Freedom & Justice for SAMAR & JAWAD

INFINITE INJUSTICE:

Human Rights Breaches and the Wrongful Convictions of

Samar Alami & Jawad Botmeh

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HUMAN RIGHT BREACHES & THE WRONGFUL CONVICTION OF SAMAR & JAWAD

Background and introduction

On 1 November 2001, Ms Samar Alami (Lebanese Palestinian) and Mr Jawad Botmeh (Palestinian) lost their appeal against their wrongful conviction of conspiracy to cause explosions in relation to the 1994 London bombings of the Israeli Embassy and Balfour House, and against their sentence of 20 years, imprisonment. There is no direct evidence connecting them to the attacks and both had alibis. Samar & Jawad, although politically active, are innocent of any involvement in these attacks. The two have always protested their innocence, and repeatedly emphasised, publicly and privately, that they do not believe that these bombings could be justifiable or acceptable. The crime of which they are convicted has not been fully investigated: while they languish in prison, the bombers remain free.

The bombings which, thankfully, did not result in any death or serious injury, were a carefully planned, professionally executed and highly sophisticated exercise that must have involved substantial resources and preparation. Yet, at trial, the authorities attributed them to a small London based group of amateurs and "quintessentially English Palestinians" frustrated with the peace process in the Middle East. The latter motive, which was presumed and never proven, is itself based on a fallacious inference that a political opinion of that nature is a sufficient reason for involvement in a bombing attack. Samar & Jawad's wrongful convictions were largely secured through a systematic and unrelenting suppression of evidence pointing to parties and individuals unrelated to them. This was done by: failing to disclose evidence; deciding that the material requested is irrelevant; using Public Interest Immunity certificates (PIIs) or gagging orders; and at times police losing exhibits and documents.

This report documents the injustices that have been inflicted on Samar & Jawad, and the way they have been made an exception to basic precepts of fairness and most procedural guarantees underpinning English law. In particular, their absolute right to a fair and open hearing has been breached both at trial and appeal. Standards of fairness are all the more important in view of the crime perpetrated, and of the severity of the sentences delivered. Their breach is correspondingly more alarming and aggravating. The fight for justice is far from over, as the appellants are now taking their case to the House of Lords, and if that fails to the European Court of Human Rights (ECtHR).

More detailed background information can be found in the Appendices. Appendix A gives the chronology of the case, and Appendix B sketches its key aspects, including the charge sheet and the questions raised to the House of Lords. Note that while in court and in all official correspondence Samar & Jawad have been held party to the bombings, the actual attacks were not mentioned in the charges. Appendices C, D, and E, cover key pre-trial problems, the "human errors" in disclosure, relevant rulings from ECtHR, and key points from the appeal judgment.

The conduct of the investigation

There are three areas of concern about the investigation. Firstly, the police and prosecution (CPS) have clearly failed to complete the investigation or to pursue enquiries after the trial. *To date, it is not known (at least not to the public or defence):*

- **what explosive and what mechanism were used in the bombings,**
- **where the explosives were made up,**
- **where the car bombs were assembled,**
- **who wrote the letters claiming responsibility,**
- **who drove the cars.**

The investigation failed to identify fingerprints on key documents (a claim letter & its envelope;

a doorbell of a building next to the embassy; the documents relating to the purchase of the cars and to the purchase of the chemicals). It failed to identify the handwriting on keydocuments. To date, there is no evidence that the police are continuing the investigation. Secondly, at times, the investigation displayed lack of rigour and objectivity, and raised other issues outlined in Appendix C. In the case of Mrs Z, who was acquitted of being the actual bomber at the embassy: the police failed to measure her height, which did not correspond to the description of the bomber as given by eye witnesses; the identity parade was seriously flawed; the forensic results were contaminated. Furthermore, the acquittal of two people who were alleged to have key roles in the CPS's scenario of a London "home-grown" group, itself questions the validity and logic of that scenario. Another example is that, up until the trial, the CPS emphasised the importance of a tiny hand-drawn sketch of a place in Sidon, Lebanon (about 2 inches, consisting of a square and triangle). It argued that it was a map of Finchley and therefore evidence of planning the bombings at Balfour House. The defence was able to refute this evidence by simple scrutiny, which should have been applied before this "map" was produced in court.

Thirdly, the police "lost" at least two pieces of evidence which constituted two potential leads that the defence could have investigated. At trial, the defence was unable to investigate a car involved in a "dry-run" of the bombing (according to the testimony of a guard working at the gates of the road to the embassy), because police had lost the logs of the entrance to the road to the embassy. As to the second piece, during the appeal in October 2000, the defence received evidence from a journalist, Mr Tim Wise. He said that he had reported his flat-mate to the police in July 1994, after he found that the latter had several documents, including a list of ammunition & arms, and maps of the embassy and of Finchley. Two detectives took a statement and removed all the documents, which were logged in at Fulham police station. Hence, the appeal was adjourned pending further enquiries, with questions put to the CPS for explanations. It was only in April 2001 that the prosecution disclosed a whole bundle of statements dismissing Mr Wise's evidence, explaining the suspect's possession of an ammunition list (he had a security company). As for the maps, it claimed that even though the maps were lost, there had been no map of the embassy. *Clearly these statements should have been served at trial*. As such, this indicates there is a failure to investigate this information and to disclose its details at trial.

In October 2001, it was officially recorded that the documents had been lost, but no explanations were given. The appeal judges declined to hear Mr Wise's evidence, were not interested in the apparent contradictions between various statements. They effectively accepted the suspect,s explanation at face value, even though he had several faiths and name changes, and was now calling himself Corleone. Yet, the judges still concluded that Mr Wise's evidence did not prove that Mr Corleone was party to the bombings (although the defence did not claim as much), adding that the defence could have investigated that at trial. Actually, all there was available to the defence at trial was: a message noting Wise's contact with the police (one out of thousands of messages that had to be examined); a short response from an officer in the Anti-Terrorist branch dismissing the message as unimportant, and stating that the suspect was known to Special Branch without referring to any map of the embassy. This simple dismissal, and the losing of the maps, are more remarkable given the zeal with which the police and the same officer handled the issue of the Sidon sketch. At a recent public meeting (21 March 2002), Mrs Peirce, Samar & Jawad's lawyer said:

"What we saw in their appeal, was the Court of Appeal once again, substituting itself for the jury, saying it could consider fresh evidence, saying it could ignore fresh evidence... Powerful new witnesses talking about reconnaissance being made, maps being drawn of the clearly targeted Israeli embassy by other people."

The right to a prompt trial

The ultimate sanction of the criminal law is the deprivation of the offender's liberty. Because imprisonment is intended to serve as the punishment for convicted prisoners, parliament has set limits on pre-trial custody time, namely 112 days after committal and 220 days since

arrest, the only exception being in cases of treason. Excessive remand periods undermine not only the principle of the presumption of innocence, but when combined with bad prison conditions, adequate defence preparation (as happened in Samar's case in particular, see "Conditions of detention" in Appendix C).

In this case the right to a prompt trial was repeatedly undermined, as can be seen from the chronology set out in Appendix A. Custody time limits were exceptionally extended three times in Jawad's case and twice in Samar's case. At the pre-trial stages, the CPS were given at least 5 times extensions to prepare the committal bundles and decide on what evidence to serve (16/3/95; 26/3/95; 5/6/95, 30/6/95; and 28/7/95). Even the original trial date of January 1996, which was only provisionally indicated in September 1995, would have violated the set legal limits. In June 1996, although a judge rejected representations that the seriousness of the charges offences constituted a good cause for an extension, he still ruled that the unavailability of a judge of suitable seniority was a good and sufficient cause (The Independent, Law Report 18/6/96).

After the trial, it took over two years for Samar & Jawad just to get a leave to appeal hearing, which took place in May 1999. Incredibly, and almost uniquely in recent years, it took another 14 months for the appellants to be informed of the appeal date, mainly because of the CPS's failure to indicate their availability. Thus, and despite repeated demands by the defence, it is only in July 2000 that Samar & Jawad were told that the appeal would start on 24 October 2000, i.e. four years after trial. It is hard to recall a similar case in recent years. The CPS again failed to respond when the appeal was adjourned, serving in April 2001 the evidence requested by the defence in October 2000, and failing to indicate their availability until July 2001. As a result, the appeal resumed a year later, in October 2001.

Prosecuted on the basis of a false scenario

The prosecution's main premise has been that the defendants were an isolated, London-based group of amateurish Palestinians dissatisfied with the Middle East peace process. Yet they never defined Samar or Jawad's roles, nor who are the other conspirators, nor did they re-adjust their scenario after losing the case against the alleged bomber. Anyway, both the prosecution and the judge accepted that Samar and Jawad did not belong to any known "terrorist organisation". The CPS and police also held that there was an "intelligence vacuum" surrounding the bombings, and that no one else existed in this scenario. Detective Superintendent Mr Emerton said at trial on 4/11/1996:

"One of the big things about this investigation, frankly, is the intelligence vacuum that surrounds it. There was nobody anywhere in the world who can give any indication of any clue about anybody doing anything. This is a straightforward police investigation."

Press reports and other material suggesting other scenarios were dismissed by the CPS. The CPS ran the trial as if it took place in a political vacuum, and the jury really only had one candidate for the plot. In the absence of knowing who was motivated to carry out the bombings and in whose interests the bombings took place, Samar & Jawad were only able to deny that they were themselves involved. With limited information at hand, their defence was unable to investigate leads, consolidate other potential solid scenarios, or present the jury with other candidates. Not only did this situation shift the burden of proof on the defence to prove innocence, but it also meant that the trial judge himself summed up the case in a particular way.

Despite the availability of the information since the arrests in 1995, and despite the CPS's duty to do so, nothing was revealed to the defence, trial judge, or jury about:

a) the warning that the Israeli embassy itself passed on to the Foreign Office before the bombings.
b) the revelations made by former MI5 'whistleblower' agent David Shayler in 1997-98, which were that:

- The British security services had received a warning about the attack from an impeccable source

- A senior MI5 officer involved in the investigation concluded in a report written shortly after the bombings that Israeli intelligence could have been involved in the attacks.

The "Shayler" evidence showed that the Crown's case of an isolated, home-grown group, had been presented by selecting some material and blocking the disclosure of other. Such serious intelligence assessments make it extremely unlikely that a small amateurish group in England could have been responsible for the bombings, and point towards a well-resourced and highly placed organisation. They completely undermine the basis of the CPS scenario of an "intelligence vacuum".

Since the emergence of the Shayler evidence in 1997, the prosecution ignored the defence's requests for disclosure, and eventually withheld much of it in the name of national security, that is through an *ex-parte* or PII hearing (a closed hearing that excludes the defence) at the Court of Appeal in March 1999. It was not until another PII hearing at the appeal in October 2000 that the defence was finally given a snippet of evidence. The evidence that it summarises was included in three huge crates of material that only the appeal judges saw, and which had been withheld from the trial judge, jury and defence.

The snippet that the defence was given consisted of unsigned hand-written pages of about 400 words stating that:

"Some months prior to the bombing.., the security service and MPSB (Special Branch) had received information... that a terrorist organisation, unconnected to the appellants, was seeking information about the location and defences of the Israeli Embassy in London for a possible bombing attack".

Without elaborating, it adds that related intelligence after the bombings indicated that the organisation did not carry out the bombing (see Appendix D for the full text). As such the "note" raises more questions than it answers. In fact, it was so vague that defence experts were unable to analyse it. What was given to the defence was so partial and insufficient that it was tantamount to non-disclosure.

Still, this "note" clearly shows that *the prosecuting authorities, on their own evidence, pursued what they knew to be a false scenario of an "intelligence vacuum"*. From the outset, the security services and the prosecution knew of candidates, unrelated to the defendants, who were interested in and capable of carrying out the attacks. (According to the meagre information available to date, some of those candidates were: the unnamed terrorist organisation, Iranian and Israeli agents). In effect, the authorities tailored the evidence at trial in order to make it appear that the only realistic scenario was the one outlined by the Crown at the trial. *Had the existence of the evidence been admitted at trial, the defence may well have had a different strategy* (in terms of investigation, cross-examination, and presenting alternative scenarios), *the judge may have directed the trial and summed up the case differently, and the CPS simply could not have constructed its scenario as it did*. All this evidence must have helped the defendants' credibility. *A potentially positive impact on the jury and a different outcome cannot be ruled out entirely, as the appeal judges allowed themselves to do.*

Failures to disclose vital evidence

The current threshold tests in criminal proceedings require the disclosure of:

- all evidence against the defendants;
- material that could provide leads or that could reasonably undermine the prosecution's case;
- material that raises issues not apparent from the evidence used in constructing the CPS's case.

Such is the importance of these procedural guarantees for the functioning of the criminal justice system and for preventing the occurrence of miscarriages of justice that in November 2000, the Attorney General issued new rules whereby police officers and lawyers who fail to

comply with current guidelines on disclosure should face disciplinary action, and whereby all defendants are to be given access to all unused material obtained by the police.

This case could not be a more striking exception to these guarantees and procedures, and throughout, the prosecution have failed in their disclosure obligations. Leaving aside the issue of material withheld under the guise of national security, and over and above the "Shayler evidence", at trial, the prosecution failed to disclose evidence on a number of issues whose relevance they accepted:

- CCTV evidence (reportedly there was no video in the cameras of the embassy);
- the role & findings of Israeli officers in their investigation;
- the warning received by the embassy;
- assessments and contacts by foreign intelligence services regarding the London bombings.
- material relating to possible Iranian involvement, a theory widely floated in the media at the time of the bombings.

The defence's own investigations as well as the "note" make it highly unlikely that no substantive material regarding these issues is either available to or in the possession of the authorities.

Clearly, the "Shayler" evidence and the "note" about the unknown terrorist organisation are evidence that undermines the CPS's case and passes the threshold tests. Clearly the trial judge should have seen it, and clearly it *could and should have been disclosed to the defence in some form*. Why was it not disclosed? The "note" claims that the information was not disclosed to the trial judge through at least *six counts of "human error" and "oversight"*. The failures occurred for 6 years (1994-2000), across 4 organisations (MI5, MI6, Special Branch, the prosecution), at least 8 individuals, in 7 stages. The last stage, not mentioned in the document, was when the Home Secretary signed a 1998 PII certificate. Therefore, as spelled out by Mr Mansfield QC, the leading barrister for the defence:

- Prior to the bombings, there was an unacceptable "bungling" by MI5, MI6 and Special Branch in dealing with information received, resulting in them not disclosing these mistakes and failing to disclose evidence.
- Either there has been astonishing incompetence or a deliberate effort to frame the wrong people.
- Given their continuing duty to disclose, the prosecution has clearly failed in the pre and post trial stages. The six-year wait for disclosure was totally avoidable. If initial failures to disclose were due to "errors", what explains failures subsequently?

Whether deliberate or not, blunders by so many people and so many organisations raise the most serious doubts about the integrity of the disclosure exercise in this case: what guarantees are there that other information also been suppressed due to "human error"? The blatant disregard for disclosure by the CPS in practice did not stop the Director of Public Prosecutions, David Calvert-Smith QC (who was also the main prosecutor at trial) to claim in public:

"Fair, timely and focused disclosure of material gathered by the police and others, which may undermine the prosecution case or assist the defence, is a vital component of a civilised criminal justice process. Without it the innocent will be convicted, the guilty acquitted and the system as a whole will lose the respect of the public for whose benefit it exists."
(*The Independent*, 30/11/2000).

Non-disclosure of this magnitude and of material that goes to the heart of the case almost inevitably implies unfairness at trial and at appeal. In its press release on 5 November 2001, Amnesty International stated its concern that Samar & Jawad "have been denied their right to a fair trial because they have been denied full disclosure - both during and after the trial - of all information, including intelligence information, that may have been relevant to the investigation of the bombings". In its Annual Report 2002, it added that it believes that "their convictions were unsafe."

Denial of access to evidence & the abuse of secrecy laws

Aside from "human errors" in the disclosure process, the prosecution denied Samar & Jawad vital evidence by either: deciding that the material requested by the defence was not relevant; or blocking access by claiming immunity from disclosure in the name of national security.

With regard to the former, the defence has submitted a number of requests for disclosure at and since trial regarding the following categories of evidence: links or comparisons to the Argentinean bombings of 1992-1994; references to possible Iranian connections to the London attacks; and information about bombings outside the UK at the same time. The defence are interested in this last category because terrorist attacks are described by experts on terrorism as being "grass hoppers", i.e. that they are typically part of an on-going tit-for-tat war, which must be looked at in order to properly attribute or analyse a particular incident.

The Right To A Fair Trial In Brief

British and international obligations recognize that every one shall have the right to a fair and public hearing. This is in itself an absolute right, as is confirmed by the Human Rights Act. Any limitation must not interfere with the right to a fair trial as a whole, and must be subjected to a test of strict necessity and proportionality.

Article 6.1

- Right to a fair and public hearing by a competent, independent and impartial tribunal;
- Right to equality of arms;
- Right to be tried within a reasonable time;
- Right to disclosure of evidence;
- Right to access to court;
- Right be tried in his/her presence, to defend himself/herself in person or through a lawyer;
- Right to participate in the hearing; knowledge of and opportunity to comment on matters before the decision-makers
- Right to know the reasons for decisions;

Artic/e 6.2: *the presumption of innocence*

- Right to be presumed innocent until proven guilty;
- Right to silence
- Freedom from self incrimination: not be compelled to testify against himself/herself or to confess to guilt;

Article 6.3

- Right to be informed promptly of the nature and cause of the charge;
- Right to have adequate time and facilities for the preparation of his or her defence;
- Right to examine, or have examined, witnesses against him/her & to call witnesses to testify on his/her behalf;
- Right to legal assistance of choice

In addition, there are numerous international standards which spell out the right to fair trial, including the United Nations (UN) Standard Minimum Rules for the Treatment of Prisoners, the UN Basic Principles on the Independence of the Judiciary, the UN Guidelines on the Role of Prosecutors and the UN Basic Principles on the Role of Lawyers. This right is also spelled out in Charter of Fundamental Rights in the European Union and International Covenant on Civil and Political Rights.

The Crown's general position was that only information about bombings on 26 & 27 July 1994 that relates to their scenario is relevant, and that nothing else is relevant. They added that Israel has had too many enemies since its creation, and they couldn't possibly disclose all

they know about all hostile activities against that country. No explanation has been given for the non-disclosure and the systematic denial of access to any information on Israeli intelligence and role in this whole case (the document seen by Shayler and the warning received from the Embassy are two obvious examples). This remains another and additional reason for concern about the failures to disclose.

PIIs (Public Interest Immunity certificates) or Gagging Orders

PII certificates, which provide the authorities with immunity from disclosure, are in effect gagging orders that deprive the defence from accessing material. They usually approved in court in closed hearings that exclude the defence: as such, they are inherently unfair. The defence has no independent access to this information, no ability to know what proportion of evidence was ever withheld from them, and no ability to compel its production. Access to material is even more important if it is negative information about a defendant, who otherwise has no chance to challenge it. At a hearing before the Joint Committee on Human Rights in Parliament on 19/3/2001, the Attorney-General, Lord William of Mostyn said:

"PII certificates, we use them very sparingly. As is known, it is the individual minister who takes responsibility for claiming the PII. All I have to do is ensure that the certificate is in proper form. Even then, the certificate from the minister always says that it is for the judge to decide ultimately... PII is sparingly used and the ministers know they cannot shelter behind any suggestion that I have approved what they said..."

(paragraph 72, Joint Committee on Human Rights: Minutes of Evidence, 19 March 2001, http://www.parliament.the-stationeryoffice.co.uk/pa/jt200001/jtselect/jtrights/66/1031901.htm)

Lord Mostyn's careful statement is compatible with the fact that the norm in criminal cases is full disclosure. It is precisely because PIIs represent a departure from this principle and a source of unfairness that they have to be used sparingly, and in a way that the unfairness is counter-balanced by some measure or procedural guarantee. *Current case law suggests to agree that only the trial judge is able to exercise such a balance.*

This case has again been made into an exception to the above norms. Immunity is usually claimed to protect names of agents, intelligence sources, or top secrets, but PIIs should not be used to block forensic material or evidence that is of central relevance to a case as happened here. Far from being used sparingly, PII hearings took place before the trial, during the trial, before the appeal, and during the appeal. During the trial, gagging orders were used to suppress objective scientific results obtained by the British and Israeli authorities regarding the type of explosives used in the bombings. To date, this remains a mystery. The "Shayler" evidence suffered a similar fate: the defence has been asking for this and other evidence since November 1997 to no avail. Whilst admitting that this information was relevant to the case, the Home Secretary signed a PII certificate in 1998 but no one knew about it until the application for leave to appeal in March 1999.

At the appeal itself in October 2000, the CPS applied for and were granted another PII hearing. Despite recent case law that points to a contrary decision, the Court of Appeal decided to hold the hearing *ex-parte*, but "invited" senior defence counsel to join the hearing on condition that they make an undertaking of complete confidentiality (i.e. not disclosing anything to either the solicitor or their clients). The defence team, having consulted both legal associations and their clients, decided it was impossible to participate in such hearings, mainly because the undertaking was impracticable and would substantially undermine their ability to carry out their duties (such as investigating leads) and obligations of client confidentiality. After the PII hearing, the judges disclosed the "note" and refused to disclose anything else. They said nothing about the fact that PIIs have been used to conceal "human errors" and failures to disclose.

In fact, in their judgment on 1 November 2001, the judges said that the serial "human errors" had no cynical implication, adding that the material they saw in the closed secret hearing was

rightly withheld because "it affects national security at the highest level, and would, if disclosed, present a clear and immediate threat to life". But it is precisely because there is very important material relevant to the bombings and to the case, but unconnected to the appellants, that it should have been disclosed, since it clearly assists their case of innocence and completely undermines the CPS's case that this was a straightforward police investigation. The CPS cannot have it both ways: that the bombings were carried out by an isolated, amateurish London-based group, but also that there are big intelligence secrets relating to them.

The appeal judges' behaviour represents an appalling setback for human rights legislation and for the protection of fair trial standards. Their decision to hold another PII hearing and not follow it with *full* disclosure compounds the unfairness of the original trial and goes against the Human Rights Act. In this respect, the defence's case could not have been stronger or clearer. It held that, in this case, the Court of Appeal should not hold an *ex-parte* hearing, because such a hearing would not remedy the breach caused by withholding evidence from the judge at trial. At trial, the trial judge would have conducted a more balanced exercise, and material could have been subjected to more scrutiny, with the trial judge constantly assessing the need for disclosure as issues were being discussed and witnesses cross-examined. The Court of Appeal cannot decide for the judge and jury unless the fresh evidence is made available to all sides. Hence, in Samar & Jawad's case, short of full disclosure, the Court of Appeal should have quashed the convictions and ordered a retrial. In addition, if the Court of Appeal, as it did, insisted on holding an ex-parte hearing without subsequently disclosing all information to the defence, this would be in violation of Article 6 of the European Convention on Human Rights (ECHR), incorporated in the Human Rights Act.

This is particularly so after the European Court's ruling in the Rowe and Davis case, which said that "*...the prosecution's failure to lay the evidence in question before the trial judge and to permit him to rule on the question of disclosure deprived the applicants of a fair trial*". When that case returned to the Court of Appeal for a second time in July 2000, the judges said that the failure to disclose was "rightly condemned as a violation of Article 6", and was one of the key points having rendered the trial so unfair as to undermine the safety of the convictions. The same ruling of a breach of Article 6 was also delivered by the ECtHR in the case of Atlan (2001), where again, evidence was withheld from the defence and judge at trial, and PII hearings were held at appeal, which Atlan lost. More details are available in Appendix E.

Reasons given by Mr Mansfied, QC, for refusing to give an undertaking and sitting *in camera*:

Mr Mansfield said that having consulted with the appellants, the Chair of the Bar Council, and the professional standards committee, he was allowed not to accept the undertaking, especially given the implications it would have on future cases. With regards to the Bar, there were no guiding rules one way or the other. However, since the Rowe & Davis appeal of 1993, the Bar has followed the practice where such an undertaking was not made, the dangers normally cited being as follows:

1. Such an undertaking carries the substantial risk of undermining at least two aspects of confidence: the public confidence in the profession and the trust of the client in Counsel.
2. An undertaking involves the barrister being unable to perform one of his/her most important duties: giving clients advice as to what is in their best interest.
3. The undertaking precludes being able to obtain the assistance and assessment of clients as to the meaning, relevance, and other aspects of the information. This is especially true if specialist knowledge areas are required to analyse the information.
4. The material viewed might contain adverse material or material concerning a defendant's personally. It is impossible for the barrister to contain that material and not have a chance to fight back, especially if it is erroneous.

Continued

5. The undertaking necessarily involves practical difficulties. How can one retain material, maintain confidence, without the risk of accidentally revealing some of it?
6. All this is compounded by the request that the undertaking embraces solicitors (or the request that solicitors are not present). One of the reasons is the solicitor's investigative role and full familiarity with the case, a role impossible to perform if he/she cannot have access to evidence. The Law Society has further advised Mrs Peirce that she does have a duty of disclosure to her clients. It is impossible for her to accept the undertaking.

The current position of the Bar and the current Attorney General is that there is client/Counsel relationship takes precedence over all e/se and therefore there can be nothing about the client's case that is known only to Counsel and NOT the client. Otherwise, it would destroy confidence and make representation impossible.

As well as the European Court, the two leading UK human rights groups Justice and Liberty (The National Council For Civil Liberties) consider that PII procedures continue to breach the right to a fair and public trial. They both recommend at least instituting a system of a Special Adviser as a limited measure to balance an element of fairness with the need for confidentiality when sensitive material is at stake. This is expressed, for example in Liberty's submission to the UN's Human Rights Committee:

"The use of public interest immunity procedure at trial remains incompatible with the right to a fair trial under Article 14 (of the International Covenant on Civil and Political Rights)... In our view the secret PII procedure continues to breach the right to a fair and public trial."
(Liberty, *The UK Government's Human Rights Record: A Summary For Submission To The United Nations Human Rights Committee*, October 2001, p.28)

To recapitulate, the equality of arms, one of the most fundamental principles of English and international law, was never respected in this case:

- The defence has been at a systematic and extremely severe disadvantage through both the suppression of evidence and the repeated use of PIIs. It has no ability to know what is withheld, or to compel the production of any evidence.
- It has been continuously prevented from accessing material, let alone investigate it, integrate it into its defence strategy, or use it in court.
- The excessive withholding of evidence and denial of information about the sources of information have also undermined Samar & Jawad's right to examine, or have examined, witnesses against them or indeed for them (for e.g. Shayler could have been called at trial).
- Throughout the case, everyone but the defence has been deciding what is relevant or what is disclosable.

Significantly, the use of PIIs in this case has been a chief reason why Samar & Jawad have been denied justice. It subjected them both to unfair procedures and hearings. Its use at appeal constituted an additional breach of fairness. It also deprived them of the right to know and use relevant material that sheds light on the full circumstances of the bombings, and material pointing out to other candidates.

Victims of secrecy and state power

It is normal practice in criminal cases, including terrorist attacks, to divulge as much as possible about the crimes committed, and if necessary to protect the sources of information. In this case, vital evidence and key aspects of the bombings are known to the bombers, the British and Israeli authorities, but not to the appellants, who, like the public, were never allowed to know the full circumstances of the bombings. As two individuals, Samar & Jawad had no chance when facing state power, including the ability of minister after minister to call on secrecy laws to block disclosure and avoid questions raised by the defence. A poignant example

is the PII signed in 1998, which was signed even though the material it covered passed the threshold tests for disclosure. Yet, one would have thought that if any of this evidence condemned the accused, it would have been used as evidence against them.

The revelation of the serial "human errors" makes it very likely that the desire to hide the initial bungling by intelligence service was a key motivation for withholding evidence, and for upholding the current convictions. Secrecy laws were readily available for the authorities to use, and allowed them to place evidence beyond the reach of the defendants for reasons that have little to do with justice. The evidence that they elected to show to the appeal judges was so minimal, insufficient, and partial, that it raised more questions than it answered. Who indicated that the "terrorist organisation" did not carry out the attack, when and on what basis? If they are so sure that it did not do it, why withhold the information? Can "intelligence" be trusted after the admission of "errors"? How many other candidates exist? What guarantees are there that "errors" did not affect other disclosures?

It is most worrying that the intelligence services elected to claim that there was an intelligence vacuum, failed to properly act on information received or file it properly, only to be allowed to play judge and jury and decide that the terrorist organisation did not carry out the attack, on the basis on their own secret information. It is most worrying that they were not even asked to explain what was done about them, or what was done to avoid "human errors" in other cases.

Another area of particular concern are the certain -albeit unseen-Israeli role, interests, and pressures. The individual who manned the camera at the embassy the day of the bombing was not interviewed by police and was removed to Israel. An unspecified number of people removed samples and material from the crater left by the car bomb, but no one knows how many they were, what they took, or what results they obtained. The ambassador himself congratulated police after the initial wave of arrests in 1995 even before the trial. Anything pertaining to their role in the investigation or their findings has been invariably excluded from mention or disclosure, as well as the warning that the embassy itself received at the time. Further, the report written by a senior MI5 officer pointing to the possible involvement of Israeli agents in the bombings themselves was not disclosed.

Thus, there are genuine fears that justice is being blocked by extremely high level political considerations. These have effectively left the defence with the impossible task of defending two individuals, who although innocent, have no proof of their innocence other than their alibis, their open lives, and other logical arguments. None of these stood a chance of being sufficient against the words of police and prosecution, and the secrecy laws available to them. Furthermore, this case raises the most serious concerns about the lack of accountability of the intelligence services, and about their ability to decide what to disclose and when. The requirements of procedural guarantees and the basic standards and requirements of disclosure in criminal law have been undermined by the repeated interference by so many branches of the executive.

The right to be tried by an impartial & independent judiciary

Far from acting as a break on the failures by the executive particularly in terms of fulfiling disclosure obligations, the judges in this case have acted in a way that was systematically biased against the defence and that effectively approved the injustices Samar & Jawad have suffered. Of particular concern is the automatic way in which they all acceded with no hesitation to the repeated demands for immunity from disclosure by the prosecution and the intelligence services.

The bias in the trial judge's summing-up can be found: in his failure to mention Samar & Jawad's alibis; in his failure to refer to the arguments advanced by the defence in the second half of his summary (He repeated the CPS' allegations, raising doubts only about the defence, while ignoring their arguments. He dwelled on issues and points which were abandoned by the CPS. He also ignored the CPS's shifting positions and minimised the destruction of the

alleged links between the defendants and the conspiracy); and in his decision not to take action against an Israeli journalist who approached a juror with his telephone number. But what was even more questionable was his decision to approve the withholding of forensic evidence which clearly could have been disclosed in some form without compromising security. *This case is almost unique in the fact that it is not publicly known what type of explosive was used in the bombings*.

The judges looking at the application for leave to appeal in 1999 were aware that the trial judge had not seen relevant material. Yet all they said was that this was an "unhappy event". They could have disclosed immediately what was disclosed in October 2000, in which event the defence could have already investigated the material. Instead, Samar & Jawad had to wait for another 14 months before having their appeal heard and the matter resolved.

The behaviour of the appeal judges themselves was completely biased towards the prosecution. The case and arguments they set out in the judgement are practically undistinguishable from the CPS's presentation. As such, the judgment is a complete endorsement of the prosecution's case in its entirety, with no questions raised or any other qualms. Of particular concern are the following:

1) Their willingness to hold another PII hearing and not to follow it with full disclosure is in direct contradiction with recent case-law. (compare Appendices E and F)
2) They failed to note the contradiction between the claim by the police that an "intelligence vacuum" surrounded the bombings, and the fact that they themselves were each asked to see a crate of intelligence material.
3) Their refusal to opt for full disclosure is in direct contradiction with the statements of Sir Richard Scott in his Inquiry that:

"The balance must always come down in favour of disclosure if there is any real possibility that the withholding of the document may cause or contribute to a miscarriage of justice...in order to prevent the possibility that a man may...be deprived of the opportunity of casting doubt on the case against him…it must follow that a document which might assist a defendant...cannot be withheld on the ground of some greater public interest."

(Sir Richard Scott, *Report of the Inquiry into the Export of Defence Equipment and Dual-Use Goods to Iraq and Related Prosecutions*, Paragraph K6.12)

4) They failed to even recommend that future "human errors" should be avoided, let alone ask for an investigation into what happened, and let alone reprimand the prosecution or police. Had a hospital admitted so many "human errors", it would have been undoubtedly subjected to investigation. Had the defence or a witness withheld such relevant evidence from the court, there would have been suggestions of perjury or of perverting the course of justice.
5) They decline to hear fresh evidence, even though the witness had been brought over from Australia. Without hearing it, they dismissed the evidence and jumped to the conclusion that it would have made no impact on the jury.

In fact, there has been so much bias in favour of the prosecuting authorities that it is not unreasonable to question whether the judges have been entirely independent of the executive, and were not, in fact, ruling in a way that protects ministers and the intelligence services from embarrassing revelations. The "appalling vista" referred to by Lord Denning, when dismissing one of the Birmingham Six's first attempts to secure justice, is continuing.

Conclusions

- **Samar & Jawad are innocent** of the charges they have been convicted of.
- Pressures after the bombings to find perpetrators meant they were scapegoated. There are genuine and serious concerns that this miscarriage of justice is being blocked by extremely high level political considerations.
- The prosecution case was flawed at least on the following counts;
  - Their case against two of the original four defendants collapsed by the end of trial.
  - To date, the investigation has raised fundamental questions that have never been answered, not least about the identity of the bombers.
  - The scenario of "home grown" terrorist group and the existence of an "intelligence vacuum" are now undermined by the CPS's own evidence about parties unrelated to Samar or Jawad demonstrably interested in bombing the embassy.
  - The Tim Wise evidence shows that: the authorities had information about individual suspects unrelated to the appellants as well as on the attribution of the bombings; and there was a failure to disclose specific evidence and intelligence information.
- The failures in disclosure and the abuse of secrecy laws mean that Samar & Jawad are not allowed to access the information that could prove their innocence. The suppression of evidence violates the requirements of a fair, open, and objective legal process.
- The case raises several fair trial concerns:
  - The original trial was unfair because substantive and substantial evidence was hidden from the judge, jury and defence. This is a breach of the constitutional right to a fair and open hearing. It can only be remedied, in our view, by quashing the convictions and/or ordering a re-trial.
  - Having another closed hearing at appeal and not following it with full disclosure aggravates the breach of fairness at trial, and constitutes an additional violation of the right to a fair trial.
  - The defence has never been able to mount a proper defence because of the flagrant inequality of arms that has characterised this case.
  - In such circumstances, the judicial process is pre-empted from its most essential function, namely enabling the defendants to prove their innocence.
  - The appeal judges had a dismissive attitude towards new evidence.
- The serious flaws in the investigations, the notable failures in disclosure, and the serial "human errors" have cast serious doubts about the trial, the convictions, and the whole case.
- No one can say, convincingly, that Samar & Jawad have been properly tried and convicted.

Not only have Samar & Jawad rights been violated for the last 7 years, but they have also been denied the right to an effective remedy even though such a remedy has been available. While they languish in prison, the bombers remain free and unpursued. Justice must be done and be seen to be done. The longer this goes on, the worse the consequences for the UK's justice system and its human rights' record. The interests of justice and the fight against terrorism are ill-served by having innocent people languishing in prison. The way this injustice is resolved is also critical for gaining the trust of Arabs and Muslims, here and elsewhere, that they will receive a fair treatment untainted by prejudice.

As the fight for justice continues, you can:

- Make representations to the British authorities, including the prosecution.
- Write to the British ambassador in your country.

In your representations:

- Express you concern that two young people have already served several years in prison for crimes they did not commit.
- Urge the UK government to take the necessary measures to ensure the case is reviewed and reassessed objectively, rigorously, and in light of ALL available evidence.
- Urge the UK government to disclose all evidence at hand that helps Samar & Jawad's case of innocence and/or implicates other candidates.

- Urge the UK government to comply with the requirements of an open and fair legal process and with European standards of procedures.
- Support Amnesty International,s concerns about the safety of the convictions and the fairness of their trial.
- Call for the appellants, right to a fair trial to be upheld.

If you are interested in joining the Campaign, and wish to take action locally to ensure that Samar & Jawad are freed and properly acquitted, please contact us:

By post: Freedom & Justice for Samar & Jawad, BM Box FOSA, London WC1N 3XX.

By e-mail: postmaster@freesaj.org.uk

Visit our web-site: www.freesaj.org.uk

APPENDICES

A. Key Developments in the Chronology

January 2002: The defence team lodged an application for leave to appeal to the House of Lords.

1 November 2001: Lord Justice Rose announced that Samar & Jawad's appeal was dismissed. The Court of Appeal also refused an application to reduce the 20-year sentences. The rulings were greeted by cries of "shame" by supporters of the appellants in the public gallery.

16-17 October 2001: The 2-day appeal ended with a reserved judgement. The judges refused to call a vital new witness brought from Australia by the defence. Police have lost evidence about a suspect, unrelated to Samar or Jawad, handed to police in 1994 before the bombing. The defence repeated its specific requests for further information in possession of the prosecution and security services, including material which may connect the London bombings to others carried out at the same time in Argentina and Panama.

July 2001: The appeal date was set to resume on October 16, 2001.

April 2001: The prosecution gave a dismissive response regarding the suspect.

27 October 2000: The appeal was adjourned so that:

- enquiries could be made by the defence into a fragment of previously suppressed evidence;
- investigations could be made into a new lead received by the defence during the appeal which had never been revealed to them. A freelance cameraman said he had reported his flatmate to the police after the bombings in 1994. Two detectives had taken a statement and seized several documents including a list of ammunition, a map of the Israeli Embassy and its defences.

26 October 2000: Following the PII hearing, the judges ordered the disclosure of only one piece of information out of several crates brought into this appeal alone. This came in the form of a hand-written manuscript. This previously withheld evidence confirmed what was already publicly known thanks to Shayler.

24-25 October 2000: The appeal began. The prosecution applied for and obtained an *ex-parte* or PII hearing.

July 2000: After a 14-month wait, Samar & Jawad were finally told that their appeal was listed for 24 October 2000.

24 February 2000: The Category 'A' Review Committee accepted Samar and Jawad's third application to be de-categorised from their current Category 'A' or 'highly dangerous' status. SAMAR & JAWAD ARE NOW DE-CATEGORISED. This means their prison conditions should improve. Nearly 1,100 signatures and representations have been submitted to the Prison Service in support of the de-categorisation over the last three years.

17 February 2000: A petition of over 200,000 signatures from Palestine and Lebanon calling for disclosure of evidence in the interest of justice was handed over to 10 Downing Street (the British Prime Minister's residence). It was presented by Dr Haider Abdel-Shafi, Dr Eyad Sarraj, Tony Benn MP, Lord Gilmour and members of Samar & Jawad's families.

10 May 1999: The appeal judges granted Samar & Jawad leave to appeal against their convictions on the grounds that the withholding of evidence, including the "Shayler material", was in breach of the fairness of trial and therefore of Article 6 of the European Human Rights

Convention, and on another related ground presented by the defence in the hearings of 29 and 30 March.

6-7 May 1999: The appeal judges read the material shown to them by the prosecution on 15/3/99.

29-30 March 1999: The application for leave to appeal scheduled for 29 March was postponed as the appeal judges agreed to a request by the defence to address a procedural point that arose as a result of the prosecution's failure to give notice of the PII hearing. This allowed the defence to alert the judges to the broader issues of the trial. The non-disclosure particularly of new evidence that even the trial judge had not seen was argued to be in breach of Article 6 of the European Convention of Human Rights and of the fairness of the trial. The legal arguments of the defence were considerably strengthened by European Court's ruling against non-disclosure in the M25 case, and by Lord Bingham's ruling on the unfairness of the P.T.A in the case of 4 Algerians charged with terrorism abroad. The judges retired to consider the options.

16 March 1999: Mrs Peirce was informed that the PII certificate had been signed by the Home Secretary on 8 May 1998.

15 March 1999: PII hearing takes place in the afternoon. The appeal judges agreed to the implementation of the gagging orders. Nothing was given to the defence. The campaign's picket was attended by around 40 people is maintained from 10:00 to 14:30 amidst press presence.

February-March 1999: The campaign against the gagging of information gathered strength. 2,500 letters were sent from the West Bank & Gaza to the Home Secretary, Director of Public Prosecution, and Attorney General. A further 50 letters signed by 50 members of the Palestinian Legislative Council were delivered to the British Consulate. In Lebanon, 140 leading personalities signed 3 letters each to the above-mentioned addressees. In England a further 900 letters of protest were submitted, bringing the total to well over 1,000. These include representations from 33 MPs, 2 Lords, and 2 MEPs.

20 December 1998: The CPS informed Samar that a PII hearing would be held on March 15, 1999.

6 December 1998: The Court of Appeal set the date for the application for leave to appeal before a full court (i.e with three judges) for March 29, 1999.

November 1998: Robert Fisk published two major articles on the case in *The Independent*. The first centred on a photofit of Rida Mughrabi (the purchaser of the Audi that exploded at the embassy) produced by the defendants. The second focused on the fact that the appeal was stalled by the CPS's refusal to disclose new evidence.

August 1998: *Private Eye*, a British fortnightly magazine revealed the existence of another piece of information hidden from the defence and the jury: "Soon after the bombing a senior MI5 manager wrote a note expressing his view that the Israelis had carried out the bombing on their own to embarrass the British government into providing more security for Israeli buildings and personnel... the suggestion that a senior MI5 anti-terrorist agent believed that the Israelis were responsible obviously casts even more doubt on the convictions of Samar Alami & Jawad Botmeh."

April 1998: The prosecution informed the defence that it was considering requesting a PII hearing regarding the disclosure of the warning received by M.I.5 about the attacks.

March 1998: The prosecution informs the defence that their repeated enquiries were receiving 'active consideration'.

November 1997: Former M.I.5 agent David Shayler revealed to the *Mail on Sunday* and other media that the organisation had received a specific warning from a reliable source about possible attacks shortly before the actual bombings in July 1994. That warning had been ignored and only retrieved after the attacks. This information clearly constituted new evidence and pointed to a completely different direction than that indicated to the jury: if the warnings were as described, then those bombings could not have been carried out by Samar & Jawad. During the trial, the prosecution insisted the defendants were "quintessentially English Palestinians" who formed "their own group ". Samar & Jawad's lawyers immediately contacted the prosecution asking them to release this information which had been hidden from the public, the defence and the jury.

August 1997: Samar and Jawad applied to the Category 'A' Committee to be de-categorised from their current category 'A' status. Their application was turned down.

April 25, 1997: The appeal judge rejected the first application even though it was incomplete. The application was renewed to be considered by a full court of three judges.

January 1997: The defence team lodged an application for leave to appeal.

16 December 1996: The trial judge sentenced Samar & Jawad to 20 years, imprisonment with a recommendation of deportation afterwards.

11 December 1996: The jury returned a verdict of not guilty on all counts with respect to Mr AW. They returned a guilty verdict on the conspiracy charge for Samar & Jawad. The decision was reached by a majority of 11 to 1.

19 November 1996: An Israeli journalist approached a juror in court.

4 November 1996: The case against Mrs Z., the alleged bomber, was dropped following the judge's comment that evidence against her was 'dangerously flawed'. PII imposed regarding information obtained by Israelis and British investigators on explosive traces in the bomb sites.

1 October 1996: Trial began and was adjourned for a few days as Jawad is granted bail by the trial judge in order to get medical treatment.
10 June 1996: Direction & Pleas hearing at the Old Bailey: all the defendants pleaded not guilty on all counts.

5 June 1996: A judicial review of Mr AW's custody time limit at the Divisional court was refused. The unavailability of a judge of suitable seniority was considered to amount to a "good & sufficient cause".

20 March 1996: The newly appointed trial judge accepted Samar,s bail application on slightly stricter conditions than previously. She left HMP Durham on 26 March 1996.

19 February 1996: The custody times for AW, Samar & Jawad, due to expire, were exceptionally extended to October 1996, mainly on the basis of the 'risk to the public' argument. Jawad had already served 13 months, while Samar and Mr AW had spent 8-10 months.

26 January 1996: Following applications by defence & CPS for another short delay, the newly appointed trial judge announced that the new fixture would be October 1996, as he would not be available before then.

15 January 1996: Trial judge stood down given that he was an associate of a key prosecution witness.

7 December 1995: Following an application on Samar's behalf, the trial was adjourned to February 19, 1996.

3 November 1995: Trial judge recommended the transfer of Samar from HMP Holloway to HMP Durham in reaction to the reported serious deterioration of her health under very harsh conditions of detention. These had effectively rendered Samar unable to prepare or stand trial. The judge refused to consider postponing the trial on that basis.

8 September 1995: Mr AW was committed to be tried with the other defendants in an "old" committal at Bow Street Magistrate's Court. The suggested trial date was indicated to be January 1996.

18 August 1995: More than two months after being charged, Samar & Jawad were committed for the same original trial under the new charges in a short proceeding at Bow Street. Their custody time was extended.

28 July 1995: The case against Ms AH and Mr D was DROPPED by the CPS.

13 June 1995: One of the people released without charge in January was arrested for a second time at Heathrow Airport. He was charged the next day with conspiracy to cause explosions, and appeared in court on June 15. He was remanded in custody as a Category 'A' prisoner. Mr AW had in fact taken legal advice before planning to leave the country, and had informed the police of his intention to do so some months earlier.

3 June 1995: The three detainees were charged with possessing firearms and explosives with intent to endanger life. For Samar, this represented an additional charge under the same investigation, which did not necessitate her arrest. Further, given that she was already committed to stand trial, she should not have been approached or questioned by the police. However, at that point, to justify her arrest, the police alleged that 'new offences' had been committed whilst on bail, and that the new charges were 'separate'.

2 June 1995: Following police investigation of a London locker unit, Samar was arrested for the 3rd time from a street near her home around 10:45 a.m., while Ms AH and Mr D (one of the people arrested in Jan.,95), were arrested for a 2nd time. All arrests were made under PACE. Their homes were searched again, though this time legal representatives were allowed at Samar's residence.

19 May 1995: Samar was granted bail at the Old Bailey. She left prison on 23 May.

12 May 1995: Mrs Z. was granted bail by the Central Criminal Court. She left prison on 24 May.

10 May 1995: Samar was committed in a short hearing by Bow Street Magistrate's Court to stand for trial along with the other two defendants.

26 April 1995: Samar, Jawad, and Mrs Z. appeared at Belmarsh Magistrate's Court. Samar's case was separated so that the committal procedures of the other two defendants went on independently. Mr Botmeh and Mrs Z. were committed to stand trial. Their custody time limits were exceptionally extended.

22 March 1995: Shortly after 7 a.m., the Anti-Terrorist Branch arrested Samar for the 2nd time, this time under the Police and Criminal Evidence Act (PACE). After the arrests, police searched the house without any of the family or legal representative being present. The flat remained under police control until the following evening. Samar was charged on the same day with conspiracy to cause explosions. She appeared in court on 23 March and was remanded in custody under Category 'A'.

20 January 1995: After 4 days of questioning, three people were released without charge at around 6 p.m., and their passports returned to them a few days later. The remaining two were charged with conspiracy to cause the explosions of July 1994, and were named as Jawad

Botmeh and Mrs Z. They appeared in Bow Street Magistrate,s court on January 21, and were remanded in custody. Both were classified as Category 'A' prisoners. Ms AH, who had been arrested by the Israeli authorities, was released without charge around the same time.
It transpired that her flat in London had been severely damaged by the searches conducted in her absence.

17 January 1995: Around 7 a.m., Scotland Yard's Anti-Terrorist Branch raided the homes of five people of Palestinian origin in London, and arrested them under the Prevention of Terrorism Act (P.T.A) in connection with two attacks in July 1994 on the Israeli Embassy and Balfour House. Their homes were searched for three days, without any legal representatives being present. The same morning, the wife of one of the defendants was arrested and later released without charge. Around the same time, the Israeli army arrested a Palestinian woman who had been visiting her family in Nablus, apparently in the same connection. Meanwhile, her flat in London was searched as part of the same investigation.

B. Key aspects of the case

The Charges

Samar & Jawad faced two charges: conspiracy to cause explosions, and possession of an explosive substance and guns with intent to endanger life and/or cause serious damage to property in the UK.

There was no specific mention of the bombings. Strangely, the charge faced by the alleged bomber, whose case collapsed completely, did not name anyone as co-conspirator! Conspiracy is a 'catch-all' charge, i.e. the widest anyone can face. It allows the prosecution to be vague in their accusations, and use evidence often inadmissible under other charges. Similarly, criminal intent is easy to suggest, and difficult to disprove. The prosecution did not seek to prove that the possession was related to the bombings; in its closing speech, it merely suggested that the possession showed that they can be terrorists and that it follows from their involvement in conspiracies "like night follows day".

Missing links and key evidence against them

Missing links

- Both Samar & Jawad had cast-iron alibis.
- The investigation FAILED to identify fingerprints on key documents, or to match the handwriting on these to any of the defendants.
- The swabbing of the defendants' homes and hands for traces of explosives gave NEGATIVE results.
- There were no paper or printing links to any of the documents.
- The electronic items found in the lock-up were said by government experts not to have "any explosive significance".
- There were no links or evidence linking them to the planning of the bombings.
- Their politics is completely different to that of the bombers.
- No defendants changed their appearance or social behaviour. No one attempted to escape or went into hiding.
- If they were part of the Jaffa team,, which clearly left no traces of its highly professional act, how come it let the defendants leave the evidence in the lock-up? Why rent a small lock-up if they had access to the unknown substantive storage space that the bombers must have used?
- The judge accepted that Samar & Jawad were not part of a known terrorist organisation.
- The only link to the July 94 bombings that has not fallen apart is that Mr Botmeh was present when the Audi used as a car bomb at the embassy was bought. However, he did not buy it, as confirmed by the identity parade, handwriting, and fingerprint evidence. He never knew of its deadly use until his arrest in January 95. None of the cars he purchased or helped purchase ended in such incidents. The car was bought by Rida Mughrabi, who signed as George Davis. Rida has never been traced.

The evidence against them is unrelated to the incidents

- Samar & Jawad admitted, at great risk to themselves and to their families, the possession of the explosive substance, but they still adamantly DENY ANY INTENT TO ENDANGER LIFE or cause damage to property in the U.K. Their defence was that the items were held for the legitimate and legally defensible under British & international law- purpose of self-defence in relation to the illegal, armed and aggressive Israeli occupation. They had no intention to carry out any bombing. The possession was for experimenting, on a very small, limited scale, with the hope of helping with know-how that could be useful in last resort actions, for the defenceless Palestinian population in the Occupied Palestinian territories, in the face of violent, murderous attacks by Israelis.

- The substance found (around 2-kg) is a home-made type, namely TATP. It was split into two small, rudimentary devices, which were not primed, and an unused part. This is consistent with experimentation, not with possible use against targets. As early as September 1994, British and Israeli scientists said that TATP was MOST UNLIKELY to

have been used in the bombings.

- The guns had been left by someone who feared for his life from the Israelis, and were stored in this manner because they were no longer needed. Police checks confirmed that none of them were used and that none could be related to a criminal act; in fact, one of the guns was not even working.

Therefore, the materials found were not linked to the bombings. The amateurish nature of this evidence was in stark contrast to the professionalism and 'efficiency' of the bombers in organising the attacks and covering up their traces. The bombers have never been traced.

The grounds of appeal

The two main grounds of appeal were that:

- The convictions were unsafe in light of the evidence adduced at trial and material that appeared since the trial
- The convictions were unsafe in light of material available at trial but which was never shown to defence or even subjected to PII exercise by trial judge.

The questions to the House of Lords

The two questions submitted to the Law Lords are:

- "1. Is it lawful, within the meaning of section 6(1) of the Human Rights Act 1998, for the Court of Appeal (Criminal Division) to sit *ex-parte* in order to consider an application by the Crown to withhold relevant evidence on grounds of public interest immunity, where the evidence in question was not the subject of a public interest immunity application to the trial judge, and thereafter to uphold the claim to public immunity and to dismiss the appeal?
- 2. Does the answer to Question 1 depend upon whether the trial took place before 2 October 2000?"

C. Pre-trial concerns

The initial context of the arrests and the presumption of guilt

The case is sensitive because it involves national and foreign security interests. This in turn has led to fears that concomitant political pressures may have prejudiced the investigation. Examples of this are the congratulation to the British police by the Israeli ambassador in London after the first round of arrests in January 1995, and the simultaneity of the arrests and releases in the West Bank and London during that period. In representations concerning the conditions of detention of some of the defendants, reference was been made to uncorroborated and unspecified 'information' that 'alleged' their roles in the attacks. Such attacks also attracted wide publicity and speculation, and in this case, media images of Arabs as terrorists were revived.

The five people detained in the first round of arrests in January 1995 were initially picked up under the Prevention of Terrorism Act (PTA) which gives the police sweeping powers of arrest and extended detention. The PTA was originally introduced as an emergency measure in the immediate aftermath of the 1974 Birmingham pub bombings. The then Home Secretary acknowledged that the Acts powers were so draconian as to be "unprecedented in peace time".

Detention under the PTA may be based on intelligence information that would be inadmissible in court and which may not be disclosed to the detainee. The PTA also allowed searches of homes and property to be conducted without warrants and/or without the presence of legal representatives.

According to the civil rights group Liberty, fewer than 5% of the 7000 people detained under the PTA in Britain between 1974 & 1992 had charges brought against them. The majority were released without charges; of those charged, offences ranged from possession of

cannabis to possession of explosives. There have been several notorious miscarriages of justice involving the use of the PTA, including the Guildford Four who served 17 years of wrongful imprisonment and Judith Ward who spent 18 years in prison before being released on appeal. The UN Human Rights Committee and the UN Committee Against Torture have expressed concern over the operation of the PTA. Liberty (1993) raised concerns, stating that the PTA "has routinely been used to harass and intimidate innocent people and significantly undermine the rights of the accused to a fair trial".

One of the effects of the PTA was that it quickly created a presumption of guilt, since detainees were almost invariably labelled as terrorist suspects. In this case, many developments are strongly suggestive that the police had already decided the guilt of their suspects even before the investigation was completed or the case was assessed by judicial process.

During questioning, many questions were bluntly accusing. Neighbours and members of the Palestinian community were told by the police that those arrested were guilty. Statements of guilt were also found in the media. (For example, see the CPS statement in the *Washington Post* July 1995)

The conduct of the investigation & repercussions in the community

In a country like Britain, the police are expected to discharge their task with sensitivity and respect for the rights of the suspects and the social context in which they live. In this case, the degree of objectivity and fairness required for an impartial investigation appears to have been lacking in a number of ways.

The style and manner of arrests particularly in June 1995 were unnecessarily intimidatory given that none of the people picked up resisted arrest or carried weapons. A number of arrests were carried out in public places (e.g. one defendant was re-arrested on a street when the police could have done so at her home or at the police station where she was required to sign twice a day).

During questioning, *all the accused were not only questioned about their political and religious beliefs and associations but they were also asked what they thought of the Middle East peace process*, the fallacious inference being that criticism or disagreement with the Israeli /Palestinian peace agreement was reason enough for involvement in violent action. Other questions were equally intimidatory, invasive, and referred to personal relationships and private matters.

Such conduct repeated itself with associates, friends and the community in general. Officers rarely told witnesses of their right to have a lawyer present during interviews. Positive remarks made about the characters of the persons being investigated were met with angry responses from the police. *The style and tone of questions effectively created a shroud of suspicion and guilt by association that besieged the community*.

The Palestinian and Arab community in London has been shaken by the convictions of Samar & Jawad. The use of the PTA, the nature of the charges and the related assumptions of surveillance of members of the community were intrinsically intimidating. Moreover, the Palestinian community includes many refugees who feel particularly vulnerable in their "host" countries where Palestinians have often been the subject of pejorative stereotyping by governments and the media. For example during the Gulf war, widely respected Palestinian residents were detained without charges and threatened with deportation. Feelings of intimidation and insecurity were heightened both by concern that the Israeli and British intelligence were collaborating and by the pattern and manner of arrests.

There were other elements in the investigation which compounded such feelings. In particular, well-established lawful open community associations found themselves faced with unfriendly approaches by the police so that for a while members' participation dwindled, indicating some undermining of the freedom of association.

The community thus witnessed a disruption of normal social relations. Many worried that expressions of concern or even simple phone calls might be misconstrued. One of the corollaries was that people prepared to give sureties were reluctant to come forward, fearing that guilt might be inferred by such association or that residency renewals may be refused as a result.

Developments in the chronology of the case

A puzzling aspect of the chronology was the pattern of arrests, re-arrests and the dropping of people in and out of the case. Between January and August 1995 the number of defendants changed from two to three to five to six and down to four again. One defendant was left free for five months before being arrested as a suspect. Although his arrest was linked to the investigation of a London locker unit it was made ten days after the charging of three others in the same connection. While the media reported the charging as part of the investigation of the two attacks, the suspects were told that in this case the charges were separate and additional to the connection to the bombings. Such inconsistencies raised the question as to what kind of criteria was being applied.

In particular, *if the claim that evidence came out at a later stage is accepted what did the initial arrests rest upon?* What makes this pattern more puzzling is police insistence that arrests were made as a result of long investigations and after surveillance. Yet at the magistrates, court, it was repeatedly said that evidence had been gathered after the arrests, making it harder to understand the basis on which those arrests took place. Hence, once charged, defendants suffered 2-3 months of detention before committal. On other occasions, the CPS referred to the complexity of the case as an excuse for failing to meet the deadlines while at the time insisting that work was being diligently carried out.

Above all, the slow delivery of papers and of committal bundles after January 1995 hampered the defence counsels, ability to know the exact case against their clients. By the spring of 1996 some statements obtained by the police in January 1995 had still not reached the defence.

Conditions of detention: Category A status

Between 1995 and February 2000, Samar & Jawad were held as Category A prisoners.
The conditions this entailed had a debilitating impact on them. Category A means that the Home Office's Category A committee believes their escape could endanger the public or national security even if this escape is unlikely. The Category A regime is extremely restrictive compounding the distress of incarceration, and can entail the following:

- The prisoner is 'shadowed' at all times i.e. S/he cannot step out of the cell without a special officer assigned to watch them and without two such officers outside the wing. The shadowing can also means a restriction of access to education or to the library prison facilities. When no"shadows" are available, this means the prisoner may also be deprived of exercise and association time.
- They have to be 'in vision' the whole time so that the lights may be kept on all night.
- Detainees are routinely subjected to strip searches, before and after court hearings, legal and social visits, even when the latter occurred under glass separation! One of the detainees was subjected to an estimated 305 strip searches (excluding frisking) in the first 360 days of detention. It is not difficult to imagine the cumulative impact of these searches over the period during which they applied. Strip-searching is a deeply intrusive and humiliating experience that many human rights organisations have condemned.
- The cells are also subject to regular searches and prisoners are moved around every few weeks which is an unsettling procedure.
- All visits to Category A prisoners have to be cleared by police and the Home Office through special vetting procedures which can take months to complete.

The Category A regime also has the general effect of isolating the prisoner and causing an unhealthy lack of sleep. The effects of prolonged isolation on the physical and mental health

of detainees have been well documented in other cases. In this case the isolation undermined the defendant,s fitness and ability to concentrate.

The regime Samar was subjected to in HMP Holloway in June-November 1995 was completely inadequate, worsened by the prison's own crisis, as exposed by the Chief Inspector of Prisons in December 1995. Samar eventually got an apology for the inhuman treatment she received, and the conditions she endured, which included:

– Being locked up 23 hours a day on most days, with the one hour outside her cell typically taken up with fetching food, or with legal/social visits. Yet Category A detainees should be allowed a minimum of 4 hours outside their cell, compared to 6-8 hours for other categories.
– Commonly spending several days without exercise; yet all prisoners should have the right to go out in the fresh air for an hour.
– Rarely eating outside the cell and being denied access to educational facilities and to showers.

These conditions interfered with Samar's defence, and contributed to the delay of the trial. The fact that she was not fit to stand trial was initially refused as a ground for postponing the trial, but it was was accepted later in December 1995. Her consequent transfer to HMP Durham prison helped her recovery, but complicated her access to her lawyers, family, and friends. However, the second adjournment (from February 1996 to October 1996) was due to the lack of availability of a judge of suitable seniority. In the summer/fall of 1999, Samar's health was also affected by a crisis in HMP Durham, when women prisoners were deprived of the right to go out in the fresh air for several consecutive days over a period of several months.

Jawad's health and ability to concentrate also suffered from conditions at HMP Belmarsh. He suffered from severe migraine and painful arthritis, the latter probably due to the lack of direct sunlight. It took 5-6 months for him to obtain dental appointments. It was easier for him to get bail than for the prison to arrange for a surgical procedure he needed! When conditions deteriorated in HMP Belmarsh in the face of tightening resources, Category A prisoners were the first to be affected, so that on most days, they were allowed out of the cell only 2 hours a day. The eyesight of Jawad (who is now in HMP Frankland) has now worsened after several years of incarceration, because of his inability to exercise his vision over a long stretch.

D. The "human errors": Evidence Disclosed To The Defence - 26.10.00

The untitled unsigned manuscript consists of six pages of hand-written sheets (double space, over 400 words) and starts as follows: "Some months prior to the bombing of the Israeli Embassy in London on 26/7/94, the security service and MPSB had received information from an agent source that a terrorist organisation, unconnected to these appellants, was seeking information about the location and defences of the Israeli Embassy in London for a possible bombing attack ...Related intelligence received after the bombing attack indicated that the terrorist organisation, had not, in fact, carried out the bombing". (MPSB is the Metropolitan Police Special Branch.)

The manuscript then describes why even the trial judge did not see this evidence. The failures to disclose occurred across 4 organisations (MI5, MI6, MPSB, the prosecution), at least 8 individuals, in 7 stages, and over 6 years. The sequence *as stated in the sheets* can be summarised as follows:

1. MI5 received the information and "disseminated" it, but "for reasons of human error" failed to place the document to counsel during the disclosure exercise.

2. Other documents from this source were also received and given to counsel, including two documents which were "very similar". Of the two, the document

referring to the above information was not placed in the file given to Mr Justice Garland (the trial judge) "through oversight".

3. The publicity that followed Shayler's allegations resulted in a review of MI5 files, and the information was passed on to the prosecution and counsel.

4. MI6 received a copy of the document originally received by MI5. It was filed by the desk officer responsible for the terrorist organisation, not by the officer handling the prosecution's request for disclosure. The information was not passed on "through human error".
5. The MPSB had a document recording the information, and placed it in a file "germane" to the issue, but not in the Israeli embassy file that would be considered by the prosecution.

6. The information was cross-referenced in a file reviewed for disclosure, but it was "overlooked" because the cross-reference had an "unusual physical position".

E. Comparison with relevant rulings of the European Court of Human Rights

Comparison with the M-25 case (Rowe & Davis)
In the M-25 case
– In the Rowe & Davis 1993 appeal, material wasn't disclosed to the defence because of the PII hearing. Had it been disclosed to defence then, the convictions might have been quashed in 1993 rather than 2000.
– In the Rowe & Davis July 2000 appeal, the courts held a PII hearing, but also ordered disclosure and quashed the convictions.
– The ECtHR ruled in February 2000 that a failure to disclose material to the trial judge constitutes a breach of Article 6.1 because it does not preserve the equality of arms, which would have been partially preserved had the trial judge seen the material. The trial judge should make decisions as to what evidence should be withheld from the defence because he is in a unique position: he sees and hears the trial unfolding, assesses the evidence discussed, and is more aware of the defence's case.
– The ECtHR considered that, following such a breach, holding a PII hearing at the appeal stage does not remedy the breach. That is because the appeal court is in no position to make the kind of decisions about the disclosure of evidence that only the trial judge should be making, especially as the ex-parte procedure means that the court will only hear submissions from the prosecution about the possible effects of the evidence on the trial. The defence is excluded.
– In June 2000, the Court of Appeal accepted that in the M25 case, the failure to disclose important material at trial constituted a material irregularity that breached the fairness of the trial and threw doubt on the safety of the convictions. "...we have come to the same conclusion, namely that the failure to make known .. was a material irregularity rightly condemned by the ECtHR as a violation of Article 6"

In Alami & Botmeh
In both cases, vital and relevant evidence was withheld by the prosecution from the trial judge. The difference with the M25 case is that in that case the evidence was eventually revealed to the defence by the Court of Appeal, thus enabling it to argue how its non-disclosure at trial had affected the safety of the convictions. In Samar & Jawad's case, the Court of Appeal sat ex-parte to consider the evidence covered by PII, but all that was released to the defence was confirmation of what was already known via Shayler's public revelations. Therefore the breach of Article 6 at trial remains unremedied. *This breach is worsened if material throws doubt about guilt, which was the case in Rowe & Davis and is the case here.*
The defence argued on the bases of the ECtHR ruling that:
– With the coming into force of the Human Rights Act (HRA), violations of the ECHR are

violations of the HRA. Seeking compatibility with the HRA is statutorily binding, and because there are no legal authorities that require otherwise, the coming into force of the HRA has an added force.

- In this case, the Court of Appeal should not hold an *ex-parte* hearing, because such a hearing would not remedy the breach caused by withholding evidence from the judge at trial.
- If the Court of Appeal insisted on holding an *ex-parte* hearing without subsequently disclosing all information to the defence, this would be another violation of Article 6 of the ECHR; it would compound the original breach, and the unfairness would go unremedied.
- The ECtHR and the Human Rights Act are concerned with the fairness of the trial procedure, which includes the appeal process. While the Court of Appeal is concerned with whether on the whole, the convictions are safe or unsafe, clear case law from the ECtHR and now from the Court of Appeal, shows that an unfair trial will almost always also mean that the convictions are unsafe. This is especially the case where the breach is substantive, i.e. it is not just a "technicality".
- In Samar & Jawad's case, the clear case law of the ECtHR and the British courts pointed to only two courses of action that would be fair, remedy the breach, and be consistent with the HRA and the related case law here and in Europe:
- If the Court of Appeal chose to keep the evidence withheld, then it should quash the convictions and order a retrial, so that the trial judge could determine the issue of disclosure.
- Alternatively, the appeal judges could order full disclosure so that the material could be subjected to full and informed arguments by both sides as to whether it made the convictions unsafe.
- If the Court of Appeal declined all these options, then it would be sending the case eventually to the ECtHR, which would then find a breach and refer the matter back to the Court of Appeal. The purpose of enacting the HRA had been to prevent appellants having to recourse to the ECtHR. Hence the slogan "bringing rights home".
- In 1999, a Privy Council decision held that a breach of the constitutional right to a fair trial can only be remedied by having the convictions quashed, and either ordering a re-trial or releasing the appellants.

Comparison with Atlan

Atlan was convicted in 1991 on drug smuggling charges. Up to the appeal in 1995 the CPS had claimed it did not have unserved information. At the beginning of this appeal (which started in November 1995 but did not conclude till 1997), the courts held a PII hearing and did not disclose anything. In February 1997, another PII hearing was held at the second appeal application. The appeal was rejected.

Atlan's case bears more similarities with Alami & Botmeh than the M-25 case because:

- The CPS admitted the relevance of the material withheld at trial, and of material whose existence emerged after the trial. Despite knowing there was information, the CPS did not disclose it, claiming the existence of an "intelligence vacuum".
- The Court of Appeal held the PII hearings after a general presentation by the defence and after the discussion of fresh evidence.
- The trial judge was mis-informed and summed up the case largely on the basis of the CPS,s scenario, which did not refer to the material withheld.

In the Atlan ruling of June 2001, the European Court recalled the rulings in Rowe & Davis, as well as Ward. *They restated the principle that all material evidence must be disclosed to the defence, and that the duty to disclose extends to material potentially favourable to the defence. Any restrictions on this right must be appropriately and fully counter-balanced*. The Court recalled its duty to ensure that the equality of arms is respected, and that requirements of fairness have been met in the procedures followed. In sum, the ECtHR's noting particularly that the CPS failed to produce information despite repeated requests by the defence at and since trial, ruled that:

"For the reasons set out in the above-mentioned Rowe and Davis judgment, the Court con-

siders that the trial judge is best placed to decide whether or not the non-disclosure of public interest immunity evidence would be unfairly prejudicial to the defence. Moreover, in this case, had the trial judge seen the evidence he might have chosen a very different form of words for his summing up to the jury. In conclusion, the prosecution,s failure to lay the evidence in question before the trial judge and to permit him to rule on the question of disclosure deprived the applicants of a fair trial. It follows that there was a breach of Article 6.1 of the Convention."

F. Excerpts from Appeal Court Ruling

Neutral Citation: [2001]-EWCA-Crim 2226
Case No: 1997/0382/X5 & 1997/0383/X5
Court Of Appeal (Criminal Division); Royal Courts of Justice Strand, London, WC2A 2LL
Thursday 1st November 2001
Before : The Vice President (Lord Justice Rose), Mr Justice Hooper, And Mr Justice Goldring

R v Jawad BOTMEH And Samar ALAMI

- "We also accept that, in accordance with s6(1) of the Act, "it is unlawful for a public authority to act in a way which is incompatible with a Convention right" and that this court is a public authority within that section (see s6(3)(a))..."
- "*Although the ECtHR in Rowe & Davis v UK and Atlan held that this court's review of the undisclosed evidence was insufficient in those cases to remedy the unfairness caused at the trial by the absence of any scrutiny of the withheld information by the trial judge, there is nothing in the court's judgments to suggest that an ex-parte examination of material by this court is, of itself, unfair*."
- "..this court having, in accordance with s2(1) of the Human Rights Act, taken into account the judgments of the ECtHR in Rowe & Davis v UK, and Atlan and the other decisions of that court to which we were referred, saw no unfairness or breach of Article 6 by us examining the undisclosed material *ex-parte* ...if Mr Emmerson is right, this court would have only two choices - either to disclose the material in an unedited form or to order a retrial. That cannot be right. An appellant is not entitled to a retrial because of some immaterial error made before or during the trial and there is, in our view, nothing in the ECtHR's judgments in Rowe & Davis or Atlan to suggest otherwise."
- "The next question is whether non-disclosure to the trial judge of the matter seen by this court gave rise to an assertable breach of Article 6 by the Crown. In our judgment it did not. Mr Rabinder Singh's analysis of Lambert satisfied us that the majority of the House of Lords decided that it is not possible for an appellant to assert, on appeal, Convention rights in relation to a trial before October 2000 (see per Lord Slynn para 9, Lord Clyde, paras 140-144 and Lord Hutton para 172). In any event, even if there were an assertable breach of Article 6, we would not regard that breach as, in itself, calling for any remedy other than a declaration of violation unless, by virtue of the breach, the jury's verdicts were unsafe."
- "We are unpersuaded that the Crown's system and strategy in relation to disclosure, as set out in detail in paragraphs 5.2 and following of their initial Skeleton Argument and paragraphs 3.2 and following of their further Skeleton Argument of 10th October 2001 is flawed. In particular the suggestion that they adopted too narrow an approach is unsubstantiated."
- "Having considered all the matter placed before us in this way, we were and are entirely satisfied about five things. First, prosecuting counsel have had access to everything they want to see and have examined all relevant and potentially material matter in accordance with... Secondly, the trial judge was correct to rule as he did in relation to the disclosure and non-disclosure of the matter before him. Thirdly, no one has attempted to conceal from this court any relevant or potentially material matter. Fourthly, public interest immunity has been rightly claimed in relation to the matter which we have seen, because it affects national security at the highest level and would, if disclosed,

present a clear and immediate threat to life. Fifthly, apart from the two matters to which we shall refer, there is nothing of significance before this court which was not before the trial judge. Having ordered disclosure of these matters to the appellants, in a suitable form, and having heard submissions in relation to them, we are satisfied that no injustice was done to the appellants by not having access to that matter at trial. We say this, first, because the matter added nothing of significance to what was disclosed at trial and, secondly, because, for whatever reason, no attempt was made by the defence at trial to exploit, by adducing it in any form before the jury, the similar material in relation to the embassy which had been disclosed at trial... he jury could not have failed to realise that there were many possible candidates for carrying out bombings of this kind."

- "The two matters which we ordered should be disclosed during the course of this appeal were, first, further information, prior to the bombings, suggesting that a terrorist organisation unconnected with the appellants may have been contemplating an attack on the Israeli Embassy and, secondly, an explanation as to the circumstances in which a document was not shown to counsel and a later document was not shown to the trial judge. *As to the information, for the reasons already given, this would have had no impact on the trial. As to the explanation about the documents, which we accept, this disposed of any possible sinister implication: we do not take the view that deliberate malpractice is a necessary or proper inference from repeated human error*, particularly in the light of the explanation given to us in the ex-parte proceedings...We should also emphasise that assessment of the accuracy or reliability of the information disclosed is no part of this court's function."
- "As to the third ground of appeal, although we read the statements, in particular from Mr Wise, .., we declined to receive this evidence for several reasons."
- "... we are unpersuaded that there is a reasonable explanation for the failure to adduce Mr Wise's evidence at trial... When viewed, as it must be, in conjunction with the contemporaneous police records to which we have referred and all the other statements and documents presented to us in the appellant's bundle, it merely shows, at the highest from the appellants, point of view, that an apparent fantasist with Iranian connections, with many convictions for petty dishonesty, who professed, sequentially, several different faiths and even more names, and who was not in this country between the end of May 1994 and January 1995 had a list of arms and ammunition, explicable by unrelated activities, and may have had a sketch of the Israeli Embassy... Mr Wise's evidence could not have made any difference to the jury's verdict."
- "*Accordingly, there is, in our judgment, no demonstrated breach of the appellants, Article 6 rights and no reason to regard their convictions as unsafe. The principal issue for the jury was whether, as both appellants claimed, Reeda existed. There was a great deal of evidence entitling the jury to conclude that he did not... These appeals against conviction are dismissed.*"