

INQUEST INTO THE DEATH OF JEAN CHARLES DE MENEZES

SUPPLEMENTARY RULING ON VERDICTS AND INQUISITION

Introduction and Background

1. In my Ruling dated 24th November 2008, I set out and explained my decisions as to what short-form verdicts should be left to the jury in this Inquest. I determined that a lawful killing verdict and an open verdict should be left to the jury, but that an unlawful killing verdict should not be left on any basis. The factual and legal background to this Inquest is set out at length in that Ruling.
2. That Ruling also contained (under paragraph 64) a list of questions which I proposed leaving to the jury in order to elicit a narrative verdict. All Interested Persons had been asked to make any submissions on the questions which should be left for that purpose. They had made oral submissions on this topic on 20th and 21st November. The representatives of the de Menezes family and the representatives of the Command Team had very helpfully provided me with draft questionnaires. Counsel to the Inquest had also suggested a number of questions for my consideration.
3. Barlow Lyde & Gilbert ['BLG'], Solicitors to the Inquest, sent the Ruling by email to all Interested Persons on Monday 24th November. That was one week before the date scheduled for the start of my summing-up (Monday 1st December). Given the controversial nature of this case, the time interval had been provided to allow all Interested Persons to consider their position and, if so advised, to bring any urgent application for relief in the Administrative Court.

4. Between 25th and 28th November, the representatives of the de Menezes family and those of the officers C2 and C12 requested an opportunity to address me on the wording of the questions. I concluded that it would be right to entertain those submissions before beginning my Summing-up to the jury. On Friday 28th November, BLG sent an email to all Interested Persons in which they said that I was prepared to hear some further submissions on the questions on Monday 1st December, but that I would not ‘rehearse arguments of principle on which [I had] already decided.’ Those further submissions were made on the morning of 1st December. Having considered them, I prepared a revised Verdict Questionnaire, and BLG sent that by email to all Interested Persons on the afternoon of that day. In the email, they stated that I would, in due course, provide my reasons by way of a Ruling. I am now doing so in this Supplementary Ruling.
5. On 2nd December 2008, the de Menezes family issued a judicial review claim and an application for a stay of the Inquest while the substantive claim was considered. I heard submissions on what course I should adopt later that morning. Mr Mansfield QC for the family made clear that he was not asking for the entire judicial review claim to be argued out before the Inquest proceeded. Rather, he was keen to obtain the view of the Administrative Court on whether or not I had erred in refusing to leave one or more ‘open questions’ inviting the jury to add further conclusions if they wished to do so. Since it was apparent that the Administrative Court would be able to consider Mr Mansfield’s application before I completed my Summing-up, I decided to commence it. This decision was made on the basis that, if the Court concluded that a further question had to be left, it could be given to the jury at the end of the Summing-up without any unfairness.
6. The family’s application was considered by Mr Justice Silber on the afternoon of 2nd December, and judgment was given on the afternoon of 3rd December. The Court refused permission to seek judicial review of my decision not to leave an open question of the kind mentioned above. No application for permission to appeal was made at the end of the hearing. The remainder of the family’s judicial review claim was adjourned generally.

Issues

7. There are three broad issues involved in this Ruling:
 - (i) What factual questions should I leave to the jury about the events in the tube carriage?
 - (ii) What ‘contributory factors’ should be put to the jury to elicit their views as to the circumstances and events which made some causal contribution to the death of Mr de Menezes?
 - (iii) Should any ‘open question’ be asked, to invite the jury to add further conclusions if they so wish?
8. In approaching these issues, I shall apply the legal principles set out in paragraphs 6-15 and 62 of my principal Ruling.

(i) Factual Questions about Events in the Tube Carriage

9. In my judgment, the jury should be asked to reach conclusions on the events which took place in the carriage at Stockwell. In particular, they should be asked questions concerning the sequence of events in the period between officers C12 and C2 entering the carriage and the shooting. These are issues of central significance, and much evidence at the inquest has been devoted to the question of precisely what happened. They are matters of public interest, and there has been considerable speculation about them.
10. Officer C12 gave evidence to this effect. The officer entered the carriage, whereupon Mr de Menezes stood up from his seat and moved towards him, appearing to close the distance between them. The officer shouted ‘Armed Police’ and levelled his gun at the head of Mr de Menezes. Nevertheless, Mr de Menezes continued forward. At this point, the surveillance officer, ‘Ivor’ moved forward and grabbed Mr de Menezes in a ‘bear hug’, pushing him back

into his seat. C12 says that he was convinced that Mr de Menezes posed an imminent and mortal threat to all in the carriage. He moved forward and fired into the head of Mr de Menezes.

11. Officer C2 also gave evidence of Mr de Menezes standing up, moving forwards and being grabbed by Ivor. He did not specifically recall a shout from C12. He does not claim to have shouted himself until the very moment before he fired. He says that he moved forward at the same time as C12 and also fired into the head of Mr de Menezes.
12. The general description of Mr de Menezes standing up and moving forward is supported by a number of other police officers in the carriage. A number of members of the public were also present in the carriage. Their accounts vary greatly, and most accepted that their recollections were patchy or incomplete. None of them specifically recalled hearing C12 shout 'Armed Police' as he described. On the other hand, a number did recall shouts at various stages. None of them remembered seeing Mr de Menezes stand up and move forward in the way described by the officers. However, it is also true to say that none of them gave an entirely detailed and accurate account of Ivor's tackle.
13. In my judgment, the following questions should be asked to elicit the jury's conclusions on these matters:
 - (1) Did officer C12 shout the words 'Armed police' at Mr de Menezes before firing?
 - (2) Did Mr de Menezes stand up from his seat before he was grabbed in a 'bear-hug' by officer 'Ivor'?
 - (3) Did Mr de Menezes move towards officer C12 before he was grabbed in a 'bear-hug' by officer 'Ivor'?
14. In drafting those questions, I have rejected the argument that the questions should not be asked on the ground that they have no causal relevance to the

death. I do not accept that these events were causally irrelevant. They occurred directly before the fatal shooting. C12 gave evidence that he did not enter the carriage with a preconceived determination to shoot Mr de Menezes. He said that he would not have fired if Mr de Menezes had not stood up and moved towards him.

15. I have also rejected the submission that the questions should not be asked because the resolution by the jury of the issue whether the killing was lawful will be decisive of any relevant questions concerning events in the carriage. As explained in the main Ruling (paragraphs 23-24), the jury could properly reject C12's account of events in the carriage in part or in whole but still believe that he was acting lawfully in self-defence.
16. I have accepted the submission of Mr Stern QC, counsel for C2 and C12, that the reference to the bear-hug by Ivor should appear in questions 2 and 3 so as to assist in clarifying the sequence of events. I have also concluded that question 1 should only refer to officer C12, since any shout by C2 was obviously too late to make any difference.
17. Mr Stern has also submitted that question 2 should not be asked, for two reasons. First, no witness who claims to have seen the entire sequence of events asserts that Mr de Menezes did not get up, whereas several police witnesses say that he did. Secondly, the physical evidence, as interpreted by the forensic scientists, supports the account of a bear-hug, which would be difficult to achieve if Mr de Menezes had not got out of his seat to some degree. I do not accept that this question should not be asked. There are a number of bystanders who did not see Mr de Menezes get up. While they may well be mistaken, the matter is one which deserves to be put to the jury. Moreover, if this question is asked, the jury will be required to analyse the entire sequence of events and give an answer in relation to each significant event. If a fair summary of the evidence is given, they can properly be asked to answer this question.

18. Mr Stern also submits that the jury should be entitled to give the answer ‘Cannot decide’ to each of these questions. That is an eminently sensible suggestion. It would give greater clarity to the answers and avoid misinterpretation. In my judgment, the same approach should be taken to question 4. I do not understand any Interested Person to disagree with that approach.
19. Mr Mansfield took a position of neutrality on the matters considered above. However, he argued that a further question should be added as to whether any shout of ‘Armed Police’ was a challenge to Mr de Menezes with which he could reasonably have complied. In my judgment, that question should not be added. It would not be a conclusion of fact but purely a matter of opinion. Moreover, it would be a speculative question and one which would be difficult for the jury to answer meaningfully. The answer could be uninformative, since it could beg the question as to, or turn upon, the definition of a ‘challenge’ and the definition of ‘compliance’. In any event, the questions I am leaving to the jury are concerned with whether Mr de Menezes’s actual response to any shout of ‘Armed Police’ was to stand up and move forward.

(ii) Contributory Factors

20. Over the course of this inquest, a great deal of evidence has been properly adduced concerning the sequence of events which led to the confrontation in the carriage. It is a matter of public interest for this Inquest to attempt to resolve the question of how Mr de Menezes was wrongly identified as a suspected suicide bomber and ultimately confronted by firearms officers in an underground train carriage. In my main Ruling, I decided that it would be appropriate to ask the jury to indicate whether or not a series of factors had contributed to the death of Mr de Menezes. In the exercise of my discretion, I concluded that this would be a proper means of eliciting the views of the jury on the circumstances in which Mr de Menezes came by his death. I rejected a suggestion of the Metropolitan Police that a proper course was to leave only short-form verdicts of lawful killing and open verdict and no other question. The main Ruling included a proposed list of possible contributory factors,

some based on suggestions by the family, some based on suggestions by the Command team and some based on suggestions by Counsel to the Inquest.

21. Mr Mansfield has put forward a revised version of the questionnaire which appeared in the main Ruling. I shall address below, in turn, the points raised in his revised draft. For ease of reference, the final version of the Verdict Questionnaire, on which the jury will record their conclusions, is attached to this Supplementary Ruling as Appendix A.

- (i) Mr Mansfield suggests that I should make clear that a factor can properly be regarded as contributory provided that it has caused or made a more than minimal contribution to death. I have included a suitable direction on causation in the Written Legal Directions to the jury. Those Directions were canvassed with all Interested Persons and they have been accepted by all. A copy of those Directions is attached to this Supplementary Ruling as Appendix B.
- (ii) The original draft questionnaire included an option (4(b)) whereby the jury could conclude that the death was caused in part by the fact that better photographic images of the suspect were not provided to surveillance teams. Mr Mansfield submits that this should be re-worded to refer to a 'failure' to provide better images. I have accepted that submission. It makes clear that a criticism of this kind should only be registered if better images could and should have been provided. See the new question 4(b).
- (iii) Mr Mansfield submits that the jury should be offered the option of saying that the content and tone of briefings to firearms officers contributed to the death. Mr Perry QC for the Command Team submits that this point should not be included. He points out that neither officer who conducted the briefings was challenged about their content or tone. He also says that the content and tone of the briefings could not have played a major part in the outcome, given the evidence of the two officers who fired. I agree, and would add

that the content of the briefings was essentially accurate and the tone was largely dictated by the circumstances on the day.

- (iv) In the original draft questionnaire, the jury was offered the opportunity to say that the general difficulty in providing an identification of Mr de Menezes in the time and circumstances available contributed to his death (4(c)). Mr Mansfield submits that that should be limited to the period before Mr de Menezes accessed public transport. In my judgment, the jury's consideration of this factor should not be limited solely to that early period. They could properly conclude that problems with identification were still relevant at later stages in the surveillance.
- (v) Mr Mansfield has suggested that the jury be given the option of saying that the death of Mr de Menezes was caused in part by a failure to ensure that he was stopped before reaching public transport. Mr Horwell QC for the Metropolitan Police and Mr Perry both submit that it would not have been practicable to devise a tactic which could have ensured this happened. They add that this factor could not have been causative of death, because a satisfactory identification could not have been communicated and a challenge ordered in the circumstances on 22 July 2005. There is some force in those submissions. However, there is also force in Mr Mansfield's argument that, by a combination of better surveillance control, better communications and a different approach to intervention, Mr de Menezes might just have been stopped on Upper Tulse Hill. In my judgment, this factor should be left to the jury, having regard to the fact that the standard of proof for causation would be the balance of probability. The jury should be reminded of the difficulties with the proposed tactic, and of how events occurred in practice. The particular wording suggested by Mr Mansfield goes too far in suggesting a 'Yes' answer. In my judgment, the factor can fairly be put in these words: 'A failure by the police to ensure that Mr de Menezes was

stopped before he reached public transport.’ See the new question 4(c).

- (vi) In the original draft questionnaire, the jury were offered the option to say that death was contributed to by: (e) the fact that the views of surveillance officers regarding identification were not accurately communicated to others; and (f) the fact that the position of the cars containing the firearms officers was not accurately known to the Command Team. Mr Mansfield submits that those should be re-worded to refer to ‘failures’. In my judgment, the phraseology originally used already imports a degree of criticism and the original wording should remain.
- (vii) Mr Mansfield has suggested that a further option should be offered, whereby the jury can say whether the death was caused in part by a ‘failure to have efficient communications systems operating’. I agree that an option should be included which allows the jury to say that shortcomings in communications systems made a material causal contribution to the death of Mr de Menezes. However, I accept the submissions of Mr Perry (a) that the wording should not imply that there necessarily was a failure and (b) that it should refer to the system as it was actually operating on 22 July. See new question 4(h).
- (viii) In the original questionnaire, the option was left for the jury to say that death was caused in part by the fact that surveillance officers were not used to perform the stop of Mr de Menezes at Stockwell. Mr Perry argues that a more analytical form of words should be used, if any such option is left. I agree that the original wording gave rise to a risk that the jury might apply too much hindsight. The jury should only suggest that surveillance officers should have been used to intervene if they reach the following conclusion: that Commander Dick was wrong to decide, when told that specialist firearms officers were in position, that surveillance officers should

not perform the stop. Therefore, I have decided to re-word this factor so as to highlight that point. The new wording is as follows: ‘A failure to conclude, at the time, that surveillance officers should still be used to carry out the stop of Mr de Menezes at Stockwell Station even after it was reported that Specialist Firearms Officers could perform the stop.’ (new question 4(i)).

- (ix) Finally, Mr Mansfield has argued that the jury should be given the option to say that the content and tone of the instruction to stop Mr de Menezes contributed to his death. I have rejected that submission. There is consistent evidence from the officers at New Scotland Yard that Commander Dick’s order, which was relayed by Trojan 84, was to the effect that Mr de Menezes should be ‘stopped’. There is equally consistent evidence from the firearms officers that they took that to mean that he should be arrested. There is no evidence that C2 or C12, or any other firearms officer, took the order as an authorisation or encouragement to fire a critical shot. The evidence does not justify a conclusion being left to the effect that the tone and content of the order made a material causal contribution to the death.

In summary, the verdict questionnaire leaves to the jury, in substance, almost all the contributory factors with which the de Menezes family are concerned. However, I have taken into account the submissions of the police parties and I have made every effort to ensure that the questionnaire is fairly worded.

(iii) ‘Open Question’

22. Before my main Ruling, the representatives of the de Menezes family had submitted that, in addition to leaving a series of contributory factors to the jury, I should also invite the jury to add any other factors they regarded as causally relevant, subject to particular legal guidance. This has been referred to colloquially as a ‘sweep up’ or ‘catch all’ question. In paragraph 67 of the Ruling, I rejected that submission and added that the questions as framed

represented the best way of eliciting the conclusions of the jury without infringing the Rules or the guidance of the Courts. I remain of that view. However, as Mr Mansfield has expanded upon his point considerably in writing and in oral argument since the main Ruling, it is only right that I should set out in more detail my reasons for rejecting the submission.

23. First, to leave to the jury an open question of this kind in a case of this complexity would seriously risk eliciting an answer which contravenes Rule 36(2) and/or Rule 42 of the Coroners Rules (see paragraph 7 of the main Ruling for those provisions). It is no easy task to resolve the central issues of fact in a case of this type without breaching the requirement that the verdict should not address matters going beyond the means and circumstances of the particular death (Rule 36(2)). Equally, in a case where allegations of fault have been many and various, it is very difficult for a jury to reach judgmental conclusions of fact which do not 'appear to determine' any question of civil liability or any question of criminal liability of a named person (Rule 42). The Higher Courts have, for good reason, said that words importing criticism, such as 'failure', can be used in an inquest verdict, but that words importing negligence cannot be used (see paragraph 62 of the main Ruling for a review of the legal principles). One lawyer or judicial officer acting alone can have difficulty with the drafting of appropriately worded conclusions in these circumstances. Asking 11 lay jurors to perform the task by committee would not be right in this case, however conscientious and astute they may be.
24. Secondly, such an open question would also give rise to a real risk that the answer(s) given might address causally irrelevant matters. This case concerns a complex police operation. It is not straightforward to trace the effects of early strategic decisions through to the events at Stockwell Station. I have received extensive written and oral submissions on what matters could or could not have been causally relevant.
25. Thirdly, an open question might give rise to a risk that the jury gave an answer which conflicted with my decision on short-form verdicts, or the reasoning in support of that decision.

26. Finally, it is the duty of a coroner to act as a ‘filter against injustice’, in the words of Leveson J in *R (Sharman) v Inner North London Coroner* [2005] EWHC 857 Admin. A coroner should direct the jury carefully so as to avoid, or at least minimise, the risk that the inquisition will contain findings which contravene statutory Rules or authority. I have sought to do that by drafting questions and conclusions carefully, and in the light of submissions made by all Interested Persons, including counsel for the de Menezes family. All Interested Persons are entitled to expect that the central issues in the case are resolved, but in a way which complies with the Rules and the guidance of the Higher Courts.
27. In addition, Mr Mansfield submitted that the jury should be invited to express any view they might have as to the gravity of particular failures and the degree to which particular circumstances or omissions causally contributed to the death. I have rejected that submission. These questions of causal contribution and ‘gravity’ are difficult legal or philosophical enquiries for anyone, especially in a factually complex case such as this. To give the jury sound directions on such questions in these circumstances would be extremely difficult. There would be a real risk here that any answers would contravene Rule 42, or would at least be open to misinterpretation.

Sir Michael Wright
Assistant Deputy Coroner for Inner South London

8th December 2008

APPENDIX A: VERDICT QUESTIONNAIRE

	SHORT-FORM VERDICTS	
	Enter 'Lawful Killing' or 'Open Verdict' in box to the right.	
	QUESTIONS	Answer
1.	Did officer C12 shout the words 'Armed police' at Mr de Menezes before firing?	YES NO CANNOT DECIDE
2.	Did Mr de Menezes stand up from his seat before he was grabbed in a 'bear-hug' by officer 'Ivor'?	YES NO CANNOT DECIDE
3.	Did Mr de Menezes move towards officer C12 before he was grabbed in a 'bear-hug' by officer 'Ivor'?	YES NO CANNOT DECIDE

	FACTORS FOR CONSIDERATION	
4.	Do you consider that any of the following factors caused or contributed to the death of Mr de Menezes?	
(a)	The suicide attacks and attempted attacks of July 2005 and the pressure placed upon the Metropolitan Police in responding to the threat.	YES NO CANNOT DECIDE
(b)	A failure to obtain and provide better photographic images of the suspect, Hussain Osman, for the surveillance team.	YES NO CANNOT DECIDE
(c)	A failure by the police to ensure that Mr de Menezes was stopped before he reached public transport.	YES NO CANNOT DECIDE
(d)	The general difficulty in providing an identification of the man under surveillance (Mr de Menezes) in the time available and in the circumstances after he had left the block at Scotia Road.	YES NO CANNOT DECIDE

(e)	The innocent behaviour of Mr de Menezes which increased the suspicions of some officers.	YES NO CANNOT DECIDE
(f)	The fact that the views of the surveillance officers regarding identification were not accurately communicated to the command team and the firearms officers.	YES NO CANNOT DECIDE
(g)	The fact that the position of the cars containing the firearms officers was not accurately known to the command team as the firearms officers were approaching Stockwell Station.	YES NO CANNOT DECIDE
(h)	Any significant shortcomings in the communications system as it was operating on the day between the various police teams on the ground and with New Scotland Yard.	YES NO CANNOT DECIDE
(i)	A failure to conclude, at the time, that surveillance officers should still be used to carry out the stop of Mr de Menezes at Stockwell Station even after it was reported that Specialist Firearms Officers could perform the stop.	YES NO CANNOT DECIDE

APPENDIX B: WRITTEN LEGAL DIRECTIONS TO JURY

General Directions

It is the task of a Coroner's jury, in completing an Inquisition, to answer four statutory questions:

- (1) Who the deceased was;
- (2) How he came by his death;
- (3) When he came by his death;
- (4) Where he came by his death.

The phrase 'how he came by his death' means: 'by what means and in what circumstances he came by his death'.

The Inquisition must also contain some formal details required for registration of the death.

Otherwise, the jury is prohibited from expressing any opinion on any other matters.

The law states that no verdict shall be framed in such a way as to appear to determine any question of criminal liability of a named person or any question of civil liability whatever.

Short-Form Verdicts

You have to decide between two available short-form verdicts:

- (1) Lawful Killing;
- (2) Open Verdict.

You should consider Lawful Killing first.

Lawful Killing

A Lawful Killing verdict should be returned where the evidence shows that it is probable (i.e. more likely than not) that the deceased died by the deliberate application of force against him and that the person causing the injuries used reasonable force in self-defence or defence of another person, or to prevent a crime, or to assist in a lawful arrest, even if that force was by its very nature or the manner of its application likely to be fatal.

On the facts of this case, you should return a verdict of Lawful Killing if you find that officers Charlie 2 and Charlie 12, when they shot Mr de Menezes, were acting in lawful defence of themselves and/or others.

To reach that conclusion, you would have to be satisfied of two matters, on the balance of probabilities standard (i.e. more likely than not):

- (a) that, at the time they fired, they honestly (albeit mistakenly) believed that Mr de Menezes represented an imminent, mortal danger to them and/or others around them; and
- (b) that they used no more force than was reasonably necessary in the circumstances as they honestly believed them to be.

As to (a): The question is whether the officers' belief was honestly held, not whether it was reasonable for them to hold that belief. You can only consider whether the belief they claimed to hold was reasonable insofar as that helps you to decide whether they actually held that belief.

As to (b): If you consider that the officers believed themselves and/or others to be under imminent and mortal threat, you should not judge too precisely the exact degree of force which they used. It can be reasonable to use lethal force in self-defence.

In general, you should bear in mind that the law does not require a person to wait for an attack before taking defensive action. A pre-emptive strike can be justified, depending on the circumstances.

Open Verdict

If having considered all the evidence, you consider that the necessary elements of a Lawful Killing verdict are not established as being more likely than not, you should return an Open Verdict.

Bear in mind the following points:

- (a) You should not return an Open Verdict just because you cannot establish a peripheral point of fact about the death.

- (b) You should not return an Open Verdict because you disagree amongst yourselves. Whichever verdict you return, you must agree on it.
- (c) You should not return an Open Verdict as a mark of censure or disapproval.
- (d) An Open Verdict, if returned, would not represent any failure on the part of the jury to carry out its task properly; it would only be a reflection of your view of the state of the evidence.

The Questionnaire

Questions (1) to (3)

Questions (1) to (3) on the questionnaire are all factual questions about events in the carriage.

The following example shows how you should answer the questions.

When answering Question 1, you should tick ‘Yes’ if you conclude that it is more likely than not that the officer did shout ‘Armed Police’ before firing. You should tick ‘No’ if you conclude that it is more likely than not that the officer did not shout ‘Armed Police’ before firing. You should tick ‘Cannot decide’ if, on the evidence before you, you cannot give a ‘Yes’ or ‘No’ answer.

Question (4)

Question (4) asks you to consider a number of factors which, it has been suggested, may have made some causal contribution to the death of Mr de Menezes. There are 9 sentences ((a)-(i)), each of which describes a different factor.

You should consider each separately.

When considering all your answers, you should apply the balance of probabilities standard: more likely than not.

If you decide that the particular sentence reasonably accurately describes something which happened and that it caused or more than minimally contributed to the death of Mr de Menezes, you should tick ‘Yes’ in the box next to the sentence.

If you decide that the particular sentence either does not describe something which happened or, if you think it did happen, you decide that it did not contribute to the death of Mr de Menezes, you should tick ‘No’ in the box next to the sentence.

If, on the evidence before you, you cannot reach a conclusion about any particular factor, you should tick 'Cannot decide'.