it would be at that time that their client would carefully consider whether to take a limitation point.

57. Two years later, on 24 April 2020 Slater + Gordon Lawyers wrote to the Home Secretary and the Foreign Secretary, inviting a "standstill agreement" in respect of limitation.

58. On 28 July 2020 the Government Legal Department wrote on behalf of both the Home Secretary and the Foreign Secretary. Although an interim agreement was reached as a holding response, the Secretaries of State did not agree to enter into the proposed limitation standstill agreement.

59. In our judgment, this procedural history provides an important backdrop to the circumstances which then prevailed in March 2023, when Sir John Saunders published his report. The Claimants' solicitors were alive to the limitation issue and had expressly sought the agreement of the Respondents in relation to it but had not been given those assurances. We readily understand why they did not feel able to file even holding claims before they had seen the published report by Sir John Saunders on 2 March 2023, and the apology given by the Director General on publication of that report. However, we consider that it was then incumbent upon them to move with real expedition at that stage to file these proceedings. It may be that the view was taken that the full one-year normal limitation period was still available. This may explain why the claims were not filed until the end of February 2024. In any event, we consider that the need to file these claims promptly after the publication of the Inquiry Report was not given the priority that it needed. In this context, we note that, as a result of a question raised by the Tribunal during the hearing, we were informed in writing after the hearing that instructions were sent to leading counsel (not Mr Weatherby) on 23 May 2023 but advice was not received until 13 December 2023. Even after that advice was received, the claims were not filed until 29 February 2024, about two and a half months later.

60. We bear in mind the other matters that had to be investigated and arrangements which had to be put in place but, in our view, the filing of the proceedings was not given the priority which (assessed objectively) it should have been.

61. Furthermore, we bear in mind that there has already been a public inquiry, led by a retired High Court Judge, which has been able to consider both OPEN and CLOSED evidence, including live evidence from the officers concerned. This is in contrast to the situation considered by the Tribunal in *Al-Hawsawi*, where the public interest in investigating the underlying issues was one of the factors which persuaded it to allow that claim to proceed. Furthermore, the claimant in that case has at all material times been detained at Guantanamo Bay and is not able to communicate with his lawyers in the normal way. This causes obvious difficulty in obtaining instructions from him.

62. We also bear in mind that, as Mr Sheldon has submitted to us, there is inevitably some prejudice to the Respondents even though he fairly and realistically acknowledges that much of the evidence has already been obtained and to that degree there is not the prejudice that there might otherwise have been. In particular, we accept his submission that the Respondents will inevitably be required by these proceedings to divert time and resources to defending these proceedings rather than their core responsibilities. Those responsibilities of course include the protection of the lives of people in this country by, for example, preventing future attacks.

63. Finally, we bear in mind that, although it would not be appropriate to review the merits of the claims at this preliminary stage, the primary purpose of a claim under the HRA is to vindicate the Convention rights concerned rather than to obtain monetary remedies. Although it is true that there has been no formal declaration by any judicial tribunal to the effect that the Claimants' Article 2 and/or 3 rights have been violated, the fact is that there has been an extensive public inquiry, as well as other reviews, into the

underlying events. The fact is also that the Director General of the Security Service has issued a public apology for the failures by the Service. We do not consider that the possibility of obtaining declarations that there has been a violation of the Convention rights, and the possibility that there may be some modest awards of damages should lead to the conclusion that it would now be equitable to permit these claims to proceed.

Conclusion

64. For the above reasons we conclude in all the circumstances that it would not be equitable to permit these claims to proceed.