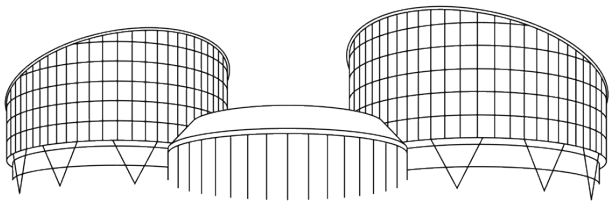

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

FOURTH SECTION

DECISION

Applications nos. 50541/08, 50571/08 and 50573/08
Muktar Said IBRAHIM against the United Kingdom
Ramzi MOHAMMED against the United Kingdom
and Yassin OMAR against the United Kingdom

The European Court of Human Rights (Fourth Section), sitting on 22 May 2012 as a Chamber composed of:

Lech Garlicki, *President,*
Nicolas Bratza,
George Nicolaou,
Ledi Bianku,
Zdravka Kalaydjieva,
Nebojša Vučinić,
Vincent A. De Gaetano, *judges,*

and Lawrence Early, *Section Registrar,*

Having regard to the above applications lodged on 22 October 2008,

Having deliberated, decides as follows:

THE FACTS

1. The applicants are Somali nationals. Mr Ibrahim is represented before the Court by Irvine Thanvi Natas, a firm of solicitors based in London. Mr Mohammed is unrepresented. Mr Omar is represented before the Court by Arani Solicitors, a firm of solicitors based in Southall. All three applicants are currently in detention.

A. The circumstances of the case

2. The facts of the case, as submitted by the applicants, may be summarised as follows.

1. The background facts

3. At around midday on 21 July 2005, in a manner almost identical to the events of 7 July 2005 when four suicide bombers killed fifty-two people in London, four men attempted to detonate explosive devices on three underground trains and a bus. In each case the detonator initiated but the main charge failed to explode. The men, whose images were captured by closed-circuit television cameras, subsequently fled. The applicants and Mr Hussain Osman were later identified as the four suspects involved.

4. A fifth device was abandoned, undetonated, in a bin. It was discovered on 23 July 2005. Mr Manfo Asiedu was later identified as the fifth suspect.

5. Subsequent testing revealed that the failure of the devices to explode was most likely the result of the inadequate concentration of liquid hydrogen peroxide. The liquid hydrogen peroxide in the devices was found to have a concentration of around 58 per cent. A concentration of around 70 per cent would have been needed for them to explode.

a. The arrest and detention of Mr Omar

6. Mr Omar was arrested on 27 July 2005 at 5.15 a.m. in Birmingham. He was formally arrested and cautioned using the new-style caution, namely that he did not have to answer questions but that anything he did say might be given in evidence, and that adverse inferences might be drawn from his silence if he failed to mention matters later relied on by him at trial.

7. He arrived at Paddington Green Police Station, London, at 7.20 a.m. At 7.50 a.m. he requested the attendance of a solicitor. He was told that he was entitled to consult a solicitor but that this right could be delayed for up to forty-eight hours if authorised by an officer of the rank of superintendent or above. At 7.55 a.m. a superintendent ordered that Mr Omar be held incommunicado (see paragraphs 78-79, 81-84 and 86 below).

8. Shortly afterwards, a different superintendent directed that a safety interview be conducted with Mr Omar. A “safety interview” is an interview conducted urgently for the purpose of protecting life and preventing serious damage to property. The detainee is questioned in order to secure information that may help avert harm to the public, by preventing a further terrorist attack, for example. Notwithstanding a request by the detainee for legal advice and representation, the interview occurs in the absence of a lawyer and before the detainee has had the opportunity to consult a solicitor (see paragraphs 78, 80-83 and 85-86 below).

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

10. At 9.15 a.m. the custody officer contacted the duty solicitor on behalf of Mr Omar. He advised the duty solicitor that he would be contacted when the booking-in procedure had been completed. At 10.06 a.m. and 10.14 a.m. Mr Omar again requested access to a solicitor. He was told that this would be arranged as soon as the booking-in process had been completed.

11. At 10.24 a.m. the custody officer was told that a further safety interview had been authorised. It was recorded in writing that Mr Omar had not been given access to legal advice on the grounds that delaying the interview would involve an immediate risk of harm to persons or damage to property and that legal advice would lead to the alerting of other people suspected of having committed offences but not yet arrested, which would in turn make it more difficult to prevent an act of terrorism or to secure the arrest, prosecution or conviction of persons in connection with terrorism offences. The reason for these beliefs, which was also recorded, was that Mr Omar was suspected of participating in the attacks of 21 July together with at least three as yet unidentified accomplices.

12. Safety interview A commenced at 10.25 a.m. and concluded at 11.11 a.m. At the beginning of the interview, Mr Omar was given the old-style caution, namely that he did not need to say anything but that anything he did say might be given in evidence. Safety interview B commenced at 11.26 a.m. and concluded at 12.11 a.m. Again, Mr Omar was given the old-style caution at the start of the interview. At 12.19 p.m. the duty solicitor was contacted and told that safety interviews were taking place. At 12.31 p.m. safety interview C commenced. This time, Mr Omar was given the new-style caution. It finished at 1.17 p.m. At 1.35 p.m. safety interview D commenced, following the administration of the old-style caution. It was completed at 2.20 p.m. During the safety interviews, Mr Omar either claimed that he did not recognise the other suspects from the photos in the media or he gave an incorrect account of how he knew some of them. He deliberately misdescribed their involvement in the events of 21 July.

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

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

b. The arrest and detention of Mr Ibrahim

15. Mr Ibrahim was arrested on 29 July 2005 at 1.45 p.m. in a flat in west London on suspicion of involvement in acts of terrorism on 7 and 21 July 2005. He was cautioned and was then asked whether there was any material on the premises which might cause danger and replied that there was not. He was asked whether there was any material anywhere which the police should know about and he replied that the police already knew about "58 Curtis" (the premises where the explosive devices were believed to have been manufactured) because they had been there already. He identified the other man that the police had seen at the west London flat that day as Mr Mohammed and was asked whether the latter had control of any materials likely to cause danger. He replied, "No, listen, I've seen my photo and I was on the bus but I didn't do anything, I was just on the bus". He was told that he would be interviewed about that later and that all the police wanted to know was whether there was anything at another location that was likely to cause danger. Mr Ibrahim indicated that he was aware that the police were trying to "link us to seven seven" (referring to the events of 7 July) and then said that he did "do the bus" but that he had had nothing to do with the events of 7 July 2005.

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

17. At 4.12 p.m., during the booking-in procedure, he asked a police officer, "How long am I looking at, 50 years?". The booking-in process was completed shortly afterwards.

18. At 4.20 p.m. he was reminded of his right to free legal advice and replied that he understood what had been said to him. The duty solicitor was called at 4.42 p.m. and given a reference number. At 5 p.m. the duty solicitors called the police station and asked to speak to Mr Ibrahim. They were told that he was "unavailable". They called again at 5.40 p.m. and were told that their details would be passed to the officer in charge of the investigation for him to call them. They were informed that telephone contact was impractical because the appropriate consultation rooms were unavailable.

19. At 6.10 p.m. a superintendent ordered an urgent interview and directed that Mr Ibrahim should be held incommunicado. The custody record explained that his right to access to legal advice was delayed because there were reasonable grounds for believing that delaying an interview would involve immediate risk of harm to persons or serious loss of, or damage to, property; and that it would lead to the alerting of other persons suspected of committing a terrorist offence but not yet arrested, which would make it more difficult to prevent an act of terrorism or secure the apprehension, prosecution or conviction of a person in connection with terrorism offences. The record referred to the suspicion that Mr Ibrahim had

detonated an explosive device on 21 July 2005 as part of an organised attack intended to kill and injure members of the public.

20. At 7 p.m. a different solicitor called the police station and asked to speak to Mr Ibrahim. She was told that no-one of that name was held at the police station. At 7.10 p.m. a police officer called her and confirmed that Mr Ibrahim was not in custody. At 7.45 p.m., when it was established that Mr Ibrahim was at the police station, she was told that he was already represented by the duty solicitor.

21. At 7.58 p.m. Mr Ibrahim was taken from his cell for a safety interview. At 8 p.m. the second solicitor contacted the custody officer. The custody record indicates that there was an issue because two solicitors wished to represent Mr Ibrahim. At 8.15 p.m., while Mr Ibrahim was being interviewed, the second solicitor called again seeking to speak to him.

22. The safety interview began with the new-style caution. He was told:

> "...[W]hat that means is that I am going to ask you some questions, you don't have to say anything if you don't want to but the court can draw what's called an inference from that and that just means that they can look upon your silence as perhaps a sign of guilt. And then what is being said here, it is being tape recorded and it can be used in court."

23. During the safety interview, Mr Ibrahim was asked whether he had any materials such as explosives or chemicals stored anywhere. He denied knowing where any such materials might be stored or having any knowledge of planned attacks which might endanger the public. He told the police that he did not know anything about explosives and that he had no link with any terrorist groups. He added that he did not know anyone who dealt with explosives, was a danger to society or was planning terrorist activities. He did not know two of the men connected with the events of 21 July shown on television. He was unaware of anyone he knew having been involved in these events. He said that Mr Mohammed was not someone who would be prepared to do anything like that. The safety interview ended at 8.35 p.m.

24. At 8.45 p.m. the duty solicitor arrived at the police station. Mr Ibrahim was sleeping and saw the solicitor at 10.05 p.m.

25. During subsequent interviews while Mr Ibrahim was in detention, he made no comment.

c. The arrest and detention of Mr Mohammed

26. Mr Mohammed was arrested and cautioned on 29 July 2005 at 3.22 p.m. at a flat in west London on suspicion of involvement in the commission, preparation or instigation of an act of terrorism.

27. Mr Mohammed arrived at Paddington Green Police Station at 4.29 p.m. At 4.39 p.m., he requested the assistance of the duty solicitor. At 5.05 p.m. the custody officer asked the relevant officers to inform him

whether Mr Mohammed was to be held incommunicado and at 5.48 p.m. this was authorised.

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

29. At 6.59 p.m. the custody officer called the duty solicitor scheme and was given a reference number. At around 7 p.m., a solicitor received a call from the duty solicitor scheme. At 7.19 p.m. Mr Mohammed signed the custody record indicating that he wished to speak to a solicitor as soon as practicable. At 7.34 p.m. he was told that he was being held incommunicado.

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

31. At 8.14 p.m. the safety interview of Mr Mohammed commenced. He was given the new-style caution. He was then told that he was suspected of involvement in the attacks of 21 July and asked if he had any knowledge of further explosives, and those who had them, which could cause harm to the public in the near future. He maintained that he had nothing to do with the events of 21 July 2005 and that he knew nothing about them. He did not recognise the photographs of the alleged perpetrators which he had seen in the media. The safety interview finished at 8.22 p.m.

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

33. On 31 July 2005 Mr Mohammed was interviewed for the second time, this time in the presence of a solicitor. Early in the interview, the solicitor read out the following statement by Mr Mohammed:

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

34. Thereafter Mr Mohammed exercised his right to silence.

d. The defence

35. The four defendants accused of detonating their bombs later accepted that they had been involved in the events of 21 July 2005 and had detonated explosive devices on the underground trains or on a bus. They claimed that their actions were not intended to kill but were merely an elaborate hoax designed as a protest against the war in Iraq. Although the

bombs had been designed to look realistic, they had deliberately been constructed with flaws to ensure that the main charge would not detonate.

2. The trial

36. The trial against the applicants, Mr Osman, Mr Asiedu and one other co-defendant accused of taking part in the essential preparation for the attacks commenced on 15 January 2007.

a. The admissibility of the safety interviews

37. The applicants submitted that the admission of the evidence of the safety interviews would have such an adverse effect on the fairness of the proceedings that it ought to be excluded pursuant to section 78 of the Police and Criminal Evidence Act 1978 ("PACE" – see paragraph 89 below). They contended that their right of access to a solicitor before and during the safety interviews was violated and that their privilege against self-incrimination was breached as a result of the use of the new-style caution, when in fact the old-style caution, which made it clear that no adverse inferences could be drawn from their silence as they had not had access to solicitors, ought to have been used. They also submitted that the admission of evidence of safety interviews should be excluded on grounds of public policy as if they were routinely admitted there was a greater likelihood that suspects would refuse to answer questions about public safety.

38. A *voir dire* was conducted. The judge handed down his ruling on 27 February 2007. He referred at the outset to the explanation given by the superintendent who took charge of the investigation of the situation which he faced. The superintendent referred in particular to the discovery of a quantity of chemicals which appeared to be far in excess of that required to construct the devices used during the attacks of 21 July and evidence that the suspects were in receipt of considerable post-event assistance.

39. The judge examined the safety interviews conducted in respect of Mr Omar. He noted that in answering the questions designed to protect the public, Mr Omar had volunteered a very large amount of misleading information. He had not incriminated himself at any stage, but had instead told extensive exculpatory lies. The judge considered it clear that the police officers had concentrated throughout on issues that might have revealed information relevant to assisting them to locate people or items that could pose a danger to the public. He noted that there was no suggestion that the police had exceeded the requirements of what was necessary and that it was acknowledged that the lines of questioning were relevant to public safety issues.

40. As regards Mr Ibrahim, having reviewed the evidence showing the times and locations of the various interviews and consultations taking place at the police station, the judge accepted "unhesitatingly" that it would have

been impractical for a telephone conversation between the solicitor and Mr Ibrahim to have been arranged at the time of her telephone calls. He observed that at the relevant time there were eighteen detainees at the police station, all arrested for suspected involvement in the events of 21 July 2005. The police station was exceptionally busy and the conference rooms had been prioritised for face-to-face consultations; it was not a realistic option to leave a room free with a telephone socket for telephone conversations with lawyers. The judge however noted that the police had accepted that there had been a breakdown in communication in that the interviewing officers were not told that his solicitor was trying to speak with him on the telephone. He examined the transcript of the safety interview conducted and noted that Mr Ibrahim had consistently denied having knowledge of any planned future attacks or hidden explosives.

41. In respect of Mr Mohammed, the judge again summarised his position in the safety interview, which was that he was not involved in and had no knowledge of the events of 21 July 2005.

42. The judge then referred to the relevant statutory framework governing access to legal advice for those held under terrorism legislation (see paragraphs 78-88 below), which made it clear that where a suspect was interviewed without legal assistance, the old-style caution should be administered. He noted that section 34(2A) of the Criminal Justice and Public Order Act 1994 (see paragraph 87 below) prohibited the drawing of adverse inferences from silence where the suspect had not had access to legal advice. However, he considered that this did not extend to preventing the court from admitting evidence of things said by a suspect during questioning, including any lies that he told, whether or not he had had the benefit of legal advice. The judge indicated that the jury would be told in terms that, contrary to the new-style caution administered, no adverse inferences could be drawn from the failure of the applicants to mention during questioning facts later relied on at trial.

43. The judge turned to review this Court's case-law on access to legal advice and the right to silence. He continued:

> "In my view, the following conclusions are to be drawn from those decisions of the ECHR. First, legal advice can be withheld for good cause during the early stages of interviews, so long as the conditions in which the interviews occur are not significantly coercive (*Magee*) and so long as access is not delayed for an excessive period (*Murray*). Moreover, interviewing a suspect having withheld legal advice and following a new-style caution is not decisive in the assessment of whether there has been a breach of Article 6 (*Averill*). Rather, the court must look at the circumstances overall and the use to which evidence is put (and including whether adverse inferences are drawn). Accordingly, so long as the overall circumstances have not caused irretrievable prejudice to the rights of the defendant, much will depend on the directions a jury receives as to how they should approach the silence or the statement of a suspect in these circumstances. As the court made clear in *Averill*, considerable caution is required when attaching weight to the fact that a person arrested in connection with a serious criminal offence and having been denied access to a lawyer

> during the early stages of his interrogation responds in a particular way – or as in that case, does not respond – to the questions put to him. The need for caution is not removed simply because an accused is eventually allowed to see his solicitor and then refuses to answer questions. A jury must be given a strong and careful warning that they must take into account all of the relevant circumstances; they must have discounted all reasonable ("innocent") explanations for the accused's silence or statements before they consider using this material against him; and the jury must be told to be careful not to accord disproportionate weight to this evidence."

44. He considered that the Code and the cautions were primarily designed to protect an accused from self-incrimination and to warn him of the consequences if he chose to answer questions and the harm that could be done to his case if he failed to reveal elements of his defence on which he later relied at trial. They were not intended to protect defendants from telling lies. He explained:

> "Whilst I recognise that an accused may benefit from having a solicitor remind him of his moral duty to tell the truth, in my view it is an invalid argument to suggest that an interview is necessarily inadmissible because the suspect did not have the advantage of a consultation with a solicitor, who had been excluded for good cause, in order to tell him that he should not deceive the police."

45. The judge concluded that, despite the absence of a solicitor during the safety interviews and the use of the wrong caution, there was no significant unfairness or material infringement of the applicants' right to a fair trial.

46. Specifically as regards Mr Omar, the judge found that he had been denied access to a solicitor for a little over eight hours. The safety interviews were conducted expeditiously and as soon as they were completed Mr Omar was given access to a solicitor. The interviews were neither coercive nor oppressive, as accepted by Mr Omar's counsel. Although a breach of the Code occurred when the new-style caution was administered at the beginning of safety interview C, that did not affect his attitude to the questioning. He continued telling lies consistent with what he had said in safety interviews A and B.

47. As far as Mr Ibrahim was concerned, the judge was of the view that it would have been impractical for him to have spoken to a solicitor before the booking in procedures were completed at 4.42 p.m. Although there was, in theory, time for a face-to-face conference between 6.10 p.m., when the safety interview was authorised, and 7.58 p.m., when it was commenced, the judge considered that, in light of the pressure under which the police were working, it was wholly understandable that no officer appreciated that there was time to ask the duty solicitor to attend for a meeting with Mr Ibrahim before the safety interview commenced. However, the judge was of the view that it should have been possible, between 5 p.m. and 7.58 p.m., to ensure that the duty solicitor was given access to Mr Ibrahim by telephone and the judge accordingly concluded that, to this limited extent, he was incorrectly denied access to legal advice by telephone.

However, he considered that this error did not involve a material infringement of his defence rights, noting:

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

48. The judge considered that the erroneous use of the new-style caution was a straightforward and wholly understandable oversight on the part of the officers conducting the interview, given the pressure under which they were operating. He noted that the safety interview was short; that it was not suggested that it had been conducted coercively; and that the questions did not go beyond legitimate questioning for safety purposes. The applicant saw a lawyer around seven and a half hours after his first request to see one.

49. In respect of Mr Mohammed, the judge found that legal advice had been delayed for about four hours, during which time eight minutes of questioning took place. There was no suggestion that the interview was held in coercive circumstances. Aside from the administration of the new-style caution, there was no evidence of any pressure having been applied. The judge was sure that the interview did not exceed the legitimate bounds or purpose of a safety interview and was, on the contrary, focused and appropriate.

50. In response to the submission that the accused were confronted with irreconcilable propositions when asked to participate in the safety interviews, the judge found that they were not. He noted:

> "... The defendants were confronted with a stark but clear choice: either they could help the police in the knowledge that what they said may be utilised against them, or they could protect themselves and remain silent ... What is clear beyond doubt is that the defendants were not misled or deceived as to the underlying purpose of the interviews, the possible consequences of answering questions or the potential risks of not revealing elements of their defence ..."

51. He further observed that the defence that the applicants chose not to reveal at that stage was directly relevant to the public safety issues and was easy to describe. It did not require any detailed understanding of the criminal law or a complicated factual explanation. It could have been summed up by the single word "hoax". He accepted that it was sometimes necessary to have the assistance of a lawyer before a suspect could

understand and describe a complicated defence, but indicated that this was not the case here.

52. Third, he considered that the defendants might have had a more credible position if they had answered the questions posed in ways which were at least arguably designed to assist the public and which, as a result, incriminated them. However, it was common ground that the defendants had either lied or failed to reveal what they knew in the safety interviews: rather than incriminate themselves, they had offered false exculpatory explanations. Fourth, the judge found that the invitation to cooperate in the process of protecting the public was not an impermissible inducement. Finally, he concluded that the administration of the new-style caution did not pressurise the defendants into providing any element of their various defences.

53. The judge set out in detail the approach he had adopted to the exercise of his discretion to exclude the evidence. In particular, he had given full weight to the principle that access to legal advice before and during questioning was one of the most fundamental rights that should only be denied on reasonable grounds in particular cases; and he had taken into consideration the fact that the environment in which the applicants were held was not in any true sense coercive and that the questioning was neither oppressive nor unfair. While he accepted that the erroneous administration of the new-style caution involved a level of indirect compulsion, this was not, in his view, decisive: the choice for the applicants was an easy one and they had not been "induced" by the caution to incriminate themselves but had instead told deliberate, exculpatory lies. Finally, he noted that the evidence of the safety interviews was potentially of high relevance to the central question raised in the trial, namely whether the defences now advanced were possibly true.

54. He concluded that there had been no material infringement of the right of any of the accused to exercise his defence rights and that the interviews were therefore admissible in their entirety. He observed that carefully crafted jury directions would be required in due course

b. The evidence

55. The issue at trial was whether the failure of the devices to explode was an intentional design flaw or a mistake in the construction of the devices. The prosecution relied heavily on the applicants' answers in their safety interviews to undermine their defence that the events of 21 July were intended as a hoax. There was also evidence of extremist material found at the residences of Mr Omar and Mr Osman. The prosecution also relied on evidence as to the purchase of the material for the devices and the construction of the devices. They established that between 28 April and 5 July, 443 litres of liquid hydrogen peroxide at a concentration of 18 per cent had been purchased from three shops in north London in a total of

284 containers by Mr Asiedu, Mr Ibrahim and Mr Omar. There was evidence that they had requested liquid hydrogen peroxide at 60-70 per cent strength and that they had boiled the hydrogen peroxide to increase its concentration. A number of the empty bottles later recovered had handwritten markings on them noting "70" or "70%", which the prosecution contended was evidence that the defendants believed that this concentration had been reached. Further, shrapnel had been added to the devices, which would have increased fragmentation upon explosion and maximised the possibility of injury. A farewell letter written by Mr Mohammed, which the prosecution alleged was a suicide note, had been recovered.

56. The three applicants gave evidence to the effect that their actions were intended as a hoax. Mr Osman did not give evidence.

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

c. The Osman confession

58. During the night of 7-8 June 2007, while Mr Osman was detained in prison, he made remarks to two prison officers which were capable of constituting a confession within the meaning of the applicable legislation. By this stage in the trial the prosecution had already commenced its closing submissions. The prosecution did not apply to have the evidence reopened to admit evidence of the Osman confession. In particular, no application was made to admit the confession as hearsay evidence against the applicants. However, the confession was relevant to the defence of Mr Asiedu. He therefore sought permission to reopen his case and adduce the evidence of the prison officers. The confession was not challenged by Mr Osman, who did not dispute that he had uttered the statements in question.

59. On 12 June 2007 the trial judge ruled that Mr Asiedu could reopen his case to adduce evidence of the Osman confession. It is not clear whether counsel for the applicants sought to have the confession evidence excluded altogether. However, it emerges from the judge's ruling that counsel for Mr Mohammed and Mr Ibrahim sought disclosure of medical records and permission to cross-examine the officers to demonstrate that the confession was unreliable.

60. The judge noted that the evidence of the confession was admissible only against Mr Osman, although it could be relied on by the prosecution and Mr Asiedu to support their different cases. He refused the defence request for disclosure and permission to cross-examine. He considered that

although Mr Osman had displayed some unusual behaviour early on in the trial, there was no suggestion that he was suffering from any mental illness such as to affect his ability to express himself reliably on issues relevant to his case. The judge had personally examined Mr Osman's medical records and was satisfied that nothing had been revealed to lead him to determine that the evidence was so lacking in reliability that it ought to be excluded. He emphasised that the introduction of such evidence as the defence wished to introduce would be highly prejudicial to Mr Osman, while not going to a live issue before the jury in their cases, given that the confession evidence was limited to the cases of Mr Osman and Mr Asiedu. He concluded that before the evidence was introduced to the jury, they would receive a strong direction as to the ambit of its relevance, which would be repeated during the summing up. He considered that this would ensure that the confession would not upset the fairness of the proceedings.

61. The prison officers subsequently gave oral evidence of the confession by Mr Osman. Prior to their being called, the jury were given a firm, unequivocal direction that their evidence was relevant only to the cases of Mr Osman and Mr Asiedu; it was irrelevant to the remaining defendants. This direction was later repeated during the trial judge's summing up to the jury.

d. The summing-up

62. As noted above, during the summing up the jury were directed that the evidence of Mr Osman's confession was evidence against him alone and could not constitute evidence against the applicants.

63. The jury were further directed that no adverse inferences could be drawn from the failure of the applicants to mention during police interviews prior to consultation with a lawyer facts on which they later sought to rely at trial.

64. The judge also directed the jury that allegations advanced by counsel were not evidence and it was only the answers given by witnesses that constituted evidence in the case.

e. The verdict

65. On 9 July 2007 the applicants together with Mr Osman were convicted of conspiracy to murder in the Central Criminal Court. The jury were unable to reach verdicts in respect of Mr Asiedu and the remaining co-defendant and a re-trial in their cases was ordered.

66. On 11 July 2007 the applicants were sentenced to life imprisonment with a minimum term of forty years' imprisonment.

2. The appeal

67. The applicants sought leave to appeal against their convictions. They argued that the evidence of the safety interviews should have been excluded and that they should have been permitted to challenge the reliability of the Osman confession. Mr Omar also argued that attacks on his solicitor's character made by counsel for Mr Asiedu in his closing speech had rendered his trial unfair.

68. On 23 April 2008 the Court of Appeal refused leave to appeal against conviction. It noted at the outset:

> "5. ... It is virtually impossible to imagine the pressure and concerns which must have been felt by the police investigating teams. Two weeks earlier four bombs had been successfully detonated with the dreadful consequences with which we are familiar, and they were now faced with four more bombs, again in the transport system, which had been detonated, but failed to explode. The bombers involved on 7th July had perished, but the perpetrators of the second intended atrocity were at large, free to repeat their murderous plans, and to do so more effectively. They had to be found and detained, and the immediate objective of the investigation, including interviews of those arrested in connection with these incidents, was directed to public safety."

69. As to the effect of the admission of the safety interviews, the court observed:

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

70. The court was of the view that an interview process which, so far as possible, enabled the police to protect the public was a necessary imperative. It considered that the question whether the results of such interviews should be used as evidence against the suspects was delicate. However, it emphasised that in the present cases none of the applicants had said anything which directly incriminated them, or involved any confession to involvement in or even remote knowledge of the conspiracy to murder on 21 July. Nevertheless, it noted, the interviews provided important evidence against them, not because they told the truth and revealed knowledge of or involvement in terrorist activity, but because the applicants had made a number of demonstrably untrue assertions without suggesting the defences that they later advanced at trial. The prosecution relied on these untrue assertions to undermine the credibility of the defendants who sought to advance the "hoax" defences. The court accepted that, owing to police error, incorrect cautions were administered to the applicants before they told the lies in question. However, it emphasised that each applicant was warned that the answers given in the safety interviews might be used in evidence against them. The court continued:

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

71. The court was satisfied that the exercise of discretion by the trial judge was fully informed and that he approached the relevant issues with care.

72. As regards Mr Omar, the court noted that he was the first of the defendants to be arrested and that, as a consequence, what he might have to say was of absolutely crucial importance to the stark public safety issues which confronted the police at the time. It observed that during the *voir dire*, it was expressly accepted that the decision to hold a safety interview before Mr Omar was granted access to a lawyer was a valid decision under schedule 8 of the Terrorism Act 2000 (see paragraphs 78-86 below). It was further conceded that the interviews were conducted fairly and moderately, and that they were neither coercive nor oppressive. However, on appeal counsel for Mr Omar sought to argue that the police action to delay Mr Omar's access to legal advice was not lawful. The Court noted:

> "First, breaches of the relevant Code do not make subsequent police actions unlawful, at any rate in the sense that they are or would be sufficient of themselves to lead to the exclusion of the results of the subsequent interviews. When, as the judge found, the police were not seeking deliberately to manipulate the system in bad faith, he was required to address the exclusionary powers provided by section 78 of PACE: no more, no less. This leads to the second consideration, that it is always open to the defendant's advocates at trial to make a deliberate forensic decision to waive or ignore, and therefore choose not to rely on the breaches of the relevant Code, if the effect of inviting attention to them may increase rather than diminish the defendant's difficulties. In short, the trial advocate must make his own judgment whether to advance argument based on breaches of the relevant Code, or to argue some, or one, but not all of them."

73. The court could see nothing to support the conclusion that the decision to admit the evidence of the safety interviews in Mr Omar's case was flawed.

74. In respect of Mr Ibrahim, the court noted that three submissions were being advanced by his counsel. First, it was argued that the superintendent's conclusion that a pre-interview consultation between Mr Ibrahim and the duty solicitor would cause unnecessary delay was a serious error of judgment as the safety interview had not taken place until over an hour later. Second, it was contended that the continued questioning of Mr Ibrahim after he had denied knowing anything constituted a breach of the Code, paragraph 6.7 (see paragraph 85 below). Finally, it was submitted that the administration of the new-style caution had contributed to the unfairness by introducing an element of coercion. The Court of Appeal explained in detail how the trial judge had approached these matters and concluded that it saw no basis for interfering with his decision that the safety interview should be admitted.

75. As regards Mr Mohammed, the court noted that the trial judge had accepted that the wrong caution was given and that access to legal advice was delayed for almost four hours. The court also emphasised that the judge was confident that the interview was a genuine safety interview and that he had noted that it had lasted eight minutes and was not held in coercive circumstances. The court could see no basis for interfering with the decision of the trial judge that the admission of the evidence did not render the trial unfair.

76. As to the ground of appeal advanced by Mr Omar regarding attacks on the character of his solicitor, the court noted that no objection had been raised at trial to the terms of the closing speech of counsel for Mr Asiedu. It further noted that no suggestion was made that a direction be given to the jury to the effect that they were not to take into account the remarks, despite the fact that the trial judge had circulated draft directions to counsel well in advance and had invited proposals for amendment. In conclusion, the court was satisfied that the trial judge had dealt adequately with the issues in his summing up when he reminded the jury that allegations made by counsel were not evidence in the case (see paragraph 64 above).

77. As far as the Osman confession was concerned, the Court of Appeal emphasised that the confession had been used as evidence against Mr Osman only and for the purposes of Mr Asiedu's defence. It found that the applicants had no locus standi to cross-examine or to introduce evidence because, as everybody understood at trial, Mr Osman's confession was admitted on the limited basis that it was not and could not constitute evidence in the case against any of the applicants.

B. Relevant domestic law and practice

1. Safety interviews

a. The Terrorism Act 2000

78. The Terrorism Act 2000 ("the 2000 Act") governs the arrest and detention of those suspected of committing terrorist offences. Schedule 8 deals with access to legal advice. The law cited below sets out the position at the material time; amendments which are not significant in the present cases have since been made to the relevant provisions.

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

80. Paragraph 7 provided that a person who was arrested as a suspected terrorist was entitled, if he so requested, to consult a solicitor as soon as

reasonably practicable, privately and at any time ("the right to legal advice"). This right was also subject to paragraph 8.

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

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

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

b. The Code of Practice

83. At the material time no codes of practice existed in relation to the above provisions. However, Code C, adopted under the Police and Criminal Evidence Act 1984, regulated the position of those detained on suspicion of terrorism.

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

85. Section 6 of Code C dealt with the right to legal advice. Paragraphs 6.1 and 6.5 set out the general right to legal advice as established in paragraph 7 of schedule 8 to the 2000 Act and explained that the exercise of the right could only be delayed in accordance with Annex B of the Code. Paragraph 6.6 explained that a detainee who wanted legal advice could not be interviewed until he had received such advice unless Annex B applied; or

there were reasonable grounds to believe that the consequent delay might have, *inter alia,* the consequences set out in paragraph 8 (a) to (d) of schedule 8 to the 2000 Act (see paragraph 81 above) and when a solicitor had been contacted, awaiting his arrival would cause unreasonable delay to the process of the investigation. In both cases, the restriction on drawing adverse inferences from silence would apply because the suspect had not had the opportunity to consult a solicitor. Paragraph 6.7 explained that once sufficient information had been obtained to avert the risk, the questioning should cease until the detainee had obtained legal advice.

86. Part B of Annex B concerned persons detained under the 2000 Act. It provided that the right discussed in sections 5 and 6 could be delayed for up to forty-eight hours if there were reasonable grounds to believe that the exercise of the right would lead to the consequences set out in paragraph 8 of schedule 8 of the 2000 Act (see paragraph 81 above).

2. Cautions

87. Section 34 of the Criminal Justice and Public Order Act 1994 permits adverse inferences to be drawn by a jury where a defendant fails to mention during police questioning any fact relied on in his defence in subsequent criminal proceedings. The precise circumstances in which such adverse inferences can be drawn are explained to the jury in detail in the trial judge's summing up. Pursuant to section 34(2A), such adverse inferences cannot be drawn if the defendant was not been allowed an opportunity to consult a solicitor prior to being questioned.

88. At the relevant time, Part D of Annex B to the Code clarified that no adverse inferences from a detainee's silence could be drawn in any interview during the period for which access to legal advice had been delayed pursuant to Annex B. Annex C, which dealt with restrictions on drawing adverse inferences from silence, explained that section 34 of the 1994 Act was subject to any overriding restriction on the ability of the court to draw adverse inferences. This restriction applied where a detainee had, before interview, asked for legal advice, been denied access to a solicitor and had not changed his mind about wanting legal advice. It clarified that the terms of the caution in these circumstances was:

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

3. Admissibility of evidence

89. Section 78 PACE provides the court with a discretion to exclude evidence if its admission would have such an adverse effect on the fairness of the trial that it ought not to be admitted.

90. Under section 76 PACE, a confession made by an accused person may be given in evidence against him.

91. At common law, such a confession is not normally admissible against any other person implicated in it. The case of *R v. Hayter* [2005] 1 UKHL 6 concerned an appeal by a defendant who had stood trial for murder together with two co-accused. One of the two co-accused had confessed to his girlfriend. The trial judge directed the jury that, if they were satisfied that the two co-accused were guilty of murder, it would be open to them to take account of those findings of guilt in deciding whether to convict the appellant. All three defendants were subsequently convicted. A majority of the House of Lords found that the trial judge had directed the jury not to take into account the co-accused's confession in the case against the appellant. Thus, there was no infringement of the common law rule prohibiting the admissibility of one accused's confession against another accused. There was no good reason why the co-accused's guilt could not be used by the jury as a fact against the appellant, and it was of no significance that the co-accused's guilt had been established by his own confession.

COMPLAINTS

The applicants complained under Article 6 §§ 1 and 3 (c) of the Convention about the refusal to allow them prompt access to legal advice, the erroneous administration of the new-style caution and the subsequent admission at trial of the evidence of the safety interviews.

They further complained under Article 6 §§ 1 and 3 (d) about the prohibition on adducing evidence to challenge the reliability of Mr Osman's confession.

Finally, Mr Omar also complained about the prejudice caused by attacks on his solicitor's character made in the opening and closing submissions of counsel for Mr Asiedu at trial.

THE LAW

92. Article 6 §§ 1 and 3 (d) provide, in so far as relevant, as follows:

> "1. In the determination of ... any criminal charge against him, everyone is entitled to a fair ... hearing ... by [a] ... tribunal ..."
>
> ...
>
> 3. Everyone charged with a criminal offence has the following minimum rights:
>
> ...

(c) to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require;

(d) to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him."

A. Joinder

93. Given their similar factual and legal background, the Court decides that the three applications should be joined pursuant to Rule 42 § 1 of the Rules of Court.

B. The alleged violation of Article 6 §§ 1 and 3 (d) in respect of the Osman confession

94. The applicants contended that the refusal of the trial judge to allow them to adduce evidence to challenge the reliability of the Osman confession rendered their trial unfair. They argued that the jury were essentially asked to find as fact, on the basis of the Osman confession, that there had been a plan to use real bombs in a genuine suicide attack in the context of the cases against Mr Osman and Mr Asiedu, but to ignore that finding in considering the applicants' cases. This, the applicants submitted, was artificial, particularly in light of the House of Lords ruling in *R v. Hayter*, which permitted a finding of guilt in respect of one accused to be used as a fact against another (see paragraph 91 above). In the absence of any evidence to challenge the reliability of the confession, the applicants considered that the jury had no choice but to treat it as reliable. As a consequence their defences were fatally damaged.

95. The Court recalls that the guarantees in Article 6 § 3 (d) are specific aspects of the right to a fair hearing set forth in Article 6 § 1 which must be taken into account in any assessment of the fairness of proceedings. While Article 6 § 1 guarantees everyone's right to a fair trial, it does not as such prescribe rules of evidence and in particular rules on the admissibility and probative value of evidence, which are essentially matters for the national law (see *X. v. Belgium*, no. 8876/80, Commission decision of 16 October 1980, Decisions and Reports (DR) 23, p. 235. See also *Schenk v. Switzerland*, 12 July 1988, §§ 45-46, Series A no. 140; *Gäfgen v. Germany* [GC], no. 22978/05, § 162, ECHR 2010; and *Al-Khawaja and Tahery v. the United Kingdom* [GC], nos. 26766/05 and 22228/06, § 118, 15 December 2011). The question which must be answered is whether, having regard to the various interests at stake, the proceedings as a whole were fair (see *Doorson v. the Netherlands*, 26 March 1996, §§ 67 and 70,

Reports of Judgments and Decisions 1996-II; and *Al-Khawaja and Tahery*, cited above, § 118).

96. The Court notes, first, that no application was made by the prosecution to have the evidence of the Osman confession admitted as hearsay evidence against the applicants. Indeed the prosecution did not seek to adduce evidence of the Osman confession at all: the application to adduce the evidence was made by a co-accused (see paragraph 58 above). The trial judge emphasised that the evidence was admissible against Mr Osman only and that it was not probative of any issues in the applicants' cases. The judge directed the jury accordingly prior to the taking of evidence from the two prison officers, and he repeated the direction in the course of his summing up at the end of the trial (see paragraphs 61-62 above). The Court has previously attached weight to the clarity of relevant jury directions regarding the correct approach to evidence presented at trial and has indicated that, in the absence of evidence to the contrary, jury members are assumed to be able to follow and to apply such directions (see *Firkins v. the United Kingdom* (dec.), no. 33235/09, 4 October 2011).

97. Second, the Court observes that the trial judge examined carefully the arguments advanced by counsel for Mr Omar and counsel for Mr Mohammed to support their applications to adduce evidence to challenge the reliability of the confession. In refusing their applications, he provided detailed reasons for his decision (see paragraph 60 above).

98. Third, it is clear that, in reaching his decision, the trial judge had regard to the other interests at stake, namely Mr Osman's defence rights. He considered that allowing the applicants to adduce evidence pertaining to Mr Osman's mental state would be highly prejudicial to him, and weighed this in the balance together with the fact that the evidence would not be probative of any issue in the applicants' cases (see paragraph 60 above).

99. Finally, the Court observes that there was a great deal of evidence against the applicants to justify a finding of guilt against them (see paragraph 55 above). Indeed, as the Court has already noted, the prosecution did not seek to reopen their case to adduce the confession evidence in support of their case against Mr Osman, and made no application to have the evidence of the confession admitted as hearsay evidence against the applicants (see paragraph 58 above).

100. In these circumstances, the Court is satisfied that the decision of the trial judge to refuse the applicants permission to adduce evidence of Mr Osman's mental condition and to cross-examine the police officers discloses no appearance of a violation of Article 6 § 1 read in conjunction with Article 6 § 3 (d) of the Convention. The complaint must therefore be rejected in accordance with Article 35 §§ 3 and 4 of the Convention.

C. The alleged violation of Article 6 § 1 as regards the attacks on Mr Omar's solicitor

101. Mr Omar further alleged that the attacks on the character of his solicitor made at trial by counsel for Mr Asiedu in his opening and closing remarks rendered his trial unfair as the jury were likely to accord some weight to those comments.

102. In the light of all the material in its possession, and in so far as the matters complained of are within its competence, the Court finds no appearance of a violation of the rights and freedoms set out in the Convention or its Protocols arising from this complaint. It accordingly rejects this complaint in accordance with Article 35 §§ 3 and 4 of the Convention.

D. The alleged violation of Article 6 §§ 1 and 3 (c) in respect of the applicants' access to a lawyer and the admission of the evidence of the safety interviews

103. The Court considers that it cannot, on the basis of the case file, determine the admissibility of this complaint and that it is therefore necessary, in accordance with Rule 54 § 2 (b) of the Rules of Court, to give notice of it to the respondent Government.

For these reasons, the Court unanimously

Decides to join the applications;

Decides to adjourn the examination of the applicants' complaints concerning the delay in their access to a lawyer and the admission of the evidence of the safety interviews at trial;

Declares the remainder of the applications inadmissible.

Lawrence Early
Registrar

Lech Garlicki
President