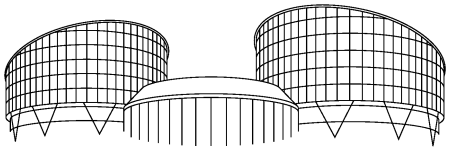

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

FOURTH SECTION

CASE OF SHER AND OTHERS v. THE UNITED KINGDOM

(Application no. 5201/11)

JUDGMENT

STRASBOURG

20 October 2015

Request for referral to the Grand Chamber pending

This judgment will become final in the circumstances set out in Article 44 § 2 of the Convention. It may be subject to editorial revision.

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

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

Guido Raimondi, *President,*
Päivi Hirvelä,
Ledi Bianku,
Nona Tsotsoria,
Paul Mahoney,
Faris Vehabović,
Yonko Grozev, *judges,*
and Françoise Elens-Passos, *Section Registrar,*

Having deliberated in private on 15 September 2015,

Delivers the following judgment, which was adopted on that date:

PROCEDURE

1. The case originated in an application (no. 5201/11) against the United Kingdom of Great Britain and Northern Ireland lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by three Pakistani nationals, Mr Sultan Sher, Mr Mohammed Rizwan Sharif and Mr Mohammed Umer Farooq ("the applicants"), on 17 January 2011.

2. The applicants, who had been granted legal aid, were represented by Mr A. Yousaf, a lawyer practising in Bradford. The United Kingdom Government ("the Government") were represented by their Agent, Ms M. Addis, of the Foreign and Commonwealth Office.

3. The applicants alleged, in particular, that they were not given adequate information about the specific allegations against them as required by Article 5 §§ 2 and 4 of the Convention; that the procedure for hearing applications for warrants of further detention was incompatible with Articles 5 § 4 and 6 § 1; and that the searches of their homes violated their right to respect for their private lives and homes and Article 1 of Protocol No. 1.

4. On 2 October 2013 the application was communicated to the Government.

5. The applicants and the Government each filed written observations (Rule 54 § 2 (b)). In addition to the parties' observations, third-party submissions were received from Privacy International, which had been granted leave by the President of the Section to intervene in the written proceedings (Article 36 § 2 of the Convention and Rule 44 § 3 of the Rules of Court).

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

6. At the time of the facts set out below the applicants resided in the United Kingdom on student visas. Their details are set out in the appendix.

A. The applicants' arrests and initial detention

7. On 8 April 2009 the applicants were arrested, along with nine others, under the Terrorism Act 2000, as amended ("the 2000 Act"), in various locations in the North West of England. The arrests occurred in the context of Operation Pathway.

1. Mr Sher

8. Mr Sher was arrested at 6.35 p.m. on 8 April under section 41 of the 2000 Act (see paragraph 91 below) on suspicion of being involved in the commission, preparation and instigation of acts of terrorism. According to the custody record, his detention was authorised to secure and preserve evidence and to obtain evidence by way of questions.

9. At around 10 p.m. a review of Mr Sher's detention was carried out by a senior police officer. Mr Sher made no representations. His continued detention was authorised as necessary in order to secure and preserve evidence and to obtain evidence by questioning.

10. At 7.40 a.m. on 9 April a notice ("TACT 5 form") was served on the applicant's solicitor, Mr Yousaf. The notice set out, *inter alia*, the following:

> "You are hereby informed that
>
> ...
>
> SULTAN SHER
>
> has been arrested under the provisions of **Section 41 of the Terrorism Act 2000** as it is reasonably suspected that he is or has been involved in the commission, preparation or instigation of acts of terrorism."

11. Mr Yousaf confirmed that he was happy for further reviews of detention to take place in his absence and that he had no representations to make at that time.

12. At 9.35 a.m. a further review of Mr Sher's detention took place. Mr Sher was advised that his continued detention was believed to be necessary to obtain relevant evidence by questioning; to preserve relevant evidence; to await the results of examination or analyses of relevant

evidence; and to secure the examination/analysis of anything with a view to obtaining evidence.

13. At around 4 p.m., Mr Yousaf was provided with a copy of a pre-interview briefing document ("brief"). The third paragraph of the brief said:

> "Your client has been arrested on suspicion of being concerned in the commission, preparation or instigation of an act of terrorism contrary to section 41 of the Terrorism Act 2000. Your client was informed that the arrest was necessary to allow the prompt and effective investigation of the offence. After caution your client made no reply. The arrest followed an Intelligence Operation conducted by the North West Counter Terrorism Unit."

14. It went on to list twelve names of people under arrest at different locations and said that their homes and associated premises were the subject of search, recovery and forensic scrutiny. Ten properties were the subject of such searches, although it was said that this was likely to increase "as further intelligence associating individuals to various premises come to the attention of the investigative team". It added:

> "Your client should be made aware that such examinations of scenes will include searches for bomb-making equipment, devices, explosives, composite material, recipes, documentary evidence, computers and IT storage devices and mobile telephones ..."

15. It concluded:

> "Your client will be asked questions relating to his access and association to various properties and individuals subject of this investigation. Your client will be asked about computer usage and methods of communication but most significantly, he will be asked questions relating to his knowledge or any information he might have in relation to the commission, preparation or instigation of acts of terrorism ..."

16. At around 5 p.m. a further review of Mr Sher's detention took place. His continued detention was deemed necessary for the reasons previously set out.

17. Shortly after 6 p.m. a first police interview began. Mr Sher was asked detailed questions about other people arrested, the various premises being searched and his knowledge of bomb-making equipment. He made no comment in response to these questions. The interview lasted for around one and a half hours in total.

18. Shortly before midnight, a further review of Mr Sher's detention took place. His continued detention was deemed necessary for the reasons previously set out.

2. Mr Sharif

19. Mr Sharif was arrested at 5.37 p.m. on 8 April under section 41 of the 2000 Act on suspicion of being involved in the commission, preparation and instigation of acts of terrorism. According to the custody record, his detention was authorised to secure and preserve evidence and to obtain evidence by way of questions and the applicant was informed.

20. At 11 p.m. a review of Mr Sharif's detention was carried out by a senior police officer. Mr Sharif made no representations. His continued detention was authorised as necessary to secure and preserve evidence and to obtain evidence by questioning.

21. At 7.40 a.m. on 9 April, a TACT 5 form was served on Mr Yousaf in respect of Mr Sharif in the same terms as the form served as regards Mr Sher (see paragraph 10 above). Again Mr Yousaf confirmed that he was happy for further reviews of detention to take place in his absence.

22. At 9.50 a.m. a further review of Mr Sharif's detention took place. Mr Sharif was advised that his continued detention was believed to be necessary to obtain relevant evidence by questioning; to preserve relevant evidence; to await the results of examination or analyses of relevant evidence; and to secure the examination/analysis of anything with a view to obtaining evidence.

23. At 4.50 p.m. a further review of Mr Sharif's detention took place. His continued detention was deemed necessary for the reasons previously set out.

24. At some point in the afternoon, Mr Sharif received a brief in almost the same terms as that received by Mr Sher (see paragraphs 13-15 above). He was subsequently interviewed for around half an hour and was asked in particular about other people arrested. He made no comment.

25. At 11.45 p.m. a further review of Mr Sharif's detention took place. His continued detention was deemed necessary for the reasons previously set out.

3. Mr Farooq

26. Mr Farooq was arrested at 5.35 p.m. on 8 April under section 41 of the 2000 Act on suspicion of being involved in the commission, preparation and instigation of acts of terrorism. According to the custody record, the reasons for his detention were explained to him.

27. At around 9.45 p.m. a review of Mr Farooq's detention was carried out by a senior police officer. Mr Farooq made no representations. His continued detention was authorised as necessary in order to secure and preserve evidence and to obtain evidence by questioning.

28. On 9 April, a TACT 5 form was served on Mr Yousaf in respect of Mr Farooq in the same terms as the form served as regards Mr Sher (see paragraph 10 above). Again Mr Yousaf confirmed that he was happy for further reviews of detention to take place in his absence.

29. At 9.15 a.m. a further review of Mr Farooq's detention took place. Mr Farooq was advised that his continued detention was believed to be necessary to obtain relevant evidence by questioning; to preserve relevant evidence; to await the results of examination or analyses of relevant evidence; and to secure the examination/analysis of anything with a view to obtaining evidence.

30. At 5.40 p.m. a further review of Mr Farooq's detention took place. His continued detention was deemed necessary for the reasons previously set out.

31. At some point in the afternoon, Mr Farooq received a brief in almost the same terms as that received by Mr Sher (see paragraphs 13-15 above). A subsequent police interview lasted for around half an hour and Mr Farooq and was asked in particular about other people arrested. He made no comment.

32. Shortly before midnight, a further review of Mr Farooq's detention took place. His continued detention was deemed necessary for the reasons previously set out.

B. The search warrants

33. Meanwhile, on 8 April 2009, the police applied for and were granted search warrants by the Manchester Magistrates' Court in respect of a number of addresses connected with the applicants. The police officer making the application indicated that he had reasonable grounds for believing that the material was likely to be of substantial value to a terrorist investigation and that it had to be seized in order to prevent it from being concealed, lost, damaged, altered or destroyed.

34. The relevant material was defined as:

> "Correspondence, leaflets, posters, magazines, subscription forms, identification documents, travel documents, passports, maps, sketches, plans, telephone records, accommodation details, literature/books, vehicle documents in relation to use/control, correspondence in relation to other properties/lock ups/garages and their keys, receipts for purchased goods, records of religious/political beliefs, handwritten notes, receipts, invoices, order forms, delivery notes, adverts, travel information land sea and air. Computers, computer equipment, PDA's software, hardware, digital storage, faxes, printers, scanners, copiers, printer paper, DVDs, CDs, CD Roms, video/audio cassettes, memory sticks, mobile phones, sim cards, evidence of purchase of mobile phones and registration and billing, credit cards, top-up cards, cash, cheque books, money transfer documents, financial documents, cameras/video equipments, photographs/negatives, communication devices, chemical or pre cursor materials, memorabilia/ornaments/flags, items to conceal or transport items, any item believed to be connected to terrorism ..."

35. Search warrants were granted in those terms. The warrants included these words:

> "Authority is hereby given for any constable, accompanied by such person or persons as are necessary for the purposes of the search, to enter the said premises on one occasion only within one month from the date of issue of this warrant and to search the premises ..."

36. The search of Mr Sher's home address was conducted over a ten-day period between 8 April and 18 April. The search at his place of work was conducted between 11 and 14 April.

37. Mr Sharif and Mr Farooq shared an address. Their residence was the subject of a search between 8 April and 19 April.

38. In relation to all of the properties that were searched, the police went to the property first thing in the morning and worked in shifts until about 7 p.m. They then closed up the property and it was cordoned off. They resumed their work at the property again the next morning, and worked in this way until the search was concluded.

C. The applicants' further detention

1. The first application for further detention

39. On 9 April the applicants were informed that an application would be made at the City of Westminster Magistrates' Court for a warrant of further detention for the period of seven days beginning with their day of arrest; and that a hearing would take place on 10 April. The notice of the application and the hearing went on to explain:

> ""Both yourself and your legal representative may make written or oral representations and attend a hearing, subject to the provision of Schedule 8 para 33(3) of the Terrorism Act 2000, which provides that the judicial authority may exclude you or your legal representative from any part of the hearing. Your legal representative has been informed by written notice of his, and your, right to attend the hearing, subject to the provision mentioned above. Police are seeking a Warrant of Further Detention for the period of seven days beginning with the time of your arrest because it is necessary in order to obtain or preserve relevant evidence or pending the result of an examination or analysis of any relevant evidence or of anything the examination or analysis of which is to be or is being carried out with a view to obtaining relevant evidence relating to the commission of an offence or offences under the provisions of Section 40(1)(a) or which indicates you are a person who falls within the provisions of Section 40(1)(b) of the Terrorism Act 2000."

40. The application to the City of Westminster Magistrates' Court contained, at section 9 under a heading "Further Enquiries to be made", a lengthy description of the police operation and the current state of play in the ongoing investigation. The section 9 material was not provided to the applicants or Mr Yousaf.

41. The hearing was fixed for 9.30 a.m. on 10 April 2009. Part of the hearing was closed to allow the District Judge to scrutinise and ask questions about the material in section 9. The applicants and Mr Yousaf were therefore excluded from this part of the hearing. They made no complaint about the procedure at that time.

42. At the open part of the hearing, a senior police officer made an oral application for further detention which was reduced to writing and a copy of the note was provided to the applicants and to Mr Yousaf. The written note explained why the section 9 material was being withheld and provided some details about the police operation. It also gave details of all the property seized so far and explained that the investigation contained:

> "intelligence and evidence that support[ed] the premise that [the applicants] through significant association with other detained persons [were] conspiring to plan a terrorist attack within the UK."

43. Mr Yousaf cross-examined the police officer during the hearing and did not complain about the applicants' detention or suggest that they should not be further detained.

44. At 1.20 p.m. the District Judge granted the warrants for further detention until 15 April. The formal notification of the decision explained:

> "On application by a police officer of at least the rank of Superintendent, and having taken account of representations made by or on behalf of the person named above concerning the grounds upon which further detention is sought, I am satisfied that in accordance with paragraphs 30 and 32 of Schedule 8 to the Terrorism Act 2000, that:
>
> ...
>
> (ii) the investigation in connection with which the person is detained is being conducted diligently and expeditiously;
>
> (iii) there are reasonable grounds for believing that the further detention of the person named above is necessary to obtain relevant evidence whether by questioning him or otherwise or to preserve relevant evidence, or pending a result of an investigation or analysis of any relevant evidence or of anything the examination or analysis of which is to be or is being carried out with a view to obtaining relevant evidence..."

2. The detention from 10 April to 15 April

(a) Mr Sher

45. On 10 April 2009 Mr Sher was provided with a second brief. It indicated that one of the other arrested suspects had said that he had lived with Mr Sher at two addresses and that he had knowledge of another arrested suspect. This document formed the basis of an interview with Mr Sher which began shortly after 6 p.m. and concluded one and a half hours later. During the interview, Mr Sher was asked about his acquaintance with some of the other arrested suspects and his familiarity with some of the searched premises. He made no reply to the questions put.

46. No interviews were carried out over 11 and 12 April, which was the weekend of Easter.

47. On 13 April Mr Sher received a third brief which contained details of material found at various searched properties which could allegedly be linked to him. The brief was used as the basis of a further series of interviews which began at around 1 p.m. and lasted for about four hours in total. Again Mr Sher answered no comment to the points put to him.

48. On 14 April 2009 Mr Sher and his solicitor were provided with a fourth brief. It identified a number of items which were said to be "areas of interest" to the investigation, including: text messages between detainees; maps outlining designated areas of interest which significant numbers of the public would be expected to frequent; a detailed handwritten document

depicting a militaristic zone abroad; access to and movements around the security industry including access to airports; mobile telephone use; international travel, including visits to Pakistan, and the purpose of travel; suspected reconnaissance at public locations; meetings of significance; and money transfers abroad. The document went on to say:

> "Evidence exists linking your client to persons currently in custody. Direct evidence exists of the detainees meeting on a number of occasions both in Liverpool and Manchester. Mobile telephone pictures exist illustrating further associations between those persons arrested on this operation.
>
> The purpose of this briefing is to broadly outline the police investigation and its strong belief that preparatory acts for an attack plan were in place. A significant amount of exhibits are still currently being assessed and may form part of further pre-interview briefing."

49. Again, the document provided the basis of an interview with Mr Sher which began shortly before 1 p.m. and lasted for about an hour and twenty minutes. Mr Sher declined to comment.

(b) Mr Sharif

50. On 10 April 2009 Mr Sharif was provided with a second brief. It was based on information provided by some of the other detainees and concerned his acquaintance with them. It formed the basis of an interview with Mr Sharif which began at around 4 p.m. and concluded one and a half hours later. During the interview, Mr Sharif was asked about his acquaintance with some of the other arrested suspects and made no reply to the questions put.

51. Again, no interviews were carried out over the Easter weekend of 11 and 12 April.

52. On 13 April Mr Sharif received a third brief. It provided details of material found at his place of residence. The document was used as the basis of a further series of interviews which began at around 1.30 p.m. and lasted for about three hours in total. Mr Sharif answered no comment to the points put to him.

53. On 14 April 2009 Mr Sharif was provided with a fourth brief. It contained details of information provided by other detainees and otherwise reproduced the content of Mr Sher's fourth brief (see paragraph 48 above). It provided the basis of an interview with Mr Sharif which lasted for about three hours. Mr Sharif declined to comment.

(c) Mr Farooq

54. On 10 April 2009 Mr Farooq was provided with a second brief. It was based on information provided by some of the other detainees and concerned his acquaintance with them. It formed the basis of an interview with Mr Farooq which began at around 4 p.m. and concluded just over an hour later. During the interview, Mr Farooq was asked about his

acquaintance with some of the other arrested suspects and made no reply to the questions put.

55. Again, no interviews were carried out over the Easter weekend of 11 and 12 April.

56. On 13 April Mr Farooq received a third brief which set out details of exhibits recovered from properties linked to him. The briefing document was used as the basis of a further series of interviews which lasted for just over two hours. Again Mr Farooq answered no comment to the points put to him.

57. On 14 April 2009 Mr Farooq was provided with a fourth brief in terms almost identical to that provided to Mr Sharif (see paragraph 48 above). It provided the basis of an interview with Mr Farooq which lasted for just over an hour. Mr Farooq declined to comment.

3. The second application for further detention

58. On 14 April 2009 the applicants and Mr Yousaf were informed that an application had been made to the City of Westminster Magistrates' Court to extend the warrants of further detention for a further seven days. Notification of this application was in similar terms to the earlier notice. Section 9 of the application, which was withheld from the applicants, contained detailed information about the background to the investigation, the associations of the applicants, the scenes that had been searched, the forensic analysis, and the phones, computers, DVDs and documents that had been recovered. Under section 10, there was a list of bullet points under the heading "Reason Detention is Necessary Whilst Enquiries Made", which included the need to await the conclusion of forensic searches and examination and the outcome of analyses instructed and the need to question the applicants concerning items found in their possession or at premises linked with them.

59. The application was heard on 15 April at around 9.30 a.m. and the applicants attended by video link. The hearing was entirely open. A senior police officer made the oral application, which had again been reduced to writing and provided to the applicants and Mr Yousaf. He said that the police operation in question was the most significant counter-terrorism investigation since a plot in 2006 to cause explosions on aeroplanes through the use of liquid bombs; and that the North West Counter Terrorism Unit had never undertaken an investigation of this size. He explained that searches had taken place at various properties and that only one scene had been completed and released. Three were awaiting results of forensic results and seven scenes were still being searched. A total of 3,887 exhibits had been recovered to date. Priority was being given to exhibits such as documents, computers, mobile phones, sim cards and data storage devices. A large number of computers were being searched as well as DVDs and CDs. 127 phone or sim cards had been recovered and were being

forensically examined, some with large memories. The application concluded by seeking the extension to the warrant on the grounds that it was necessary to obtain relevant evidence by questioning, to preserve relevant evidence, and pending the result or analysis of any further evidence.

60. At around 10.15 a.m. the Senior District Judge granted the extensions sought. The formal notification in relation to each applicant confirmed in writing that the judge was satisfied that the investigation was being conducted diligently and expeditiously and that there were reasonable grounds for believing that the further detention of the applicants was necessary to obtain relevant evidence. The warrants were extended by seven days, until 22 April 2009.

4. The detention from 15 April to 21 April

(a) Mr Sher

61. Mr Sher was not interviewed on 15, 16, 17 or 18 April. However, on 18 April, further briefs were provided. The documents referred to his arrest on 8 April on suspicion of commission, preparation and instigation of terrorism and continued:

> "... It has been made apparent throughout the interview process, including safety interview conducted ... and in warrant applications, that we strongly believe that your client was involved in an attack plan."

62. The document referred specifically to a wordpad document recovered from a pen drive ("the Buddy email"), which appeared to be a personal email discussing the weather and plans for an Islamic wedding "after 15th and before 20th of this month". The police believed this to be code and considered that it suggested an imminent attack. The document continued:

> "Specifically we believe that your client has been part of a conspiracy with others currently in custody to murder with explosives. He is also suspected of possessing articles considered to be of use in terrorist activity."

63. It identified various maps found with locations highlighted and photographs of public places in the North West of England. There was also a reference to a mobile phone belonging to another of the suspects which was found to contain Mr Sher's telephone number.

64. The briefing formed the basis of a series of interviews on 19 April in which specific questions were put as to Mr Sher's knowledge of these documents and the other materials. No answers were forthcoming. The total duration of the interviews was about four and a half hours.

65. On 20 April there was a final round of briefing documents, again referring to emails and computer communications, in particular via a specific and identified user name belonging to Mr Sher. In a subsequent

interview lasting around one and a quarter hours, Mr Sher made no comment.

(b) Mr Sharif and Mr Farooq

66. Neither Mr Sharif nor Mr Farooq was interviewed on 15, 16 or 17 April. A further brief was provided on 18 April to each. The document summarised information provided by some of the other detainees; set out details of significant text messages received and sent from mobile telephones which were either in the applicants' possession at the time of their arrest or discovered during the search of his residence; and gave details of other documents found during the searches, including maps of Manchester with locations highlighted. The briefing formed the basis of interviews with Mr Sharif and Mr Farooq on 18 April lasting for a total of almost three hours and one and half hours respectively. At the beginning of the interviews, Mr Sharif and Mr Farooq were told that the police believed that they had been conspiring with others to cause explosions. No responses were forthcoming during the interviews.

67. On 19 April the applicants and their solicitor received a final briefing document in similar terms in each case. The document referred to their arrest on 8 April on suspicion of commission, preparation and instigation of terrorism and continued:

> "... It has been made apparent throughout the interview process, including safety interview conducted ... and in warrant applications, that we strongly believe that your client was involved in an attack plan."

68. The document referred to the Buddy email (see paragraph 62 above) and continued:

> "Specifically we believe that your client has been part of a conspiracy with others currently in custody to murder with explosives. He is also suspected of possessing articles considered to be of use in terrorist activity."

69. In subsequent interviews with each applicant lasting around one and a quarter hours, neither made any comment.

70. No interviews took place on 20 April.

D. The applicants' release

71. On 21 April 2009 the applicants were released without charge and were served with deportation orders. They were then detained under immigration legislation and on 22 April 2009 were transferred into immigration service custody pending deportation.

E. The judicial review proceedings

72. On 26 June 2009 the applicants commenced two sets of judicial review proceedings. In one ("the first action"), they sought to challenge the deportation orders. That action does not form the basis of their application to this Court. The other ("the second action") was lodged against five defendants: (1) Greater Manchester Police ("GMP"); (2) West Yorkshire Police ("WYP"); (3) the City of Westminster Magistrates' Court; (4) Manchester Magistrates' Court; and (5) the Home Secretary. In their claim form, the applicants sought to challenge the legality of their treatment between 8 and 21 April. They contended in particular that their rights under Articles 5 §§ 2 and 4 and 6 § 1 of the Convention had been breached because they had not been provided with sufficient information at the time of arrest or detention as to the nature of the allegations against them; and because of the closed procedure permitted in hearing applications for warrants of further detention. They further argued that the searches of their homes were unlawful because the search warrants had been granted in terms that were too wide; because the terms of the warrants had been breached in that although the police had permission to undertake a search on one occasion they had actually occupied the premises for many days; and because of the seizures themselves.

73. On 21 July 2009 permission to apply for judicial review in the second action was refused by the Divisional Court. The judge summarised the remedies sought:

> "3. The remedies sought by the claimants are extensive. They are set out in section 6 of the Claim Form in these terms:
>
> '(1) A declaration that the arrest of all three claimants by the first defendant was unlawful.
>
> (2) A declaration that the detention of all three claimants authorised by the second defendant was unlawful.
>
> (3) A declaration that the detention of all three claimants authorised by the warrants of further detention, and the extension of those warrants, issued by the third defendant was unlawful.
>
> (4) A declaration that the procedure under Schedule 8 of the Terrorism Act 2000 for the hearing of applications for warrants of further detention is incompatible with Article 5(4) of the European Convention on Human Rights.
>
> (5) An order quashing the search warrants at the home addresses of the claimants.
>
> (6) A declaration that ...the issuing of ... [search warrants for the home addresses of the applicants] by the fourth defendant was ... unlawful.
>
> (7) A declaration that the entry search and seizures at home addresses of the claimants was unlawful.
>
> (8) A mandatory order requiring the return of all items seized in execution of the search warrants forthwith together with any copies howsoever made or held by the

defendants and their agents, and that no use be made of any knowledge obtained as a result of any examination or material unlawfully seized.

(9) Any other relief the court considers appropriate.

(10) Damages.

(11) Costs.'"

1. The complaints concerning the provision of information

74. As regards the applicants' complaints concerning the provision of information from the police about the reasons for their arrest and detention, the police argued that a private law remedy for wrongful arrest and wrongful imprisonment was open to the applicants and should have been pursued. The applicants insisted that judicial review was an appropriate remedy in respect of their complaints.

75. The judge held that judicial review was not the appropriate forum. The issues which arose where questions of fact which were not appropriate for judicial review proceedings. He explained:

"79. First, there is a pre-existing private law remedy available to these claimants against GMP and WYP. This is not a case where, if the claimants were not entitled to pursue judicial review proceedings, they would be left without a remedy. There can be no question of injustice if these proceedings were transferred to the QB [Queen's Bench Division]: indeed, it is only if such a transfer occurred that the defendants could exercise their right to trial by jury.

80. Secondly, these claims involve potentially complex disputes of fact ... [S]uch fact-sensitive issues are wholly inappropriate for judicial review proceedings.

81. Thirdly, the claims being made by the claimants are historic ... There is therefore no reason for these proceedings to take up the judicial resources of the Administrative Court, which are required for the numerous urgent and prospective judicial review proceedings issued in the High Court every week. And although it is said that these issues are of public importance, that is not, without more, a reason to keep a fact-sensitive dispute, where there are obvious alternative remedies, in the Administrative Court.

82. I do not consider that the claimants' complaint that there would be difficulties of public funding if the matter was transferred to the Queen's Bench Division, or that the claimants may then be the subject of an application for security for costs, can have any relevance to the question of the proper forum for these claims. Judicial review proceedings do not exist in order for claimants to circumvent the usual rules relating to civil litigation and the funding and costs thereof. It would be wholly inappropriate to allow judicial review proceedings to become some sort of 'costs-free' civil jurisdiction, which gets a claimant to the same result as his private law remedies (regardless of the nature of the underlying dispute), but without the usual costs risks. I note too that the claimants say that public funding has not been readily available for these proceedings either, so that does not appear to be a material consideration in any event. The claimants would not have to return to the UK to give evidence in their private law action, which could instead be provided by way of video-link ..."

76. He concluded that the matters raised ought to be addressed in an ordinary private law action in which the potentially complex factual

arguments could be properly determined. However, he added the following caveat:

> "84. I make plain that this conclusion is subject to one point. If the claimants were able to demonstrate that there were other parts of these claims which were arguable, and in respect of which judicial review proceedings offered them their only remedy, then in circumstances where the underlying issue was the same – namely, whether or not the claimants were given sufficient information – it *may* be a pragmatic and flexible solution for all such matters to be dealt with together in one set of judicial review proceedings. Accordingly, it is important in the subsequent sections of this Judgment to identify whether or not there are any such arguable judicial review claims."

77. He turned to consider the arguability of the judicial review claims against the police, in the event that he was wrong as to the appropriate forum. In that case, he said, the issue was whether, on the material before the court, permission to seek judicial review should be granted on the basis that no-one properly directing himself as to the relevant law could reasonably have reached the decision to arrest and detain the applicants (what he called a typical *Wednesbury* argument).

78. The judge referred, *inter alia*, to this Court's judgment in *Fox, Campbell and Hartley v. the United Kingdom*, 30 August 1990, Series A no. 182. He examined the lawfulness of the decision to arrest and commented as follows:

> "91. Each claimant was told that he was being arrested under section 41 of the Terrorism Act 2000 because the officer arresting him reasonably suspected that he was a terrorist. In my judgment, nothing more was required at that moment. As the decision in *Fox and Others* makes plain, a general statement of that sort will not usually amount to a breach of Article 5.2, provided of course that, thereafter, further information as to how and why such suspicions are held is promptly given to the suspect. For the reasons given in the next section of this Judgment, I am in no doubt that, on the material available to the court, such further information was given promptly to the claimants."

79. In the judge's view, the applicants could only challenge the lawfulness of their actual arrest by way of judicial review proceedings if their case was that the arresting officers did not honestly suspect them of being terrorists or that such belief was unreasonable. Since the applicants did not allege the absence of reasonable suspicion, the lawfulness of the arrests could not be impugned and the application to seek judicial review of the decision to arrest them was "hopeless".

80. Concerning the lawfulness of the decisions to detain the applicants for the first forty-eight hours, the judge said:

> "94. The custody logs demonstrate that, during the first 38 hours of the claimants' detention, the reviews were carried out at 12 hourly intervals and that all the appropriate and relevant information was taken into account. The records also reveal that neither the claimants nor their solicitor took any point as to their continuing detention during this period of 38 hours or so. On the face of the documents,

therefore, I consider that it is impossible to say that any sustainable *Wednesbury* case as to absence of information emerges at all.

95. That view is confirmed by a consideration of the documents provided to the claimants during this early period ... [O]n 9th April 2009 the claimants were given [the first brief] and, having had a chance to consider the material there contained, they were interviewed at length about it. From this information, the claimants would have been in no doubt that they were being detained under suspicion of being involved, with other named conspirators, in a plan to plant a terrorist bomb. In all the circumstances, it seems to me that this was sufficient information to satisfy Article 5.2 and Article 5.4, at least at that early stage."

81. In response to the applicants' allegation that their detention after 10 April was unlawful because it was on the basis of information solely derived from closed hearings, the judge emphasised that only part of the hearing on 10 April was closed and that the hearing on 15 April was entirely open. He considered that the applicants were being provided with sufficient information during this period to justify their continuing detention. He therefore viewed this part of the claim for judicial review as "fundamentally flawed". He noted that counsel for the applicants repeatedly asserted that the basis for the applicants' detention had never been explained to them, without ever attempting to engage with or address the contents of the various documents which had been provided to them. The judge continued:

"98. ... [I]t is plain from all that material that the allegations being made, and the questions being asked, were becoming more and more specific as the days passed, and that by the end of the 13 day period of detention, the claimants were each aware that they were being detained on suspicion of being involved, with other named co-conspirators, to cause imminent bomb explosions at certain specified public locations in the North West of England.

99. [Counsel for the applicants] submitted that the claimants should have been given detailed information at the outset of their detention, with a level of specificity that was akin to the information in an indictment ... I consider that that submission is wrong in principle. The whole purpose of those parts of the ... [2000 Act] is to allow suspects to be detained after arrest without being charged because, at the time of their arrest, and perhaps for many days thereafter, it may not be possible to formulate charges against them as specifically as would appear on an indictment. That is precisely why Parliament has said that suspects can be detained without charge for up to 28 days, in order to allow further information as to the proposed charges to be obtained. Provided that sufficient information is provided to allow those detained under the [2000 Act] to challenge the lawfulness of that detention, if that is what they wish to do, then that is sufficient to satisfy both Article 5.2 and Article 5.4.

100. Of course ... the time will always come when more specific details of the suspected offences must be provided to the detainees. In this case, for the reasons that I have given, I consider that sufficient information was provided to the claimants to allow them to know why they were being detained and to challenge the lawfulness of the decision to detain them. They knew who the other conspirators were alleged to be, what the suspected crime was (intending explosions in particular public places in the North West), and what at least some of the evidence was ... that directly linked them to these allegations."

82. The judge concluded in respect of the provision of information that if, contrary to his view, judicial review proceedings against the police were appropriate, he would refuse permission as the claim was not arguable on the material provided. He accepted that the question whether the decisions of the City of Westminster Magistrates' Court to issue warrants of further detention were unlawful because inadequate information had been provided to the applicants about the reasons for their continued detention was potentially a matter of public law. However, he was satisfied that the claim was "fanciful" and unarguable since sufficient information was provided in the documents and the open hearings for the applicants to know why they were being detained.

2. The complaints concerning the searches

(a) The manner of execution of the searches

83. In respect of allegations that the police had gone outside the terms of the search warrant by executing it over a number of days and of complaints about the seizures themselves, the police again argued that judicial review proceedings were not appropriate and that private law proceedings should have been pursued by the applicants. The judge found this submission to be unarguably correct.

84. In any event, the judge held that even if these were matters for judicial review, there was no basis for concluding that the claim was arguable. He considered that the words "on one occasion" in the warrant authorised the police go to the property in question, undertake the search, and, when they had concluded that search, restore the property to the control of its occupiers. That was precisely what had happened here. The fact that the "occasion" lasted for more than one calendar day was irrelevant since there was nothing temporal about the word "occasion". Further, the complaint that certain seized items had not been returned could and would have been resolved had the applicants followed the judicial review pre-action protocol. Again, the judge concluded that if, contrary to his view, judicial review proceedings were appropriate, he would refuse permission as the claim was "hopeless".

(b) The scope of the search warrants

85. As to the complaint that the warrants were too wide, a complaint which the judge found was amenable to judicial review, he observed that the criticism appeared to be that because the warrants contained a lengthy list of references to common household items, such a list must, of itself, be too extensive or onerous. He rejected that submission for three reasons. First, he considered the assertion to be too general since a list that was too onerous in one case might be entirely appropriate in another. He continued:

> "109. Secondly, in a situation like this, the police will be unlikely to know precisely what they are looking for. So they will identify those sorts of items which, in the past, have been relevant to searches such as this. Thus there are specific references to travel documents, computers, books, DVDs and the like. But it would be unrealistic for this court now to say, over a year later, that one or two of these items might, with hindsight, have been irrationally included in a list produced at the outset of a major terrorism investigation.
>
> 110. Thirdly, the court must recognise, in undertaking these urgent investigations, the police are not hamstrung by an artificially restricted list of items that they can investigate and/or seize. It would be contrary to the public interest if, on a search of premises in the context of an ongoing and urgent terrorism investigation, the police were inhibited because item A was on the list but item B was not. There is a clear public interest in ensuring that, within properly defined limits, the list is not restricted."

86. He concluded that it was "inevitable" that in cases like this the warrants would be in relatively wide terms, explaining that the need to ensure public safety under the Terrorism Act 2000 required nothing less. He accordingly rejected the submission that the warrants were in terms that were too wide or that there was an arguable case that the decision to issue the warrants in those terms was unlawful or irrational.

3. The complaints concerning the procedure for issuing a warrant for further detention

87. Finally, the judge addressed the claim that the procedure for hearing applications for warrants of further detention the 2000 Act was incompatible with section 5 § 4 of the Convention because although it allowed for a closed procedure, there was no system of special advocates in place. He found this to be a matter which, if it was appropriate to grant permission, would justify judicial review proceedings.

88. However, he considered the claim to be unarguable. He referred to the judgment of the House of Lords in *Ward* (see paragraphs 104-105 below) which, he said, made clear that the closed hearing procedure was compatible with the Convention. He therefore rejected the submission that the provision of a special advocate was essential to ensure the fairness of the proceedings. He further noted that the applicants had not explained why the absence of express provision in the 2000 Act for a special advocate led inevitably to the conclusion that the scheme was incompatible with Article 5 § 4, since the District Judge could provide the necessary critical scrutiny in the interests of the person who was the subject of the proceedings. In any event, he held that such an advocate could have been appointed by the District Judge had such a course been considered necessary in the interests of justice. He noted that the applicants had not requested the appointment of a special advocate at either hearing. Finally, the judge considered the applicants' case to be wrong on the facts since the warrants of further detention were not made entirely on the basis of closed

information: only part of the 10 April hearing had been closed and the 15 April hearing had been entirely open. The claim for permission therefore failed both in principle and on the facts.

F. The applicants' return to Pakistan

89. In September 2009, all three applicants voluntarily returned to Pakistan.

II. RELEVANT DOMESTIC LAW AND PRACTICE

A. Arrest and detention under the Terrorism Act 2000

90. The 2000 Act allows for the arrest and detention without charge of suspected terrorists for a maximum of twenty-eight days. The relevant provisions are set out in more detail below.

1. Power of arrest

91. Section 41(1) of the 2000 Act allows a constable to arrest without a warrant a person whom he reasonably suspects to be a terrorist. The 2000 Act defines a terrorist as either someone who has committed an offence under certain sections of the Act (section 40(1)(a)), or someone who "is or has been concerned in the commission, preparation or instigation of acts of terrorism" (section 40(1)(b)).

92. Terrorism itself is defined in section 1 of the Act in these terms:

> "(1) ... the use or threat of action where–
>
> (a) The action falls within sub-section (2),
>
> (b) The use or threat is designed to influence the government or an international governmental organisation or to intimidate the public or a section of the public, and
>
> (c) The use or threat is made for the purpose of advancing a political, religious, racial or ideological cause."

93. Section 1(2) covers action which:

> "(a) involves serious violence against a person,
>
> (b) involves serious damage to property,
>
> (c) endangers a person's life, other than that of the person committing the action,
>
> (d) creates a serious risk to the health or safety of the public or a section of the public, or
>
> (e) is designed seriously to interfere with or seriously to disrupt an electronic system."

94. Pursuant to section 1(3), the use or threat of action which involves the use of firearms or explosives is terrorism, whether or not section 1(1)(b) is satisfied.

95. Section 41(3) stipulates, in so far as relevant to the present case, that a person detained under section 41 shall, subject to the other provisions of the section and unless detained under any other power, be released not later than a period of forty-eight hours beginning with the time of his arrest under that section.

2. Periodic review

96. Schedule 8, Part II of the 2000 Act sets out detailed provisions governing the detention of any person arrested under the Act.

97. Pursuant to paragraph 21, a person's detention should be periodically reviewed by a review officer. The first review should be carried out as soon as reasonably practicable after the time of the person's arrest. Subsequent reviews must, except in specific limited cases, be carried out at intervals of not more than twelve hours. No review of a person's detention should be carried out after a warrant extending his detention has been issued by a court (see paragraph 100 below).

98. Paragraph 23 entitles a review officer to authorise a person's continued detention only if satisfied that it is necessary: (a) to obtain relevant evidence whether by questioning him or otherwise; (b) to preserve relevant evidence; or (c) pending the result of an examination or analysis of any relevant evidence. Continued detention cannot be authorised under (a) or (b) unless the review officer is satisfied that the investigation is being conducted diligently and expeditiously. "Relevant evidence" is evidence that relates to the commission by the detained person of an offence set out in the Act or indicates that the detained person has been concerned in the commission, preparation or instigation of acts of terrorism.

99. Pursuant to paragraph 26, before determining whether to authorise a person's continued detention, a review officer must give the detained person or his solicitor an opportunity to make oral or written representations about the detention.

3. Warrants of further detention issued by a judicial authority

100. Paragraph 29 of Schedule 8 entitles a Crown prosecutor or senior police officer to apply to a court for the issue of a warrant of further detention. Under paragraph 36, where the application is to extend the detention up to a maximum of fourteen days from the date of arrest, it can be made to a District Judge. Applications for further detention beyond fourteen days must be put before a High Court judge, who may authorise detention up to a maximum of twenty-eight days in total from the date of arrest. Section 41(7) of the Act provides that where an application under

paragraph 29 or 36 of Schedule 8 is granted in respect of a person's detention, he may be detained during the period specified in the warrant.

101. Pursuant to paragraph 31 of Schedule 8, a detained person must be given notice of the application for a warrant of further detention and the grounds on which further detention is sought. Paragraph 33 allows the detained person an opportunity to make oral or written representations about the application for a warrant of further detention and provides a general entitlement to legal representation at the hearing. Pursuant to paragraph 33(3), the court may exclude the detained person and his solicitor from any part of the hearing.

102. Paragraph 34 provides that the person who has made an application for a warrant may apply for an order that specified information upon which he relies be withheld from the detained person and his solicitor. A court may make such an order only if satisfied that there are reasonable grounds for believing that, if the information were disclosed, evidence would be interfered with or harmed; the apprehension, prosecution or conviction of a suspected terrorist would be made more difficult as a result of his being alerted; the prevention of an act of terrorism would be made more difficult as a result of a person being alerted; the gathering of information about the commission, preparation or instigation of an act of terrorism would be interfered with; or a person would be interfered with or physically injured.

103. Paragraph 32(1) provides that a warrant of further detention may be issued only if there are reasonable grounds for believing that the further detention of the person is necessary and the investigation is being conducted diligently and expeditiously. Pursuant to paragraph 32(1A), the further detention of a person is "necessary" if it is necessary to obtain relevant evidence whether by questioning him or otherwise; to preserve relevant evidence; or pending the result of an examination or analysis of any relevant evidence. "Relevant evidence" is evidence that relates to the commission by the detained person of an offence set out in the 2000 Act or indicates that the detained person has been concerned in the commission, preparation or instigation of acts of terrorism.

104. In *Ward v Police Service of Northern Ireland* [2007] UKHL 50, the House of Lords considered the fairness of the provisions of Schedule 8 in a case where the judge had excluded the appellant and his solicitor from a hearing on an application to extend a warrant of detention for about ten minutes to consider closed information. The appellant sought judicial review of the decision to grant the warrant of further detention and his claim was refused. His appeal to the House of Lords was subsequently dismissed. The Committee explained at the outset:

> "11. Section 41 of the Act ... enables a constable to arrest without warrant a person whom he reasonably suspects to be a terrorist. The length of the detention that may follow on such an arrest is the subject of a carefully constructed timetable. This timetable, in its turn, is the subject of a series of carefully constructed procedural

safeguards. The detained person's right to liberty demands that scrupulous attention be paid to those safeguards ..."

105. After careful consideration of the provisions of the 2000 Act permitting the detained person and his representative to be excluded from part of a hearing, the Committee said:

"27. ... [T]he procedure before the judicial authority which para 33 contemplates has been conceived in the interests of the detained person and not those of the police. It gives the person to whom the application relates the right to make representations and to be represented at the hearing. But it recognises too the sensitive nature of the inquiries that the judicial authority may wish to make to be satisfied, in that person's best interests, that there are reasonable grounds for believing that the further detention that is being sought is necessary. The more penetrating the examination of this issue becomes, the more sensitive it is likely to be. The longer the period during which an extension is permitted, the more important it is that the grounds for the application are carefully and diligently scrutinised.

28. As in this case, the judicial authority's need to scrutinise may trespass upon the right of the police to withhold from a suspect the line of questioning they intend to pursue until he is being interviewed. If it does, it will not be to the detained person's disadvantage for him to be excluded so that the judicial authority may examine that issue more closely to see whether the exacting test for an extension that para 32 lays down is satisfied. The power will not in that event be being used against the detained person but for his benefit ...

29. There may be cases where there is a risk that the power given to the judicial authority by para 33(3) will operate to the detained person's disadvantage. Those cases are likely to be rare, but the judicial authority must always be careful not to exercise it in that way ..."

B. Search powers under the 2000 Act

106. Schedule 5 of the 2000 Act sets out powers relating to searches. Paragraph 1 of Schedule 5 allows a constable to apply to a justice of the peace for the issue of a warrant for the purposes of a terrorist investigation authorising any constable to enter premises, search them and seize and retain any relevant material found. Pursuant to paragraph 1(3), material is relevant if the constable has reasonable grounds for believing that it is likely to be of substantial value to a terrorist investigation and it must be seized in order to prevent it from being concealed, lost, damaged, altered or destroyed.

107. Paragraph 1(5) provides that a justice may grant an application if satisfied that the warrant is sought for the purposes of a terrorist investigation; that there are reasonable grounds for believing that there is material on the premises which is likely to be of substantial value, whether by itself or together with other material, to a terrorist investigation; and that the issue of a warrant is likely to be necessary in the circumstances of the case.

C. Judicial review

1. Appropriateness of remedy

(a) Decisions to arrest and detain

108. In *R (Rawlinson & Hunter Trustees and Others) v. Central Criminal Court & Anor* [2012] EWHC (Admin) 2254, the claimant had been arrested and sought to challenge by way of judicial review the decision to arrest him. Although there was some discussion of whether judicial review was the appropriate forum, the police accepted that judicial review was the appropriate way to challenge the arrest decision and the Divisional Court agreed. It appears that the claimant had accepted in the proceedings before the court that there was no significant factual dispute between the parties and the claim could be resolved on the basis of the documentary evidence.

(b) Decisions to grant search warrants

109. In *Bell v. Greater Manchester Police* [2005] EWCA Civ 902, the claimant sought to challenge the validity of a search warrant in private law proceedings. He complained that the warrant had been obtained on a misleading basis and that it did not properly identify the material the subject of the search. The Court of Appeal agreed with the first-instance judge that the proper avenue for challenge to the validity of the warrant was by way of proceedings for judicial review.

110. In *R (Goode) v. Crown Court at Nottingham* [2013] EWHC 1726 (Admin) the Administrative Court said:

> "51. The issue of a [search] warrant is a judicial act. It would be a novel and surprising development of the law if a court of equal jurisdiction enjoyed the power to declare invalid the judicial act of another ..."

111. The court emphasised that while a seizure of property without judicial authority could be challenged in the Crown Court, a warrant issued with judicial authority could subsequently be quashed or declared unlawful only by the Administrative Court in proceedings for judicial review of the power exercised by the Magistrates Court or the Crown Court.

112. In *R (Lees and Others) v. Solihull Magistrates' Court and Another* [2013] EWHC 3779 (Admin), the Divisional Court, citing *R (Goode)*, said that it was clear that the only forum for a challenge to the validity of a search warrant was in judicial review proceedings.

2. Appeal against a refusal to grant permission

113. Rule 52.15 of the Civil Procedure Rules ("CPR") provides:

"(1) Where permission to apply for judicial review has been refused at a hearing in the High Court, the person seeking that permission may apply to the Court of Appeal for permission to appeal."

114. Section 18(1) of the Senior Courts Act 1981 provides, in so far as relevant:

"No appeal shall lie to the Court of Appeal–

(a) ... from any judgment of the High Court in any criminal cause or matter"

115. In *Amand v. Home Secretary and Minister of Defence of Royal Netherlands Government* [1943] A.C. 147, the House of Lords decided that the refusal of an application for habeas corpus by a person arrested with a view to extradition was a decision in a "criminal cause or matter" (as set out in a predecessor Act). Viscount Simon LC held:

"This distinction between cases of habeas corpus in a criminal matter, and cases when the matter is not criminal goes back very far ... It is the nature and character of the proceeding in which habeas corpus is sought which provide the test. If the matter is one the direct outcome of which may be trial of the applicant and his possible punishment for an alleged offence by a court claiming jurisdiction to do so, the matter is criminal."

116. Lord Wright explained:

"The principle which I deduce from the authorities I have cited and the other relevant authorities which I have considered, is that if the cause or matter is one which, if carried to its conclusion, might result in the conviction of the person charged and in a sentence of some punishment such as imprisonment or a fine, it is a 'criminal cause or matter.' The person charged is thus put in jeopardy. Every order made in such a cause or matter by an English court, is an order in a criminal cause or matter, even though the order, taken by itself, is neutral in character and might equally have been made in a cause or matter which is not criminal. The order may not involve punishment by the law of this country, but if the effect of the order is to subject by means of the operation of English law the persons charged to the criminal jurisdiction of a foreign country, the order is, in the eyes of English law for the purposes being considered, an order in a criminal cause or matter ..."

117. Finally, Lord Porter held:

"... This does not mean that the matter, to be criminal, must be criminal throughout. It is enough if the proceeding in respect of which mandamus was asked is criminal, e.g., the recovery of a poor rate is not of itself a criminal matter, but its enforcement by magistrates by warrant of distress is, and if a case be stated by them as to their right so to enforce it and that the case is determined by the High Court, no appeal lies ... The proceeding from which the appeal is attempted to be taken must be a step in a criminal proceeding, but it need not of itself of necessity end in a criminal trial or punishment. It is enough if it puts the person brought up before the magistrate in jeopardy of a criminal charge ..."

118. In *R (Guardian News and Media Ltd) v. City of Westminster Magistrates' Court* [2011] EWCA Civ 1188, a newspaper had unsuccessfully requested access to documents referred to by the Magistrates' Court in extradition proceedings. The Divisional Court upheld

the ruling of the District Judge. The question arose in the Court of Appeal whether the proceedings were a "criminal cause or matter". The newspaper accepted that the extradition proceedings themselves were a "criminal cause or matter" but submitted that the order refusing journalistic access to the underlying material was not. Lord Neuberger, delivering the judgment of the court, undertook a review of the authorities in the area and considered that the newspaper's application had been wholly collateral to the extradition proceedings and made by someone not a party to those proceedings. The order of the District Judge did not invoke the Magistrates' Court's criminal jurisdiction and had no bearing upon the criminal (i.e. extradition) proceedings themselves. Lord Neuberger expressed the opinion that "any sort of final coherence in relation to the scope and effect of section 18(1)(a) can only be provided by the Supreme Court" and concluded that the best way of applying the "rather tangled" jurisprudence developed over the past thirty-five years, and ensuring maximum coherence, was to hold that the Court of Appeal had jurisdiction to hear the appeal in the case.

119. In its December 2014 judgment in *Panesar & Others v HM Revenue and Customs* [2014] EWCA Civ 1613 the Court of Appeal considered the meaning of "criminal cause or matter" in a case concerning retention, under section 59 of the Criminal Justice and Police Act 2001, of property seized pursuant to search warrants that were subsequently quashed. The court found that the case concerned a "criminal cause or matter" and concluded that it had no jurisdiction to hear an appeal. The appellants were instead obliged to make their application to the Divisional Court for certification of a point of law of general importance and pursue their appeal to the Supreme Court. Lord Justice Burnett referred to the "at times inconsistent authority on the meaning of 'criminal cause or matter'" and acknowledged that the authorities on the meaning of "criminal cause or matter" had "given rise to some uncertainty and, as Lord Neuberger recognised in the *Guardian* case, some incoherence".

D. The Human Rights Act 1998

120. Section 3(1) of the Human Rights Act 1998 ("the Human Rights Act") requires legislation to be "read down" so far as possible in order to be interpreted compatibly with the Convention.

121. Section 4 of the Act provides, in so far as relevant:

> "(1) Subsection (2) applies in any proceedings in which a court determines whether a provision of primary legislation is compatible with a Convention right.
>
> (2) If the court is satisfied that the provision is incompatible with a Convention right, it may make a declaration of that incompatibility."

122. Section 6(1) of the Act provides that it is unlawful for a public authority to act in a way which is incompatible with a Convention right. Section 6(2) clarifies that:

> "Subsection (1) does not apply to an act if–
>
> (a) as the result of one or more provisions of primary legislation, the authority could not have acted differently; or
>
> (b) in the case of one or more provisions of, or made under, primary legislation which cannot be read or given effect in a way which is compatible with the Convention rights, the authority was acting so as to give effect to or enforce those provisions."

123. Section 7(1) provides that a person who claims that a public authority has acted in a way made unlawful by section 6(1) may bring proceedings against the authority.

124. Section 8(1) of the Act permits a court to make a damages award in relation to any act of a public authority which the court finds to be unlawful.

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 5 §§ 2 AND 4 OF THE CONVENTION IN RESPECT OF PROVISION OF INFORMATION

125. The applicants complained that they were not given adequate information by the police about the specific allegations against them to enable them to mount an effective challenge to the lawfulness of their detention. They relied on Article 5 §§ 2 and 4 of the Convention, which provide in so far as relevant as follows:

> "2. Everyone who is arrested shall be informed promptly, in a language which he understands, of the reasons for his arrest and of any charge against him."
>
> "4. Everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful."

A. Admissibility

1. The parties' submissions

126. The Government's position was that the applicants had failed to exhaust available remedies as regards this complaint in two respects. First, they had failed to bring a private-law claim concerning their complaint about the provision of information regarding their arrest and detention. The Government pointed out that the Divisional Court had held that the complaints should have been brought by way of a private-law action

because they raised fact-sensitive issues inappropriate for judicial review proceedings. In light of the Divisional Court judgment, the applicants could undoubtedly have brought a civil damages claim in respect of their arrest and initial detention. The Government emphasised that the applicants did not argue that their detention was lawful under domestic law irrespective of compliance with Article 5 of the Convention, such that the only appropriate remedy would be a declaration of incompatibility under the Human Rights Act (see paragraph 121 above). In so far as the applicants contended that they were unable to pursue a private-law claim from Pakistan and would not have been able to obtain legal funding, the Government pointed out that the applicants had pursued the judicial review claim and the case before this Court without difficulty. It was also relevant, the Government argued, that the applicants were not excluded in principle from obtaining legal aid and, in any case, refusal to grant legal aid would not have rendered the bringing of a private-law claim impractical.

127. Second, the Government argued that the applicants had failed to exhaust available remedies because they had not renewed their application for permission to bring judicial review to the Court of Appeal. The CPR made provision for renewal of an application for permission to the Court of Appeal under Rule 52.15(1) (see paragraph 113 above). Although section 18(1)(a) of the 1981 Act precluded such appeals in any "criminal cause or matter" (see paragraph 114 above), the Government did not agree that the applicants' complaints before the Divisional Court concerned a "criminal cause or matter". The Divisional Court had found that complaints in respect of the applicants' arrest and initial detention should have been brought by private-law action and claims against the police, whether in judicial review or by way of private-law claims, were civil in nature.

128. The applicants did not accept that they could have brought a private-law action in respect of their complaints. In their view, the challenge brought could only have proceeded by way of judicial review. They referred to the Divisional Court's judgment in *Rawlinson* (see paragraph 108 above) in support of their position that it was perfectly proper for matters of arrest and detention to be challenged by way of judicial review. They argued that it would not have been possible to seek a declaration of incompatibility as the basis for unlawful detention in a private-law action. They further contended that legal aid would have been impossible to obtain, particularly given budgetary cuts and the fact that the applicants were, by that stage, resident abroad.

129. The applicants also argued that, in light of section 18(1)(a) of the 1981 Act, they had no right to renew their application for permission before the Court of Appeal, permission having been refused by the Divisional Court in a "criminal cause or matter". They insisted that there could be no doubt that all the matters that were before the Divisional Court were

criminal causes or matters and referred to the Court of Appeal's judgment in *Panesar* (see paragraph 119 above).

2. The Court's assessment

130. It is primordial that the machinery of protection established by the Convention is subsidiary to the national systems safeguarding human rights. This Court is concerned with the supervision of the implementation by Contracting States of their obligations under the Convention. It cannot, and must not, usurp the role of Contracting States whose responsibility it is to ensure that the fundamental rights and freedoms enshrined therein are respected and protected on a domestic level. The rule of exhaustion of domestic remedies is therefore an indispensable part of the functioning of this system of protection. States are dispensed from answering before an international body for their acts before they have had an opportunity to put matters right through their own legal system and those who wish to invoke the supervisory jurisdiction of the Court as concerns complaints against a State are thus obliged to use first the remedies provided by the national legal system (see, amongst many authorities, *Akdivar and Others v. Turkey*, 16 September 1996, § 65, Reports of Judgments and Decisions 1996‑IV; and *Gough v. the United Kingdom*, no. 49327/11, § 137, 28 October 2014).

131. As stipulated in its *Akdivar* judgment (cited above, §§ 66-67), normal recourse should be had by an applicant to remedies which are available and sufficient to afford redress in respect of the breaches alleged. The existence of the remedies in question must be sufficiently certain not only in theory but in practice, failing which they will lack the requisite accessibility and effectiveness (see also *Gough*, cited above § 138).

132. As the Court also held in *Akdivar* (cited above, § 68), in the area of the exhaustion of domestic remedies there is a distribution of the burden of proof. It is incumbent on the Government claiming non-exhaustion to satisfy the Court that the remedy was an effective one available in theory and in practice at the relevant time, that is to say, that it was accessible, was one which was capable of providing redress in respect of the applicant's complaints and offered reasonable prospects of success. However, once this burden of proof has been satisfied, it falls to the applicant to establish that the remedy advanced by the Government was in fact exhausted or was for some reason inadequate and ineffective in the particular circumstances of the case or that there existed special circumstances absolving him or her from the requirement (see also *Gough*, cited above § 139).

133. Finally, the application of the rule must make due allowance for the fact that it is being applied in the context of machinery for the protection of human rights that the Contracting Parties have agreed to set up and that it must therefore be applied with some degree of flexibility and without excessive formalism (see *Akdivar*, cited above, § 69; and *Gough*, cited above § 140).

134. In the present case the Government have argued that two remedies were open to the applicants to pursue further their complaints concerning the alleged inadequacy of the information provided to them at the time of their arrest and detention. The applicants contested the availability of either remedy on the facts of their case.

135. It is generally unsatisfactory for this Court to find itself in the position of being asked to pronounce on the correct interpretation of domestic law. Both the question whether the present complaint ought to have been pursued in private-law proceedings and the question whether it concerned a "criminal cause or matter", thus excluding the jurisdiction of the Court of Appeal, are questions better resolved by the domestic courts. However, the Court is required to assess whether domestic remedies have been exhausted and where there is a dispute between the parties about the effectiveness of a particular remedy the Court will decide the matter in accordance with the principles outlined above (see paragraphs 130-133).

136. As regards the first question, the Divisional Court made its view that private-law proceedings were appropriate to challenge the arrest and detention decisions by the police in the applicants' case very clear in its judgment. As noted above, it is in principle for the domestic courts to determine such questions and the finding of an independent and impartial superior court, such as that of the Divisional Court in the present case, that a remedy is available will generally constitute *prima facie* evidence of the existence of such remedy. The applicants referred to the case of *Rawlinson* (see paragraph 108 above) in support of their argument that judicial review, and not private-law proceedings, was the appropriate route to challenge arrest and detention decisions. However, it does not appear that the Divisional Court's judgment in that case provides support for the general rule contended for by the applicants and the applicants did not point to any specific passage of that judgment which they contended could carry such an interpretation. Moreover, while in their initial application they claimed that it would have been impossible to obtain legal aid for private-law proceedings, as the Government pointed out (see paragraph 126 above), they were not excluded in principle from the possibility of applying for legal aid. In these circumstances; and in the absence of any cited authority or examples of a restrictive approach to the award of legal aid in cases such as the applicants', the argument that legal aid would not have been available is wholly speculative.

137. Further, the Court is of the opinion that the applicants have failed to demonstrate that they were not able to renew their application for permission to bring judicial review to the Court of Appeal. The domestic judgment cited by the applicants and other judgments to which it refers (see paragraphs 115-119 above) are of little assistance, since the finding that a "criminal cause or matter" was at stake in those cases followed a careful discussion of the specific facts of the cases. The judgments themselves

recognise the ambiguity surrounding the meaning of "criminal cause or matter", with Lord Neuberger expressing the view that only the Supreme Court would be in a position to resolve the question (see paragraph 118 above). Subsequently, in *Panesar*, the Court of Appeal recognised the uncertainty and incoherence to which the existing, at times inconsistent, authorities had given rise (see paragraph 119 above). While the court in that case concluded that a "criminal cause of matter" was at stake, its conclusion followed a careful examination of section 59 of the Criminal Justice and Police Act 2001, the legislative provision in respect of which the proceedings had been brought. That provision is not implicated in the present case. Given the finding of the Divisional Court as to the private-law nature of the applicants' claim, it cannot be said with any degree of certainty that the Court of Appeal would have found that the case concerned a "criminal cause or matter" and that that court accordingly had no jurisdiction in the case.

138. The rule of exhaustion in Article 35 § 1 reflects the fundamentally subsidiary role of the Convention mechanism. The fact that the applicants dispute the findings of the Divisional Court, adjudicating at first instance, as to the true nature of the claims advanced and the appropriate domestic remedy merely underlines the importance of review of that judgment by a more senior domestic court. The Court is satisfied that the Government have demonstrated the availability of remedies that were effective and available in theory and in practice at the relevant time, that is to say, that they were accessible, capable of providing redress in respect of the applicants' complaint and offered reasonable prospects of success. The applicants have failed to establish that these remedies were inadequate and ineffective in the particular circumstances of their case or that there existed special circumstances absolving them from the requirement to pursue them.

139. The applicants' complaints under Article 5 §§ 2 and 4 as regards provision of information by the police concerning the reasons for their arrest and detention are accordingly inadmissible and must be rejected pursuant to Article 35 §§ 1 and 4 of the Convention.

II. ALLEGED VIOLATION OF ARTICLE 5 § 4 OF THE CONVENTION AS REGARDS THE PROCEDURE FOR GRANTING WARRANTS OF FURTHER DETENTION

140. The applicants complained that the procedure for hearing applications for warrants of further detention under Schedule 8 of the 2000 Act (see paragraphs 100-103 above) was incompatible with Articles 5 § 4 and 6 § 1 because it allowed evidence to be given in closed session and made no provision for special advocates. The Court considers that the complaint falls to be examined under Article 5 § 4 of the Convention only, which reads:

"Everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful."

141. The Government contested the applicants' argument.

A. Admissibility

142. The Government accepted that section 18(1)(a) of the 1981 Act (see paragraph 114 above) was likely to have prevented an appeal to the Court of Appeal in respect of this complaint. They did not argue that this complaint was inadmissible on non-exhaustion grounds.

143. The Court is satisfied that the application raises arguable issues under Article 5 § 4 of the Convention, so that it cannot be rejected as manifestly ill-founded within the meaning of Article 35 § 3 (a) of the Convention. The Court further considers that the application is not inadmissible on any other grounds. It must therefore be declared admissible.

B. Merits

1. The parties' submissions

(a) The applicants

144. The applicants conceded that they did not make an application at either hearing before the City of Westminster Magistrates' Court for a special advocate but argued that the right to a special advocate should have been explicit in the legislation. They accepted that the procedural safeguards in Article 5 § 4 were not unvarying. However, they maintained that if both domestic and European courts had held that the provision of special advocates and sufficient information in open session were necessary to safeguard Article 5 rights of individuals where there had been an interference with those rights falling short of a deprivation of liberty, then it had to follow that at least that level of protection was to be afforded where a deprivation of liberty was at stake. The failure to provide disclosure to the applicants compounded the problem. In these circumstances, decisions were made, or might be made, almost entirely based on evidence given in closed session. In the applicants' view, the Government had failed to justify its position that their case could be distinguished from that of *A. and Others v. the United Kingdom* [GC], no. 3455/05, ECHR 2009.

(b) The Government

145. The Government argued that the procedural requirements of Article 5 § 4 were not unvarying but depended on the particular

circumstances. They emphasised that the applicants' case involved an extremely complex investigation into a suspected imminent terrorist attack.

146. Distinguishing *A. and Others*, cited above, the Government pointed out that the applicants in the present case were detained for a total of thirteen days only and that the Article 5 § 4 requirements formulated in the context of the former case applied against the backdrop of lengthy or indefinite detention pending charge. Although the applicants had not been privy to all the information placed before the District Judges, they were not deprived of their Article 5 § 4 rights since: (i) they were informed of the legal basis and reasons for their detention; (ii) they were legally represented and able to make submissions to the District Judges, as well as call evidence or cross-examine the police witness; (iii) the more detailed explanation of the reasons for which detention was being sought were fully before the District Judges, even if it was withheld from the applicants; (iv) the procedure employed enabled the District Judges to be given a detailed explanation of the basis for suspicions so that they could ask questions and, if not satisfied, refuse to order detention; and (v) it was open to the District Judges to order the appointment of a special advocate if they considered it appropriate.

2. The Court's assessment

(a) General principles

147. As the Court explained in *A. and Others*, cited above, § 203, the requirement of procedural fairness under Article 5 § 4 does not impose a uniform, unvarying standard to be applied irrespective of the context, facts and circumstances. As a general rule, an Article 5 § 4 procedure must have a judicial character but it is not always necessary that the procedure be attended by the same guarantees as those required under Article 6 for criminal or civil litigation. The guarantees it provides must be appropriate to the type of deprivation of liberty in question.

148. A deprivation of liberty under Article 5 § 1 (c), as in the present case, is permitted where there is a reasonable suspicion that a person has committed an offence. A key question for a court reviewing the legality of detention is whether a reasonable suspicion exists. It will be for the authorities to present evidence to the court demonstrating grounds for such a reasonable suspicion. This evidence should in principle be disclosed to the applicant to enable him to challenge the grounds relied upon.

149. However, as the Court has explained, terrorist crime falls into a special category. Because of the attendant risk of loss of life and human suffering, the police are obliged to act with utmost urgency in following up all information, including information from secret sources. Further, the police may frequently have to arrest a suspected terrorist on the basis of information which is reliable but which cannot, without putting in jeopardy

the source of the information, be revealed to the suspect or produced in court. Article 5 § 1 (c) of the Convention should not be applied in such a manner as to put disproportionate difficulties in the way of the police authorities in taking effective measures to counter organised terrorism in discharge of their duty under the Convention to protect the right to life and the right to bodily security of members of the public. Contracting States cannot be asked to establish the reasonableness of the suspicion grounding the arrest of a suspected terrorist by disclosing the confidential sources of supporting information or even facts which would be susceptible of indicating such sources or their identity (see *Fox, Campbell and Hartley v. the United Kingdom*, 30 August 1990, §§ 32-34, Series A no. 182). It follows that Article 5 § 4 cannot require disclosure of such material or preclude the holding of a closed hearing to allow a court to consider confidential material. Pursuant to Article 5 § 4, the authorities must disclose adequate information to enable the applicant to know the nature of the allegations against him and have the opportunity to lead evidence to refute them. They must also ensure that the applicant or his legal advisers are able effectively to participate in court proceedings concerning continued detention.

(b) Application of the general principles to the facts of the case

150. In *A. and Others*, cited above, the Court took as its starting point that at the time of the detention of the applicants in that case, there was considered to be an urgent need to protect the population of the United Kingdom from terrorist attack by al-Qaeda and a strong public interest in obtaining information about al-Qaeda and its associates and in maintaining the secrecy of the sources of such information (see § 216 of the Court's judgment). The present case, like *A. and Others*, concerned allegations of a planned large-scale terrorist attack which, if carried out, was likely to result in significant loss of life and serious injury. The applicants did not argue that the context of their arrests was inadequate to justify the holding of a closed hearing and restrictions on their right to disclosure. The Court is satisfied that the threat of an imminent terrorist attack, identified in the course of Operation Pathway, provided ample justification for the imposition of some restrictions on the adversarial nature of the proceedings concerning the warrants for further detention, for reasons of national security.

151. In terms of the applicable legal framework governing proceedings for warrants of further detention, Schedule 8 to the 2000 Act sets out clear and detailed procedural rules. Thus, a detained person must be given notice of an application for a warrant of further detention and details of the grounds upon which further detention is sought. He is entitled to legal representation at the hearing and has the right to make written or oral submissions. The possibility of withholding specified information from the

detained person and his lawyer is likewise provided for in Schedule 8 and is subject to the court's authorisation. Schedule 8 also sets out the right of the court to order that a detained person and his lawyer be excluded from any part of a hearing. The grounds for granting a warrant of further detention are listed in Schedule 8 (see paragraphs 100-103 above).

152. The proceedings in the present case, which took place before the City of Westminster Magistrates' Court, were judicial in nature and followed the procedure set out in Schedule 8. An application for the warrants of further detention was made and served on the applicants the day before each of the two hearings (see paragraphs 39 and 58 above). The majority of each application was disclosed, with only information in section 9 of the application, concerning the further inquiries to be made, being withheld (see paragraphs 40 and 58 above). That information was provided to the District Judge and the applicants were given reasons for the withholding of the information (see paragraph 42 above).

153. It is true that part of the hearing on 10 April 2009 was closed to enable the District Judge to scrutinise and ask questions about the section 9 material (see paragraph 41 above). However, as the House of Lords explained in *Ward* (see paragraph 105 above), the procedure in Schedule 8 allowing the court to exclude the applicants and their lawyers from any part of a hearing was conceived in the interests of the detained person, and not in the interests of the police. It enabled the court to conduct a penetrating examination of the grounds relied upon by the police to justify further detention in order to satisfy itself, in the detained person's best interests, that there were reasonable grounds for believing that further detention was necessary. The Court is further satisfied that the District Judge was best placed to ensure that no material was unnecessarily withheld from the applicants (see, similarly, *A. and Others*, cited above, § 218).

154. The applicants complain specifically about the failure of the Schedule 8 procedure to make provision for the appointment of a special advocate. However, it is clear from the judgment of the Divisional Court that the District Judge had the power to appoint a special advocate if he considered such appointment necessary to secure the fairness of the proceedings (see paragraph 88 above). The applicants do not contest that finding. It is noteworthy that the applicants did not request the appointment of a special advocate at any stage in the proceedings in respect of either application.

155. At the open hearings, the senior police officer making the application explained orally why the application was being made and, at the second hearing, provided details regarding the progress of the investigation and the examination of material seized during the searches (see paragraphs 42 and 59 above). The applicants' were legally represented and their solicitor was able to cross-examine the police officer witness, and did so at the first hearing on 10 April 2009 (see paragraph 43 above).

156. In light of the foregoing, the Court is satisfied that there was no unfairness in the proceedings leading to the grant of the warrants of further detention on 10 and 15 April 2009. In particular, the absence of express legislative provision for the appointment of a special advocate did not render the proceedings incompatible with Article 5 § 4 of the Convention.

157. There has accordingly been no violation of Article 5 § 4 of the Convention.

III. ALLEGED VIOLATION OF ARTICLE 8 OF THE CONVENTION

158. The applicants complained that the searches of their premises violated their right to respect for their private lives and homes because: (i) the warrants permitted entry and search "on one occasion" only which could not be equated with continuous occupation; (ii) the warrants were drawn too widely, thereby permitting search for, and seizure of, almost any item of property. They relied on Article 8 of the Convention, which provides:

> "1. Everyone has the right to respect for his private and family life, his home and his correspondence.
>
> 2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety ..., for the prevention of disorder or crime, ... or for the protection of the rights and freedoms of others."

159. In respect of the latter complaint the applicants also invoked Article 1 of Protocol No. 1 but the Court considers that the matter is more appropriately examined from the standpoint of Article 8 only.

160. The Government contested the argument that a violation of Article 8 had occurred.

A. Admissibility

1. The parties' submissions

161. The Government argued that the complaint as to the manner in which the searches were carried out was inadmissible because the applicants had failed to exhaust available remedies. They referred again to the possibility of bringing a private-law remedy and to the failure of the applicants to seek permission from the Court of Appeal (see paragraphs 126-127 above). In so far as Mr Sher complained about the search of his business premises, the Government pointed out that this complaint had not been raised at all in the domestic proceedings. However, the Government accepted that the complaint in respect of the scope of the search warrants was amenable to judicial review and that section 18(1)(a) of

the 1981 Act (see paragraph 114 above) was likely to have prevented any appeal to the Court of Appeal.

162. The applicants claimed that it had long been settled law that search warrants could only be challenged in proceedings for judicial review, because it was the lawfulness of an order of the court that was challenged. They referred to domestic case-law (see paragraphs 109-112 above) and argued that the Divisional Court and the Government were wrong on this point. The applicants also relied again on the effect of section 18(1)(a) of the 1981 Act.

2. The Court's assessment

163. The Court reiterates its comments as regards the subsidiary nature of the Convention mechanism (see paragraph 138 above). It is significant that the Divisional Court considered the manner of execution of the warrant to be a private-law issue unsuitable for judicial review proceedings (see paragraph 83 above).The cases to which the applicants referred, which concerned the issues surrounding the validity and quashing of search warrants, do not appear sufficient to displace the evidence provided by the Divisional Court's judgment of the *prima facie* existence of an available and effective remedy. The Court further reiterates its comments in respect of the application of section 18(1)(1a) of the 1981 Act (see paragraph 137 above). The complaint in respect of the manner of execution of the warrant must therefore be rejected pursuant to Article 35 §§ 1 and 4 of the Convention.

164. As regards the search of Mr Sher's business premises, it is clear from the judgment of the Divisional Court that no relevant complaint was made in the domestic proceedings (see paragraph 73 above). This complaint must also be rejected, pursuant to Article 35 §§ 1 and 4, on account of the failure to exhaust domestic remedies.

165. Finally, the Court is satisfied that the complaint concerning the scope of the search warrants issued in respect of the applicants' homes raises arguable issues under Article 8 of the Convention, so that it cannot be rejected as manifestly ill-founded within the meaning of Article 35 § 3 (a) of the Convention. The Court further considers that the complaint is not inadmissible on any other grounds. It must therefore be declared admissible.

B. Merits

1. The parties' submissions

(a) The applicants

166. The applicants maintained that the warrants were unjustifiably wide in scope.

(b) The Government

167. The Government accepted that the search of the applicants' homes amounted to an interference with their Article 8 rights. The question was whether the reasons adduced to justify the measures were relevant and sufficient and whether the proportionality principle had been respected. The Government considered these conditions to be satisfied and made a number of points in this respect.

168. First, they emphasised that the warrants were issued by a judicial authority which was satisfied that the relevant statutory criteria had been met, namely: that the warrants were sought for the purposes of a terrorist investigation; that there were reasonable grounds for believing that there would be material on the premises which was likely to be of substantial value to the investigation; and that the issue of a warrant was likely to be necessary in the circumstances of the case. Second, the warrants did not purport to grant authority to seize protected or privileged material. Third, the warrant was expressly worded so that any constable was only authorised to seize articles in respect of which application had been made or to seize and retain "relevant" materials found during the search, thus excluding seizure or retention of material not justified by the terrorist investigation. Fourth, the width of the description of relevant material was justified by the fact that the police had genuine and reasonable concerns about an imminent terrorist attack and elaborate reasoning as to precisely what items might prove to be relevant was not consistent with the urgency of the situation. The width was also justified by the nature of the investigation, which concerned a sophisticated terrorist plot in which different media (in particular electronic media) were reasonably suspected of being used by the plotters to communicate. Fifth, the warrants and searches were subject to a further safeguard in the form of an *ex post facto* judicial review or claim for damages. In the present case the applicants were unable to identify that any item seized or searched for was not justified by reference to the particular nature of the investigation.

169. As regards the comments of the third-party intervener, the Government considered that they concerned an unjustified trawl and retention of personal data that was not the subject of the applicants' complaint or the domestic proceedings. Notwithstanding the sincerity of the concerns raised, the Government maintained that there was no basis for concluding that searches of the applicants' electronic data were not justified.

(c) The third-party intervener

170. The third-party intervener, Privacy International, focused its comments on searches of electronic devices, which entailed access to personal and communications data. It emphasised the innovations in technology which had resulted in previously unimagined forms of collecting, storing, sharing and analysing data. Access by law enforcement

officers to an individual's electronic devices could enable access to everything that person had ever digitally touched, encompassing data not stored on the device itself but on external networked servers. The combination of data available could be extremely revelatory. In light of the particularly intrusive nature of searches of electronic devices, Privacy International argued for a high threshold when determining whether an interference with Article 8 rights was justified.

2. The Court's assessment

171. It is not contested that the search of the applicants' homes amounted to an interference with their right under paragraph 1 of Article 8 to respect for their private lives and homes.

172. The applicants did not dispute that the issue of the search warrants was "in accordance with the law" and in pursuit of a legitimate aim, as required by paragraph 2 of Article 8. The question for the Court is whether the measure complained of was "necessary in a democratic society", in other words, whether the relationship between the aim sought to be achieved and the means employed can be considered proportionate (see *Robathin v. Austria*, no. 30457/06, § 43, 3 July 2012). Elements taken into consideration are, in particular, whether the search was undertaken pursuant to a warrant issued by a judge and based on reasonable suspicion; whether the scope of the warrant was reasonably limited; and – where the search of a lawyer's office was concerned – whether the search was carried out in the presence of an independent observer in order to ensure that materials subject to professional secrecy were not removed (see *Robathin*, cited above, § 44; and *Wieser and Bicos Beteiligungen GmbH v. Austria*, no. 74336/01, § 57, ECHR 2007-IV).

173. The warrant in the present case was issued by a District Judge in the Magistrates' Court, in the context of criminal proceedings against the applicants on suspicion of involvement in terrorism. The police officer making the application confirmed that he had reasonable grounds for believing that the material at the addresses identified was likely to be of substantial value to a terrorism investigation and the judge agreed (see paragraph 33-35 above). The applicants did not suggest that there were no reasonable grounds for granting the warrant.

174. It is true that the search warrant was couched in relatively broad terms. While limiting the search and seizure of files to specific addresses, it authorised in a general and unlimited manner the search and seizure of correspondence, books, electronic equipment, financial documents and numerous other items. However, the specificity of the list of items susceptible to seizure in a search conducted by law enforcement officers will vary from case to case depending on the nature of the allegations in question. Cases such as the present one, which involve allegations of a planned large-scale terrorist attack, pose particular challenges, since, while

there may be sufficient evidence to give rise to a reasonable suspicion that an attack is under preparation, an absence of specific information about the intended nature of the attack or its targets make precise identification of items sought during a search impossible. Further, the complexity of such cases may justify a search based on terms that are wider than would otherwise be permissible. Multiple suspects and use of coded language, as in the present case, compound the difficulty faced by the police in seeking to identify in advance of the search the specific nature of the items and documents sought. Finally, the urgency of the situation cannot be ignored. To impose under Article 8 the requirement that a search warrant identify in detail the precise nature of the items sought and to be seized could seriously jeopardise the effectiveness of an investigation where numerous lives might be at stake. In cases of this nature, the police must be permitted some flexibility to assess, on the basis of what is encountered during the search, which items might be linked to terrorist activities and to seize them for further examination. While searches of electronic devices raise particularly sensitive issues, and arguably require specific safeguards to protect against excessive interference with personal data, such searches were not the subject of the applicants' complaints or the domestic proceedings in this case and, in consequence, no evidence has been led by the parties as to the presence or otherwise of such safeguards in English law.

175. Finally, it is of some relevance in the present case that the applicants had a remedy in respect of the seized items in the form of an *ex post facto* judicial review claim or a claim for damages (see paragraph 168 above). It is noteworthy that they did not seek to challenge the seizure of any specific item during the search, nor did they point to any item which they contend was seized or searched for unjustifiably by reference to the nature of the investigation.

176. For these reasons, the Court concludes that the search warrants in the present case cannot be regarded as having been excessively wide. The national authorities were therefore entitled to consider that the resultant "interference" with the applicants' right to respect for their private lives and homes was "necessary in a democratic society" within the meaning of Article 8 § 2 of the Convention.

FOR THESE REASONS, THE COURT

1. *Declares*, by a majority, the complaints concerning the procedure for granting the warrants for further detention and the scope of the search warrants admissible and the remainder of the application inadmissible for non-exhaustion of domestic remedies;

2. *Holds*, by six votes to one, that there has been no violation of Article 5 § 4 of the Convention as regards the procedure for granting the warrants for further detention;

3. *Holds*, unanimously, that there has been no violation of Article 8 of the Convention in respect of the scope of the search warrants.

Done in English, and notified in writing on 20 October 2015, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Françoise Elens-Passos	Guido Raimondi
Registrar	President

In accordance with Article 45 § 2 of the Convention and Rule 74 § 2 of the Rules of Court, the separate opinion of Judge Vehabović is annexed to this judgment.

G.R.A.
F.E.P.

APPENDIX

1. Sultan Sher is a Pakistani national who was born in 1987, lives in Pakistan and represented by Chambers Solicitors.

2. Mohammed Rizwan Sharif is a Pakistani national who was born in 1980, lives in Pakistan and represented by Chambers Solicitors.

3. Mohammed Umer Farooq is a Pakistani national who was born in 1983, lives in Pakistan and represented by Chambers Solicitors.

DISSENTING OPINION OF JUDGE VEHABOVIĆ

I regret that I am unable to subscribe to the view of the majority that there has not been a violation of Article 5 § 4 of the Convention in the present case.

The applicants were arrested under section 41 of the Terrorism Act 2000 on suspicion of being involved in the commission, preparation and instigation of acts of terrorism. Their detention was reviewed several times without the presence of a lawyer. They were even interviewed by the police without a lawyer being present.

My opinion is that whenever there are such serious allegations against an applicant he must be able to have a representative who will provide him with proper legal assistance. I would not limit this obligation to initial questioning; it should extend to legal assistance in proceedings relating to an initial measure or extension of detention.

The following day the applicants were informed that an application would be made to the City of Westminster Magistrates' Court for a warrant of further detention of a period of seven days. A hearing took place on 10 April 2009. The applicants and their representatives were excluded from one part of the hearing. As explained in paragraph 41 of the judgment "[p]art of the hearing was closed to allow the District Judge to scrutinise and ask questions about the material ...". I share the view that it is of crucial importance that the judge dealing with the possible extension of detention should acquire knowledge of available evidence against the applicant, but I find it unjustified to exclude the applicant and his representative from part of the hearing when this discussion took place, thus removing the possibility that the applicant might dispute the relevance of evidence which was decisive for that extension of detention. The decision in the present case to exclude the applicants and their representatives from even one part of the hearing implies that the police did not provide the applicants with adequate information about the reasons for their continued detention.

My opinion is that when the applicants complained about the provision of information from the police as to the reasons for their arrest and detention, and when they insisted that judicial review was an appropriate remedy in respect of their complaints, they already used one of the available remedies. It is clear that they could have used a private-law remedy but I consider that in a situation where there are different effective remedies available to the applicant, he is obliged to exhaust not all of them but the one he finds to be more appropriate than another for the situation at hand. I cannot accept the reasoning given by the judge in these proceedings, to the effect that there was another – private law – remedy available, that these claims involved potentially complex disputes of fact or that there was no reason for these proceedings to take up the judicial resources of the Administrative Court, which were required for the numerous urgent and

prospective judicial review proceedings issued in the High Court every week. At that time, the applicants were being held pursuant to deportation orders. In order to use the private-law action, as suggested by the judge, "the claimants would not have to return to the UK to give evidence in their private law action, which could instead be provided by way of video-link"! In the reasoning given, it was not suggested that the said court was not competent to deal with the matter but that judicial review proceedings against the police were inappropriate.

Instead of providing any personal conclusion, I would refer to the detailed content of the domestic judicial decision (see paragraphs 75-82 of the Court's judgment), in which the judge reached this final conclusion, as rephrased in paragraph 82:

> "... if, contrary to his [the judge's] view, judicial review proceedings against the police were appropriate, he would refuse permission as the claim was not arguable on the material provided. He accepted that the question whether the decisions of the City of Westminster Magistrates' Court to issue warrants of further detention were unlawful because inadequate information had been provided to the applicants about the reasons for their continued detention was potentially a matter of public law."

In today's Europe there is a growing need to fight against all forms of religious radicalism, including aggressive nationalism, but this fight requires minimum guarantees against arbitrariness on the part of agents of the State and against the possible misuse of the powers vested in various State agencies.

Finally, it should be pointed out that the applicants in this case had been released without charge and had immediately been served with deportation orders.