England and Wales High Court (Administrative Court) Decisions

Neutral Citation Number: [2017] EWHC 129 (Admin)
Case No: CO/4091/2016

IN THE HIGH COURT OF JUSTICE
DIVISIONAL COURT

Royal Courts of Justice
Strand, London, WC2A 2LL
31/01/2017

B e f o r e :

LORD JUSTICE LLOYD JONES
MR JUSTICE JAY

Between:
R (oao TL)

Claimant

- and –

THE CHIEF CONSTABLE OF SURREY POLICE **Defendant**

Mark Summers QC (instructed by Stokoe Partnership) for the Claimant
Paul Stagg (instructed by Weightmans LLP) for the Defendant
Hearing date: 19th January 2017

HTML VERSION OF JUDGMENT

MR JUSTICE JAY:

Introduction

1. On 23rd May 2016 TL ("the Claimant"), whose identity we have anonymised, was arrested by DC Andreas of Surrey Police ("the Defendant") in relation to serious allegations of rape and sexual assault made by his former partner LM. She is entitled to anonymity under the Sexual Offences (Amendment) Act 1992, and nothing may be published which might lead to the identification of LM.

2. On 1st August 2016 the Claimant filed judicial review proceedings claiming, in outline, that his arrest was unlawful because it was unnecessary and actuated by more than one collateral or improper purposes. McGowan J adjourned the Claimant's application for permission to be listed in this Court as a "rolled up" hearing on notice to the Defendant. She observed that "there may be an arguable point of general application in this case". Although permission has not yet been granted, we heard full argument on the Claimant's grounds, and are grateful to Counsel for the clarity and economy of their submissions.

Essential Factual Background

3. The Claimant is the former partner of LM with whom he has a child, VL, now aged 7. Their relationship ended in 2010. Since then the Police have been called to LM's home address on numerous occasions, with various allegations and counter-allegations made by both parties. It is unnecessary to delve into any of the detail, save to note that LM has never previously made an allegation of rape and sexual assault. Further, the Claimant has never been prosecuted or cautioned in relation to any allegation LM has made.

4. Following proceedings in the Family Division of the High Court, the Claimant was granted what his solicitor describes as "full custody" of VL. A copy of the Court Order is not available. It seems clear from the available evidence that LM was granted access to her daughter at weekends, with VL staying at her property. According to the written statement of the Claimant's solicitor Mr Amjid Jabbar, dated 1st August 2016, the High Court made certain adverse findings as to her character and credibility.

5. On 27th March LM complained to Hampshire Police that the Claimant regularly raped and sexually assaulted her during the currency of their relationship. This information was transmitted to the Defendant the following day.

6. On 28th March DS Linaker of the Defendant gave a written risk assessment and proposed an investigation strategy. DS Linaker assessed the overall risk to be high, based on the Claimant's admitted attempts to track LM's movements using technological means. This was considered to be evidence of "controlling and coercive behaviour", although there was no suggestion that the Claimant had been physically abusive. DS Linaker further stated that any arrest of the Claimant should be deferred until LM had been interviewed.

7. On 1st April 2016 the Claimant was informed by Surrey Children Services that the police wished to interview him. The Claimant contacted the Defendant and left a message for the officer dealing with the case, who was now DC Andreas, to telephone him. It is clear that even at this very early stage the Claimant must have known in general terms that LM was alleging that he had committed an offence, or offences, of a sexual nature. When he came to prepare a statement for the purposes of the interview under caution which took place on 23rd May 2016, the Claimant said:

> "Assuming that these allegations [of historic abuse] are of a sexual nature (based upon the police department that DC Andreas works for) …"

8. According to paragraph 28 of DC Andreas' witness statement, he telephoned the Claimant on 2nd April to advise the latter that (a) he did not wish to discuss the allegations over the 'phone, and (b) the Claimant should not speak to LM about her complaint to the police. DC Andreas accepts that the Claimant gave an assurance in regards to (b) and stated that he was willing to be interviewed.

9. On the same day Mr Jabbar spoke to DC Andreas and reiterated his client's assurances. These were later confirmed by email. There is no indication that the Claimant later breached those assurances.

10. The timing of DC Andreas' conversation with the Claimant and then his solicitor is not altogether clear from the OE log. However, it is apparent from the entry timed at 17:15 on 2nd April that DC Andreas had already decided to arrest the Claimant before he had taken the opportunity to speak to him or LM. It may well be, as has been submitted to us by Mr Mark Summers QC for the Claimant, that DC Andreas' mindset was, at least in part, determined by his interpretation of DS Linaker's risk assessment: namely, that the grounds did not exist for the immediate arrest of the Claimant. However, Mr Summers did not submit that DS Linaker directed any police officer to arrest the Claimant.

11. On 20th April 2016 LM provided her account to investigating officers through the standard ABE procedure governing cases of this nature.

12. On 23rd April 2016 LM emailed the police officer who had conducted her interview "to stress how frightened she was of [the Claimant's] family". These fears were reiterated to the same officer on 11th May. LM was advised by that officer that "once [the Claimant] has been spoken to he will have bail conditions".

13. On 27th April 2016 DC Andreas wrote the following entry in the OE log:

> "The main priority when I return fully next week will be to arrest and interview the suspect after I have had a chance to review the victim's account."

14. DC Andreas' further OE entry for 10th May reads:

> "… I have discussed the investigation with DS Linaker and considered dealing with the suspect on a voluntary basis. The decision has been made to arrest the suspect in order to conduct a search of his home address for electronic equipment …".

15. DS Linaker's witness statement is on similar lines:

> "… voluntary attendance at the police station … is in fact something I considered with DC Andreas on 10th May 2016. On balance, given we wished to search the Claimant's home … I decided that voluntary attendance was not a reasonable or viable option in this particular case. I believed the risk of the Claimant tampering or destroying evidence was too high."

16. On the same day DS Andreas contacted Mr Jabbar to arrange an appointment for the Claimant to be interviewed at Guildford Police Station on 23rd May 2016. The Claimant was not informed at that stage that he would be arrested; he must, therefore, have been under the impression that his attendance was voluntary. However, during the course of a further conversation on 19th May, DC Andreas informed Mr Jabbar that the Claimant would be arrested. On DC Andreas' evidence, Mr Jabbar was informed that "part of our consideration in relation to arresting [the Claimant] was in order to prevent interference with the victim which may include consideration of bail conditions if we reached a point that [the Claimant] was to be bailed."

17. So it came about that when the Claimant attended to be interviewed on 23rd May 2016 he was arrested outside Guildford Police Station by DC Andreas. Mr Swan, another solicitor in Mr Jabbar's firm, was in attendance. It is sufficient for these purposes to rely on DC Andreas' account. In the first instance he informed the Claimant that the arrest was to "effect a prompt investigation". Later, and as corroborated by DC Andreas' manuscript note, he told the Claimant that the grounds for believing that a prompt investigation required him to effect an arrest were:

> "(1) to prevent interference with witness LM; (2) search of premises and seizure of evidence in relation [sic]; (3) obtain evidence by way of questioning." [timed at 11:15am]

18. The Claimant's detention was then authorised by the custody officer under section 37 of PACE 1984. It was disclosed to the Claimant that he was under investigation in relation to the rape allegation. He was interviewed under caution and provided two prepared statements. Later he was strip searched, finger-

printed, photographed and provided samples for DNA profiling purposes. The Claimant was released without charge at approximately 4pm. His police bail was subject to the following conditions:

> "Not to contact LM directly or indirectly or via any third party other than via solicitors in relation to child care and access arrangements."
>
> "Not to go to [LM's home address] at any time."

The Claimant was also required to surrender to his bail on 22nd August 2016.

19. The Claimant's premises were searched by three police officers whilst he was at Guildford Police Station. The search, purportedly carried out under section 18 of PACE, took 28 minutes and was concluded before 2pm that afternoon. The Claimant's father, a retired police officer, was present. There was some evidence that a computer had recently been moved from a desk.

20. Thereafter, the police investigation continued. It is unnecessary to set out any of the detail. The Claimant surrendered to his bail on 22nd August and was re-bailed to attend on 21st September. On 19th September 2016 the Claimant was informed that the Defendant proposed to take no further action in relation to LM's allegation. It appears from the internal documentation that the Defendant had come to appreciate the complex history between the Claimant and LM, and considered that the available evidence was insufficient to take the matter further.

21. The Claimant has maintained his claim for Judicial Review. His Claim Form seeks damages, which could be pursued separately by private law action, but the principal relief sought is for a declaration that his arrest (and associated bail conditions) was unlawful. If granted, this would lead to the removal of any record of his recent arrest from the PNC. On my understanding, the Claimant can now receive his certification as an enforcement agent, notwithstanding his recent history (he could not during the currency of his police bail); but obvious issues of stigma arise. Furthermore, it is said that unless this Court intervenes, the events of which the Claimant complains might well be deployed by the Police to justify similar action in the future in response to a false allegation.

The Legal Framework

22. The core provision is section 24 of PACE, as amended (by substitution) by the Serious Organised Crime and Police Act 2005. There is a power in a constable to effect a summary arrest but only in circumstances where he has reasonable grounds for believing "that for any of the reasons mentioned in subsection (5) it is necessary to arrest the person in question". By subsection (5):

> "The reasons are -
> …
> (e) to allow the prompt and effective investigation of the offence or of the conduct of the person in question;"

23. Section 18(1) of PACE is in the following terms:

> "**Entry and search after arrest**
>
> (1) Subject to the following provisions of this section, a constable may enter and search any premises occupied or controlled by a person who is under arrest for an indictable offence, if he has reasonable grounds for suspecting that there is on the premises evidence, other than items subject to legal privilege, that relates –
>
> (a) to that offence; …"

24. Section 18 is to be contrasted with the narrower power under section 8 for a magistrate to authorise entry and search of premises. The narrowness arises from a number of factors, including that (a) judicial authorisation is required, (b) the material must be "likely to be of substantial value", and (c) that it does not consist of or include items subject to excluded material or special procedure material. Further, sections 15 and 16 of PACE contain additional safeguards. There are also personal search

powers under section 54; and, pursuant to section 37, power in the custody officer to authorise police detention (subsection (3)) and a further power to release without charge and on bail (subsection 7(a)(i)).

25. Code G to PACE (the current version having effect from November 2012) is admissible in evidence in these proceedings. Its terms are familiar, having been set out in previous jurisprudence on this topic, but reference should be made to a number of sub-paragraphs:

> "1.3 The use of the power must be fully justified and officers exercising the power should consider if the necessary objectives can be met by other, less intrusive means. Absence of justification for exercising the power of arrest may lead to challenges should the case proceed to court…
>
> …
>
> 2.1 A lawful arrest requires two elements:
> - a person's involvement or suspected involvement or attempted involvement in the commission of a criminal offence;
> AND
> - reasonable grounds for believing that the person's arrest is necessary
> - both elements must be satisfied.
>
> …
>
> 2.8 In considering the individual circumstances, the constable must take into account the situation of the victim, the nature of the offence, the circumstances of the suspect and the needs of the investigative process.
>
> 2.9 … (e) … This [sc. the exercise of the s24(5) power] may arise when it is thought likely that unless the person is arrested and then either taken in custody to the police station or granted 'street bail' to attend the station later, further action considered necessary to properly investigate their involvement in the offence would be frustrated, unreasonably delayed, or otherwise hindered and therefore be impracticable. Examples of such actions include:
>
> (i) interviewing the suspect on occasions when the person's voluntary attendance is not considered to be a practicable alternative to arrest because, for example:
>
> …
>
> - It is thought likely that the person …:
> - may intimidate or threaten or make contact with, witnesses.
>
> (ii) when considering arrest in connection with the investigation of an indictable offence, there is a need:
>
> - to enter and search without a search warrant any premises occupied or controlled by the arrested person …
> - to prevent the arrested person from having contact with others;"

The Guidance Notes to Code G state:

> "2F. An officer who believes that it is necessary to interview the person suspected of committing the offence must then consider whether their arrest is necessary in order to

> carry out the interview. The officer … must consider whether the suspect's voluntary attendance is a practicable alternative for carrying out the interview. If it is, then arrest would not be necessary …
>
> Circumstances which suggest that a person's arrest 'on the street' would not be necessary to interview them might be where the officer:
> - is satisfied as to their identity and address and that they will attend the police station voluntarily to be interviewed, either immediately or by arrangement at a future date and time; and
> - is not aware of any other circumstances which indicate that voluntary attendance would not be a practicable alternative…
>
> 2G. When the person attends the police station voluntarily for interview by arrangement as in note 2F above, their arrest on arrival at the station prior to interview would only be justified if:
> • new information coming to light after the arrangements were made indicates that from that time, voluntary attendance ceased to be a practicable alternative and the person's arrest became necessary …"

26. The epithet "necessary" requires particular emphasis (see Richardson v The Chief Constable of West Midlands Police [2011] 2 Cr App R 1 (at paragraph 51). The constable's reasonable belief of the necessity of the arrest – here on the basis that it is requisite to allow the prompt and effective investigation of the offence – is subject to scrutiny by this court on judicial review principles, albeit the constable's reasons do not require microscopic examination.

The Rival Contentions

27. The case advanced by Mr Summers for the Claimant is that there was no objectively justifiable reason for DC Andreas to conclude that arresting the Claimant outside Guildford Police Station, and taking him into custody, was necessary for him to be able to interview him. Indeed, this was a paradigm case of voluntary attendance being the suitable means of effecting police interview: there were no reasonable grounds for believing that the Claimant would not attend as promised.

28. Mr Summers further submitted that a close examination of the chronology of events, focussing solely on the Defendant's decision-making process, demonstrates that the decision to arrest the Claimant was made at an early stage on the footing that it would bring about operational advantages: namely, the ability to deploy the search power under section 18 of PACE. In this regard it is submitted that the Defendant is caught on Morton's Fork: either the magistrate would have granted a warrant under section 8 of PACE (on which premise the failure to activate the correct legal process cannot be justified); or, alternatively, the magistrate would have refused to grant a warrant (on which premise the power under section 24(5) was being exercised for an *ex hypothesi* collateral purpose: the Claimant should have been requested to give voluntary production).

29. Mr Summers' primary submission was an intention to search a suspect's premises pursuant to section 18 of PACE, could never be the justification for an arrest under section 24(5)(e) – on the premise that it was the sole, or sole lawful, reason for arrest. He submitted in the alternative that on the facts of this case there were no reasonable grounds for arresting the Claimant in order to search his premises. In particular, the Claimant had effectively been "tipped off"; voluntary production of the sought items was an entirely realistic option which should have been pursued; and, in any event, there was no rational justification for not applying for a search warrant.

30. It is less clear, submitted Mr Summers, that the decision to arrest the Claimant was animated in significant measure by concerns about LM's physical or mental wellbeing. However, he did not seek to go behind DC Andreas's witness statement on this issue. He submitted that it is clear that the police were intent on imposing bail conditions, and that there is no distinction in substance between preventing interference with a witness and imposing post-arrest bail conditions: in reality, these amount to the same.

31. Mr Summers' primary submission was that the desire to impose bail conditions could not, without more, constitute a necessity ground under section 24(5)(e), as opposed to sub-paragraph (d) ("to protect a child or other vulnerable person from the person in question"). In the alternative he submitted that there were no reasonable grounds for deploying sub-paragraph (e) as the means of imposing bail conditions in the circumstances of this particular case. Further, it was not possible, either in principle or on the evidence, for sub-paragraph (d) to be recruited retroactively for the purpose of justifying the imposition of bail conditions.

32. Finally, Mr Summers did not go so far as to submit orally, in contrast to his written submissions, that it was sufficient for his forensic purposes to succeed on just one of his points. However, he did submit that it was clear on the available evidence that this Court could not be satisfied that the Claimant would still have been arrested if just one lawful ground remained, regardless of which it was.

33. For the Defendant, Mr Paul Stagg submitted that judicial review is an inappropriate remedy in this case because "the [Claimant's] skeleton argument is replete with assertions about controversial facts". In particular, important disputes have arisen in relation to LM's overall credibility and the conversation which took place on 19th May 2016 (see paragraph 16 above).

34. As for the merits, Mr Stagg emphasises that the yardstick for this Court is the traditional Wednesbury test, and that furthermore a decision to arrest cannot be subject to a full-blown reasons challenge. In short, as paragraph 33 of Mr Stagg's skeleton argument submits:

> "The essential error in the Claimant's submission is to treat these three factors [as itemised by DC Andreas in his contemporaneous note] as compartmentalised, whereas the reality is that they all form part of a bigger picture which was considered."

35. Mr Stagg submitted that it is clear from the Defendant's evidence that the Police did consider whether alternatives to arrest existed, but came to the conclusion that the requirements of a search of the Claimant's property and the protection of LM made arrest necessary. He submitted that this is not a case of the Claimant attending voluntarily by arrangement because on 19th May DC Andreas informed Mr Jabbar that the Claimant would be arrested. Further, he contended, there is a distinction between considerations of victim protection and the imposition of bail conditions; and, to the extent that the latter informed the decision making process, the authorities make it clear that an arrest where bail conditions might be sought would be lawful. The specific concern was to protect LM from the possibility of intimidation from the Claimant which might well have the effect of undermining her wish to give evidence, thereby frustrating the effectiveness of the police investigation. LM had voiced her concerns on several occasions, and the MoJ's Code of Practice for the Victims of Crime (October 2015) makes clear that these matters should be seriously considered. Finally, as for DC Andreas' wish to carry out a search of the Claimant's home, Mr Stagg submitted that it is risible to suggest that voluntary production of relevant evidence should be sought in cases of domestic abuse. In any event, the evidence demonstrates that the Claimant took steps to frustrate the search which he anticipated would take place. The authorities do not establish, submitted Mr Stagg, that the need for a search following arrest can never be relevant to the necessity of arrest.

36. Both Counsel made submissions on the PACE Code of Practice, as well as the authorities, which are reflected in the next and final section of this judgment.

Discussion and Conclusions

37. It is convenient to begin with Mr Stagg's submission that permission should be refused in this case, in the Court's discretion, owing to the existence of non-justiciable disputes of fact. I agree that there clearly are instances where judicial review is an inappropriate remedy: see, for example, the decision of this Court in R (Sher) v Chief Constable of Greater Manchester Police [2010] EWHC 1859 (Admin). However, in that case the factual disputes were multitudinous, complex and essential of resolution. The factual disputes in the present case cannot be so characterised. My recitation of the essential factual background has been based on the Defendant's evidence and that of the Claimant, where the latter's stands uncontroverted. DC Andreas' reasons for arresting the Claimant emerge from his written statement and contemporaneous documentation. Mr Summers accepts that his case must be

run within the traditional confines of a judicial review application, and he has not sought permission to cross-examine the Defendant's witnesses. In any event, it was unnecessary for him to make such an application, counterproductive too as it would have been. I reject Mr Stagg's submission that the parties are entitled to have their evidence judged in a private law forum. The Claimant's case raises issues appropriate for resolution in this public law jurisdiction, as well as being capable of being fairly resolved in that forum. I therefore consider that this Court should consider the merits of the Claimant's application on his substantive points.

38. I agree with Mr Stagg that the next issue to consider is the appropriate test that this Court should apply to DC Andreas' exercise of his discretionary power under section 24(5) of PACE. I have already touched on this, but I should go somewhat further. It is not for this Court to decide as a question of primary fact whether the Claimant's arrest was necessary. Mr Summers did not submit that it was, and basic principles of administrative law indicate otherwise. It would be undesirable in a case such as this to place any judicial gloss on the adjective, "necessary". Further, as Hughes LJ (as he then was) explained in Hayes v Chief Constable of Merseyside [2012] 1 WLR 517 (CA), the test is two-pronged: first, the policeman must honestly believe that arrest is necessary for one or more identified section 24(5) reasons; and, secondly, "his decision must be one which, objectively reviewed afterwards according to the information known to him at the time, is held to have been made on reasonable grounds" (see paragraph 39). These formulations reflect the policies and objects of PACE, including the need to protect the liberty of the subject.

39. The first limb of the test is subjective. Mr Summers did not submit that DC Andreas did not have the requisite honest belief. Insofar as the second limb deploys the adverb "objectively", all that means is that this Court, in the exercise of its judicial function, applies independent, objective standards to its review of the Defendant's decision: in particular, the reasonableness of the grounds upon which that decision was founded. That review is carried out on the basis of information known to the decision-maker at the time it was made. Finally, the Court does not ask itself whether *any* police officer could rationally have made the decision under challenge; it directs itself to the particular decision maker and *his* grounds. In my view, that is what this Court, Lord Thomas CJ presiding, was saying at paragraphs 22 and 23 of its judgment in R (B) v Chief Constable of the PSNI [2015] EWHC 3691 (Admin).

40. However, it should be emphasised that the underlying concept in section 24(5) is that of necessity. This cannot be envisaged as a synonym for "desirable" or "convenient". For present purposes the issue may be formulated thus: should this Court, in the exercise of its review function, conclude that an arrest was necessary to allow the prompt and effective investigation of this complaint?

41. Mr Stagg submitted that the question thus formulated is unitary or composite, rather than capable of being compartmentalised. In one sense he is correct, in that the overall picture must be examined; but in my view the Court cannot avoid examining the reasons DC Andreas recorded on 23rd May 2016. If all of these reasons are unlawful, the Court must conclude that the question posed requires a negative answer. Mr Stagg came close to submitting that reasons which are just below the waterline of legality, taken individually, may amount to a lawful section 24(5)(e) justification of necessity, taken cumulatively. In my view, that cannot be right. However, Mr Stagg made the fair point that DC Andreas' reasons are interconnected. In my view, the links between them require examination.

42. On the other hand, Mr Summers' initial position was that it was sufficient for his purposes to establish that just one of DC Andreas' reasons was unlawful. In oral argument Mr Summers drew back from this contention, and submitted instead that the Court should identify the "dominant purpose" for the arrest. In my view, an analysis of the correct approach should await my assessment of the three reasons put forward in the light of the way in which the case unfolded in oral argument.

Obtaining Evidence by Way of Questioning

43. It is convenient to begin with DC Andreas' third reason (see paragraph 17 above), namely "obtain evidence by way of questioning". His evidence was that the order in which his reasons were noted was immaterial, and I accept that evidence. DC Andreas clearly wished to interview the Claimant in order to obtain his account. If he reasonably believed that it was necessary to arrest the Claimant in order to interview him, one need look no further: the section 24(5) criterion would be met. However, in my

judgment that was not DC Andreas' state of mind. I accept Mr Summers' analysis of the chronology. On 2nd April 2016 DC Andreas had already decided to arrest the Claimant *before* he had spoken to LM or the Claimant. Yet, at the same time, it was not his intention to arrest the Claimant until after LM had been interviewed. On this footing and at that stage it is impossible to discern the basis on which DC Andreas had decided that it was necessary to arrest the Claimant in order to interview him.

44. Furthermore, at all material stages thereafter the Claimant made it clear to DC Andreas (i) that he would attend for interview on a voluntary basis, and (ii) that he would not contact LM in relation to her complaint. DC Andreas has never said that he doubted the Claimant's word in that respect. Instead, his position was – at least on 10th May 2016, which was after LM had been interviewed – that voluntary attendance was inappropriate because the Police wished to search his home address. That, of course, was a separate basis for arresting the Claimant; it had nothing whatsoever to do with whether he would attend for interview on a voluntary basis.

45. It is clear from Code G of PACE that it was incumbent on DC Andreas to ask himself whether it was necessary to arrest the Claimant in preference to a voluntary interview. As already noted, Code G specifically permits an arrest, in preference to voluntary attendance, "to enter and search without warrant". At this stage, therefore, Mr Stagg's submission about not compartmentalising DC Andreas' reasons requires examination. *If*, but only if, DC Andreas was entitled to ask himself the question posed by Code G, it would follow that he could lawfully decide not to ask the Claimant to attend on a voluntary basis and arrest him instead. *If*, on the other hand, DC Andreas was not entitled to ask himself that question (and/or, by parity of reasoning, the further question regarding the imposition of bail conditions), it would follow from the conclusions I have already reached that there was no reasonable basis in this case for arresting the Claimant solely for the purpose of interview. In short, DC Andreas made a very early decision to arrest the Claimant, regardless of the merits of the position, and then said five weeks later words to the effect that an arrest was necessary for a reason which was extrinsic to any specific need to conduct an interview. Accordingly, it is now incumbent on this Court objectively to review the validity of the other reason put forward. In fact there are two such reasons, because I accept DC Andreas' evidence that he also wished to accord LM protection.

46. It is not an answer, as Mr Stagg submits that it is, to note that on 19th May DC Andreas had informed Mr Jabbar of his intention to arrest the Claimant on 23rd May. If it were an answer, section 24(5) would have much wider reach than it actually possesses. The real point is that DC Andreas had no basis for giving Mr Jabbar this information because he had no reasonable grounds for believing that the Claimant would not attend voluntarily. DC Andreas' statement to Mr Jabbar was not based on any fresh information.

47. We were referred to Richardson and Lord Hanningfield v Chief Constable of Essex Police [2013] 1 WLR 3632. These are first instance decisions which turned on their own facts, at least as regards the interview point. Of potentially wider application is the decision of the Court of Appeal in Hayes, where at paragraph 42 of his judgment Hughes LJ said this:

> "Whilst of course it may be that it is quite unnecessary to arrest a suspect who will voluntarily attend an interview, as it was with the schoolteacher in the Richardson case, it is not the case that a voluntary attendance is always as effective a form of investigation as interview after arrest." [at 529 G/H].

Hughes LJ was merely recognising that, whereas there may be cases where the exercise of the section 24(5)(e) power for the purposes of interviewing a suspect would be unlawful, there are other situations where it would not be. There are disadvantages inherent in voluntary attendance (see, for example, section 29 of PACE), but whether these are decisive in any particular case must be fact-sensitive.

Prevention of Interference with LM

48. In my view, the next issue which should be addressed is whether the Claimant could be lawfully arrested for the purpose of preventing him interfering with LM. Mr Stagg submits that there is a distinction between (a) preventing interference with LM, and (b) the imposition of bail conditions; but in my view that is overly sophisticated. The reality here is that the Claimant was always going to be

released on police bail, and that conditions were always going to be imposed in order to protect LM. Although DS Linaker and DC Andreas did not specifically refer to bail conditions in their recorded conversation on 10th May, I have accepted their evidence that they were a material consideration. "To prevent interference with LM" was DC Andreas' first stated reason in the log he completed on 23rd May.

49. I should begin with Mr Summers' primary submission that it could never be lawful to arrest a suspect under section 24(5)(e) solely for the purpose of imposing bail conditions. He accepted in terms that other sub-paragraphs could lawfully be deployed for that purpose, in particular sub-paragraph (d). Mr Summers referred to a number of authorities.

50. At paragraph 68 of her judgment in Richardson, Slade J held that an arrest in order to impose bail conditions "may be lawful". I agree with Mr Summers that she was speaking in general terms, rather than expressly addressing sub-paragraph (e). Indeed, a closer examination of Slade J's judgment, including paragraph 52, shows that she was probably excepting sub-paragraph (e) cases from the category of likely legality. At paragraph 42 of his judgment in Hayes, Hughes LJ preferred to leave the point open. At paragraph 64 of the Divisional Court's judgment in R (B) v Chief Constable of the PSNI it is stated:

> "[The Police Officer's] final and third given reason was that arrest is necessary to allow an effective investigation because it was likely that he would wish to consider the imposition of post-interview bail conditions … In submission it was suggested that one condition might be that a Claimant should not speak to any other suspect. In circumstances where the Claimants are of good character who have fully co-operated and who will continue to co-operate, it is difficult to imagine a proper basis for imposition of any such bail condition. But in any event, the highest [the police officer] can put it is to say that he would probably wish to consider the imposition of a condition or conditions. That is not, objectively assessed, a reasonable basis for considering that arrest is necessary to allow an effective investigation. If arrest were deemed necessary under Article 26(5)(e) [the equivalent to s.24(5)(e)] because of the possible desire to impose post-interview bail conditions, then the safeguards intended under Article 26(5) would be swept way: arrest could in nearly every case be said to be necessary for this reason."

51. This paragraph was subjected to close analysis by Counsel. Mr Stagg submitted that the final clause (after the colon) was addressed to the circumstances of the case under consideration, namely a situation where the police officer had merely a "possible desire" to impose bail conditions. Mr Summers submitted that this clause is of general application. Upon reflection, I have concluded that Mr Stagg must be right. If a police officer could be heard to say – "I have the possibility (or probability) of bail conditions in mind, but I have not given thought to what they might be in this particular case" – it seems to me that the section 24(5)(e) safeguards could readily be circumvented, thereby frustrating the policies and objects of the statutory scheme. If, on the other hand, the police officer wished to impose specific conditions in order to protect a witness/complainant from intimidation, which (if it took place) would undermine an effective investigation, the position would be rather different.

52. It follows that there is no authority which gives a conclusive answer to the important point of principle raised by Mr Summers' primary submission. The answer must therefore be found in an analysis of the statutory scheme, interpreted in the context of its policies and objects. No difficulty arises if the arresting officer has some other, independent lawful reason for the arrest. The analysis must proceed on the footing that an intention to impose bail conditions is the sole reason. The question should be posed in this way: can *in principle* the imposition of bail conditions conduce to a prompt and effective investigation? In my judgment, this question requires an affirmative answer in this precise respect: if there are reasonable grounds for believing that bail conditions are necessary to protect a witness from intimidation which would or might render the investigation substantially less effective, then the requirements of sub-paragraph (e) would be satisfied. There are no considerations of statutory language or policy which properly indicate otherwise.

53. Mr Summers' alternative submission was that, objectively viewed, DC Andreas had no such reasonable grounds in the circumstances of this particular case. In riposte, Mr Stagg relied heavily on the Code of Practice for Victims of Crime and paragraphs 59 and 60 of the witness statement of DC Andreas. In particular, it is said by the arresting officer that rape suspects react emotionally to allegations of rape, that the risks to a complainant increase once the allegations being made are understood, and that he could not take the Claimant's word that he would not contact LM.

54. I have thought very carefully about DC Andreas' evidence. In common with Eady J in Lord Hanningfield, I should hesitate before second-guessing the judgment of an experienced police officer. However, this is a somewhat unusual case. The Claimant knew from early April 2016 that he was under investigation for an offence of a sexual nature, and DC Andreas must have known that the Claimant and his solicitor had worked that out. DC Andreas was also aware that there was a lengthy and complex history of allegations coming from LM. The Claimant was, and is, of good character and there is no evidence that he previously breached any assurance that he had given, or had been imposed on him. Further, there was considerable delay in the investigation of this case: some due to LM not returning police calls, another period due to the officer being on a course. The OE log does not give a picture of any particular haste or urgency; or, of any concern that unless appropriate action was taken soon, LM would be at unacceptable risk. There is no evidence that the Claimant breached his assurance between the date on which it was given, 2nd April 2016, and the date of the arrest, 23rd May 2016. In my judgment, it is clear from entries in the log that the decision to impose bail conditions was made on general policy grounds rather than the particular circumstances of this Claimant. It is noteworthy that paragraph 2.8 of Code G directs attention to those circumstances, and there is no evidence in the OE log that these were properly considered. DC Andreas tells us that he was not prepared to accept the Claimant's word, but this assertion is not explained. Finally, any residual concerns could have been addressed by warning the Claimant.

55. Overall, I am driven to conclude that, on objective examination, DC Andreas did not have reasonable grounds to believe that bail conditions were necessary to ensure a prompt and effective investigation under section 24(5)(e).

56. Mr Summers addressed us on whether the reason identified by DC Andreas – "to prevent interference with LM" – could be brought within the scope of section 24(5)(d). He properly recognised that judicial review is, of course, a discretionary remedy. He submitted that it could not, either in principle or in the particular circumstances of the present case.

57. In support of his argument of principle, Mr Summers relied on the judgment of Kerr LCJ (as he then was) in Re Alexander's and others' applications for Judicial Review [2009] NIQB 20. At paragraphs 15 and 16 of his judgment:

> "Of perhaps greater pertinence in the present debate, however, is the question whether having reasonable grounds to believe … restricts the ambit of permissible review by the courts to an examination of the actual grounds considered by the arresting officer. After all, it is to the grounds which the officer *had*, as opposed to those that he might have considered, that the subsection directs one's attention. This suggests that one should concentrate on the specific grounds to which the constable had regard. As against that approach, however, a wilful refusal to take into account factors that might have led unmistakably to a contrary view as to the necessity to arrest surely cannot be ignored in any judgment on [reasonableness].
>
> We consider that where a police officer is called upon to make a decision as to the necessity for an arrest, the grounds on which that decision is based can only be considered reasonable if all obviously relevant circumstances are taken into account …"

58. Mr Stagg helpfully drew our attention to the decision of this Court in Edwards v DPP [1993] 97 Cr App R 301. This supports the contention that the focus should be on the arresting officer's actual reasons for his arrest, not on those which might arise by inference or retrospective justification. However, on the facts of that case it was impossible to draw any inferences which might have availed the defendant.

59. I can see force in the argument that "grounds" could well be a reference to the factor or factors specifically mentioned in the relevant sub-paragraph of section 24(5). On the other hand, in my judgment the better view is that "grounds" means the arresting officer's express reasons for his decision to arrest. If DC Andreas had simply said "prompt and effective investigation" on the OE log, there would be no difference between his grounds and his reasons. However, he went further, and specifically itemised the protection of LM as one of his tripartite reasons for arresting the Claimant. In my view, there is no reason why, at least in principle, this reason could not be brought within the scope of section 24(5)(d).

60. However, I accept Mr Summers' alternative submission that this Court cannot infer that, had DC Andreas applied his mind to sub-paragraph (d), he would inevitably have concluded that its requirements were fulfilled. It is common ground that the onus of persuasion (on the Defendant) is stringent. The two sub-paragraphs are differently worded. No assessment was given to whether it was necessary to impose bail conditions to protect LM as a vulnerable person. I agree with Mr Summers that an individual assessment would be required rather than a policy judgment based on sex cases as a whole. Furthermore, if sub-paragraph (d) were to be deployed, one would have expected there to be evidence of an assessment of LM's credibility and the Claimant's co-operation over a 7-week period; and there is none. Overall, I am not satisfied that DC Andreas would inevitably have concluded that sub-paragraph (d) was applicable to the present case.

61. It follows that I must conclude that DC Andreas did not have reasonable grounds for believing that it was necessary to arrest the Claimant in order to impose bail conditions.

To Search the Claimant's Premises

62. The final issue which arises is whether DC Andreas was entitled to exercise his power under section 24(5)(e) for the purpose of searching the Claimant's premises under section 18. It is not in dispute that if the Claimant's arrest were independently justifiable on some other basis, then the section 18 power could – at least in principle – be lawfully deployed here. As already stated, it is Mr Summers' primary submission that considerations germane to section 18 can never by themselves constitute a ground of necessity for arrest, because (a) this provision predicates the prior antecedent existence of a lawful arrest, and (b) such deployment of this section would undermine the statutory scheme.

63. DC Andreas' evidence is that the Claimant's computer and other electronic devices might have contained evidence corroborating his "controlling and coercive behaviour" – the use of electronic tracking devices. DC Andreas accepts that evidence of this nature could not be directly relevant to the allegations of rape, although he considers that it would provide some general support of LM's account. On the other hand, DS Linaker's OE Log entry for 28th March 2016 records that the Claimant had already made some admissions about this in the Family Division. DC Andreas further states that the police "would also be searching for any evidence on mobile phones or computers of contact between the Claimant and the victim, or any disclosures, or references made by the Claimant about the offending which may have been evidenced electronically" (see paragraph 39 of his witness statement). In my view, this was something of a longshot, albeit not entirely fanciful. Mr Summers did not go so far as to submit that it was fanciful.

64. Further, it is DC Andreas' evidence that there was a high risk that the Claimant would tamper with evidence if given forewarning of the Defendant's intention to interrogate his computers (see paragraph 64 of his witness statement).

65. Before addressing Mr Summers' primary submission, I should deal with his alternative argument that in the circumstances of this case his client should have been asked to give voluntary production of the items sought. Mr Stagg characterised this as a "risible" suggestion. I would not go that far, nor could I agree with DC Andreas that there was a *high* risk of evidence tampering. Evidence gathered after the event cannot be relevant to the Court's assessment. I do accept Mr Stagg's submission that, given that the Claimant was unaware of the precise nature of the allegations being made against him, it should not be inferred that the metaphorical horse had already bolted: in other words, it was not pointless to carry out a search on 23rd May. Having reflected on all the available evidence, I am unable to reject the

Defendant's case on the facts. Objectively viewed, there was a proper basis for believing that voluntary production would not have been effective.

66. Mr Summers' primary submission is, therefore, capable of arising for determination. Whether it is essential to resolve the point of principle that it raises is another matter.

67. No conclusive answer to Mr Summers' primary submission may be drawn from the authorities. In Hayes, at paragraph 42 [page 530B] Hughes LJ refers to the hypothetical need to inspect a mobile telephone without warning the suspect. He was not addressing section 18 of PACE or the suggested need for an antecedent, lawful arrest. In Lord Hanningfield, Eady J came close to answering Mr Summers' submission in his favour, but in my view not quite. There, a policy decision was made not to apply for a search warrant in preference to exercising summary powers of search under section 32 of PACE (analogous to the power in play in the present case, namely section 18). Paragraphs 6, 27 and 29 of his judgment are germane:

> "6. … reliance was to be placed on the powers of search there provided [in section 32] which are ancillary to, and dependent upon, a lawful arrest having taken place …
>
> 27. … The officers were very familiar with the statutory provisions and the Code … It was in the light of that knowledge that the SIO decided that the section 32 route would be the most appropriate for the case in hand. One can see that it was in some ways convenient for the officers to take this course, without having to obtain a warrant, but that is clearly not a sufficient justification.
>
> 29. … I have come to the conclusion that the requirement of "necessity" as laid down by Parliament has not, on any realistic interpretation of the word, been met. Summary arrest was never going to have any impact on the "prompt and effective investigation" of the Claimant's credit card expenses. It is not for a judge to second-guess the operational decisions of experienced police officers, but in the circumstances of this case I cannot accept that there was any rational basis for rejecting alternative procedures, such as those adopted successfully by the Metropolitan Police. There were simply no solid grounds to suppose that he would suddenly start to hide or destroy evidence, or that he would make inappropriate contacts … I can, therefore, see no justification for bypassing all the usual statutory safeguards involved in obtaining a warrant."

68. In my view, Eady J was tethering his conclusion in the final sentence of paragraph 29 of his judgment to the particular facts and circumstances of the case before him, where there were no reasonable grounds for suspecting that Lord Hanningfield might destroy evidence before a search warrant could be obtained.

69. In oral argument Mr Summers elaborated on Morton's Fork. His submission was that the position here is dichotomous, and that the only legally permissible options were applying for a search warrant under section 8 of PACE or seeking voluntary production. It is noteworthy that both DS Linaker and DC Andreas were of the opinion that the magistrate probably would not have granted a search warrant under section 8, taking the view that the police should arrest the Claimant and exercise their powers under section 18. I am not questioning the officers' practical experience, but should immediately make clear that if magistrates are adhering to such a policy, they are wrong to do so. The safeguards inherent in Part II of PACE are there for a purpose, and should not be circumvented systematically.

70. In this case I can well see that there were, or should have been, two possible outcomes. The first is that the magistrate would or should have granted a search warrant on the footing that all the statutory preconditions were met. The second is that the magistrate would or should have refused the warrant, either because s/he took the view that the application was somewhat tenuous, or because a request for voluntary production was more appropriate. Taking these options to the next stage, Mr Summers submitted that (on the first option) the warrant would have been applied for and obtained, and (on the second option) the warrant would have been applied for and refused. On the former hypothesis, no practical difficulty arises; but on the latter it seems clear that any attempt to circumvent that refusal

through the purported application of section 18 would be unlawful – assuming that the arrest could not be independently justified.

71. There is very considerable force in these arguments. On reflection, however, it is both unnecessary and undesirable to resolve the issue of principle in the circumstances of this case. I say this for two reasons. First, Mr Stagg's final position in oral argument was not to seek to justify the Claimant's arrest if the Defendant were forced to rely on its intention to search his premises as the sole reason for it. This was not, on my understanding, a concession that Mr Summers' submissions were correct, but it does remove the need for further examination of the issue of principle in the light of the conclusions I have already reached. Secondly, a holding by this Court that the police could never deploy section 18 considerations as the sole justification for an arrest under section 24(5)(e) would have far-ranging consequences. Contrary to the matters I was putting to Mr Summers in oral argument, I consider that there are no linguistic or textual reasons preventing a search being adjunctive to, or part of, a prompt and effective investigation. Mr Summers' arguments are really Padfield-type points derived from the policies and objects of PACE seen in the context of sections 8, 18 and 24. Yet, the textual differences between sections 8 and 18 are capable of being important, have not been fully explored, and in my view appear somewhat inscrutable. In my judgment, these differences would need very thorough exploration before important findings were made on Mr Summers' high-level submissions.

72. Finally, if Mr Summers were correct, an important provision in Code G to PACE could not be supported. We have not heard from the Home Office about this. It was only in his Reply that Mr Summers unequivocally submitted that his case was inconsistent with the terms of Code G.

73. However, without accepting Mr Summers' submissions as to the principle, I find myself in full agreement with him on the particular facts of this case. Although it is possible to envisage circumstances where the Police could reasonably conclude that for exigent operational reasons any delay entailed in obtaining a warrant could undermine the investigation, in my view the Defendant's officers did not have reasonable grounds for believing that it was necessary to arrest the Claimant in order to exercise their summary search powers under section 18 of PACE. In my view, the Defendant's officers should have applied for a search warrant under section 8, and no proper basis has been advanced for not doing so. Given the obvious delays that had accumulated, it could not be said that the matter was so urgent that a warrant could not reasonably have been obtained. The Defendant would have to show that the risk of destroying evidence arose in the short period during which a search warrant would or could have been sought and obtained, and in my judgment it could not sensibly be said that there was such a risk. Indeed, it is clear that DC Andreas and DS Linaker never addressed their minds to that issue. Had they done so, they would not have waited so long before arresting the Claimant. Given that they appear to have been satisfied that he had not been "tipped off", then there was every opportunity to apply for a search warrant after 20th April 2016. Of course, if the Claimant had been "tipped off" as early as 2nd April, the need for expedition would have been all the greater; but it was never translated into action. Furthermore, it appears that the real reason for the police officers not making such an application was their concern that the magistrate would say that their powers under section 18 were preferable – as I have already said, a ground which controverts the whole statutory scheme.

Conclusion

74. Given that (a) the Claimant's arrest was unnecessary for the specific purpose of interviewing him (here, I am paraphrasing the section 24(5)(e) issue in that regard as more precisely formulated for these purposes by the Court of Appeal in Hayes), (b) there were no reasonable grounds necessitating his arrest in order to impose bail conditions, and (c) there were no reasonable grounds necessitating his arrest in order to search his premises (in preference to obtaining a search warrant under section 8 of PACE) it must follow that the lawfulness of the Claimant's arrest cannot be upheld.

Disposal

75. If my Lord, Lloyd Jones LJ is in agreement with my judgment, I would grant permission to the Claimant and uphold his claim for judicial review. He is entitled to the declaratory relief he seeks.

LORD JUSTICE LLOYD JONES

76. I agree.

Case No: CO/4091/2016

IN THE HIGH COURT OF JUSTICE

DIVISIONAL COURT

Royal Courts of Justice

Strand, London, WC2A 2LL

Before:
LORD JUSTICE LLOYD JONES
MR JUSTICE JAY

- -

Between:

	R (oao TL)	Claimant
	- and –	
	THE CHIEF CONSTABLE OF SURREY POLICE	Defendant

- -

ORDER

- -

UPON an application for judicial review lodged on behalf of the Claimant

AND UPON reading the written evidence and materials submitted on behalf of the Claimant and Defendant.

AND UPON HEARING Mark Summers QC on behalf of the Claimant and Paul Stagg on behalf of the Defendant.

IT IS ORDERED that:

1. The Claimant's arrest by DC Andreas on 23 May 2016 (and the consequent imposition of bail conditions upon him and search of his address) is declared to have been unlawful and is quashed;

2. ***The Defendant shall pay the Claimant's costs of the claim up to the date of this order, to be assessed on the standard basis if not agreed;***

3. The Defendant shall make an interim payment on account of the costs at paragraph 2 above in the sum of £15,000 within 14 days of the date of this order;

4. ***The Claimant's claim for damages shall be adjourned for determination by a Master of the Queen's Bench Division with the following directions:***

> **a.** ***The Claimant shall, by 4pm on 14 February 2017, serve a Schedule quantifying the heads of damages that he claims, together with all evidence and documents which are relevant to his claims;***
>
> **b.** ***The Defendant shall, by 4pm on 28 February 2017, serve a Counter-Schedule and any evidence or documents relied on;***

c. ***Directions for a hearing of the assessment of damages will be given by the Master;***

5. Given that LM is identifiable as the Claimant's ex-partner, and in order to give effect to para. 1 of the judgment, the Claimant's identity also be anonymised in the judgment as TL.

By the Court

31 January 2017
