Case No: A2/2002/2338

Neutral Citation Number: [2004] EWCA Civ 1579
IN THE SUPREME COURT OF JUDICATURE
COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE QUEEN'S BENCH DIVISION
MR JUSTICE CRESSWELL
HC 2001 No. 010X2465

Royal Courts of Justice
Strand, London, WC2A 2LL

Thursday, 25 November 2004

Before :

LORD JUSTICE AULD
LORD JUSTICE TUCKEY
and
MR JUSTICE JACKSON

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Between :

1) MOHAMED AL FAYED	**Appellants**
2) JOHN MACNAMARA	
~~**3) MARK GRIFFITHS**~~	
4) PAUL HANDLEY−GREAVES	
5) COLIN DALMAN	
6) JOHN ALLEN	
− and −	
1) COMMISSIONER OF POLICE OF THE METROPOLIS	**Respondents**
2) NIALL MULVIHILL	
3) JEFFERY EDWARD REES	
4) JAMES REEVE	
5) RICHARD REYNOLDS	

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(Transcript of the Handed Down Judgment of
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Official Shorthand Writers to the Court)

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Mr Ian Croxford QC, Mr Philip Marshall QC & Mr Daniel Lightman (instructed by Messrs Lewis Silkin) for the Appellants
Mr Stephen Miller QC, Mr Duncan Macleod and Miss Perrin Gibbons (instructed by The Solicitor for the Metropolitan Police) for the First, Second, Fourth and Fifth Respondents
and
Mr Simon Freeland QC and Matthew Holdcroft (instructed by Rowe Cohen) for the Third Respondent

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Judgment
As Approved by the Court

Lord Justice Auld :

1. This is an appeal by Mr Mohamed Al Fayed, the Chairman of Harrods Limited and four former employees of that Company from the judgment of Cresswell J of 13th August 2002, in which he dismissed their respective claims against the respondents, the Commissioner of the Metropolitan Police and four officers of the Organised Crime Group of that Force, Messrs Mulvihill, Rees, Reeve and Reynolds for damages for wrongful arrest and false imprisonment.

2. On various dates in March 1998 at Kennington Police Station Messrs Reeve and Reynolds and another officer, now deceased, Mr Taber, respectively arrested, without warrant, one or more of the appellants on suspicion of theft of, and criminal damage to, some of the contents of a safe deposit box that Mr "Tiny" Rowland had rented in the Harrods Department Store's safe depository, known as "the Citadel of Security". Both Mr Al Fayed and Mr Tiny Rowland were well−known and somewhat flamboyant personalities, Mr Al Fayed latterly as Chairman of Harrods, and Mr Rowland, largely through his control of Lonhro plc, as a successful trader and entrepreneur. They had a much publicised history of commercial rivalry, in particular over the control of Harrods. During the months of the police investigations, giving rise to those arrests, Mr Rowland had made no secret of his antipathy for Mr Al Fayed or of his desire to see him arrested. In the circumstances, it is not surprising that the arrests were attended by a certain amount of publicity.

3. In March 1998, each of the appellants attended at a police station, voluntarily and by arrangement with the police, with a view to an immediate interview at the police station. Each, on his arrest, was presented to a custody officer at the station and ordered to be detained in custody for the purposes of interview. Each was detained only for as long as it took to interview him, the longest interview taking just under an hour, and then immediately released on bail. In July 1998 the police brought their investigation of the matter to an end without charging any of them.

4. The appeals raise three issues, in respect of all of which Cresswell J found in favour of the police; 1) whether each arresting officer, pursuant to section 24(6) of the Police and Criminal Evidence Act 1984 ("PACE"), suspected and had reasonable grounds for suspecting that the appellant whom he arrested was guilty of theft of, and criminal damage to, some of the contents of Mr Rowland's safe deposit box; 2) if so, whether each officer acted reasonably in the *Wednesbury* sense in exercising his power of arrest under that provision; and 3) whether each of the custody officers acted lawfully, in particular in accordance with section 37(2) and (3) of PACE, when authorising the appellant's continued detention at the police station for the purpose of interview. In respect of each of those issues, there is a now fourth on this appeal, namely whether Cresswell J has given adequate reasons for his finding against each of the appellants.

The main personalities in the case

5. On the appellants' side, in addition to Mr Al Fayed, there were:

- Mr Macnamara, the second appellant, who, from 1994 was the Director of Security of the Harrods' Holding company and from August 1996 the Director of Security and a member of the Board of Harrods;

- Mr Allen, the fifth appellant, who, from 1987 until February 1996 was the Senior Security Manager (uniform) of Harrods;

- Mr Mark Griffiths, who was at all material times the Private Secretary to Mr Al Fayed, who also had been arrested and treated in the same way as the appellants and had originally joined with them in the claim, but who did not pursue it before Cresswell J;

- Mr Dalman, the fourth appellant, who was at all material times the Manager of the Safe Depository located in the Harrods Department Store; and

- Mr Handley−Greaves, the third appellant, who was Mr Al Fayed's bodyguard;

6. Also employed by Harrods at the material time was Mr Robert Loftus, who, since 1987, had been Head of Security at Harrods − Director of Security and Store Services of Harrods (Management) Limited. As such, he, and as will appear, was closely involved and took part in two of the important incidents giving rise to the police suspicions against the appellants. He was dismissed - he claimed unfairly − from his position with Harrods in February 1996, shortly after those incidents. Within a short time thereafter, he became a "whistleblower", who made witness statements, first to Mr Rowland's solicitors, and then to the police, implicating the appellants in different ways in at least two occasions of unauthorised interference with Mr Rowland's safe deposit box and its contents, but not alleging any act of theft or criminal damage on those occasions. His accounts in those witness statements was largely unchallenged and formed an important part of the material on which the police based their suspicions when deciding to arrest and interview each appellant.

7. On the police side, apart from the Commissioner, were:

- Mr Mulvihill, the second respondent, then a Commander in charge of the Organised Crime Group;

- Mr Rees, the third respondent, then a Detective Superintendent, who led and directed the investigation, but who did not himself arrest any of the appellants;

- Mr Taber, now deceased, then a Detective Inspector, who arrested Mr Macnamara;

- Mr Reynolds, the fifth respondent, then a Detective Sergeant, who arrested Mr Al Fayed, Mr Dalman and Mr Handley−Greaves;

- Mr Reeve, the fourth respondent, then a Detective Constable, who arrested Mr Allen and Mr Griffiths;

- Police Sergeant McErlane, who authorised the continued detention for interview of Mr Al Fayed and Mr Macnamara after their arrest; and

- Police Sergeant Parfitt, who authorised the continued detention for interview of Mr Allen, Mr Dalman, Mr Handley−Greaves after their arrest.

The facts

8. Even though none of the appellants gave evidence at the trial, there was considerable challenge as to the accuracy and/or reliability of the information that the police accumulated in the course of their investigation or about the truth of much of it. However, it was accepted from the start that Mr Rowland's safe deposit box had been wrongfully opened without his knowledge or authority. By the time the Judge delivered judgment, it was not in issue that the investigating police officers knew from evidence and information gathered in the course of the investigation the following matters.

9. Mr Rowland had rented a safe deposit box at Harrods Department Store for many years. The box was stored in circumstances of high security in the safe depository there. The safe depository itself was protected with a 3œ ton security vault door made of impenetrable steel and a security door to an inner vault. All visits to the depository were recorded by CCTV surveillance cameras and were logged by the depository staff. Access to the depository, which could only be gained by box holders in opening hours, required a password. They then had to negotiate a series of security doors, each of which, in opening hours, was manned. When the store was closed the security doors were time−locked and alarmed.

10. Mr Rowland's box, which was one of the largest stored in the depository was held in a locked compartment, which could only be unlocked by two different keys, one held by safe depository staff and one held by Mr Rowland. Once the compartment was opened, the box itself could only be opened by a third key held by Mr Rowland. Theft of the contents of his box by an outsider to this ring of steel and locks would have been nigh impossible, certainly not without detection.

11. Mr Rowland visited the safe depository and opened the box on 6th December 1995, and found that all was in order. The fact of his visit was recorded on the CCTV surveillance cameras and logged, and later confirmed to the police by a witness and companion. Nearly eighteen months later, on 5th June 1997, when he next visited the depository, this time in the presence of the police and after Mr Loftus's revelations, he found both the compartment door and the box

appropriately locked and with no sign of a forced entry. But he claimed when he opened the box, that many of its contents were missing and some formerly sealed envelopes had been torn, a claim supported by his wife. The claimed missing contents included a number of precious gems, including emeralds and rubies, and items of a personal nature, including correspondence, photographs and other personal documents.

12. The officers who investigated and who ultimately arrested Mr Al Fayed and his colleagues clearly had reasonable grounds to suspect that offences of theft and criminal damage as reported by Mr and Mrs Rowland had been committed, but by whom? Given the formidable security provided by the safe depository, all the pointers were to an "inside job".

13. During the course of the police investigation under the direction of Mr Rees, they established the following from information provided by Mr Loftus and confirmed by others who had become involved in different ways, and also from admissions made by the appellants in civil proceedings instituted against them by Mr Rowland. On two occasions very shortly after Mr Rowland's earlier visit to the box on 6th December 1995, the appellants, acting together in various permutations, had been involved in at least three or four unauthorised illegal openings of the box. It followed also from their information that the appellants, or some of them, would have had similar opportunities, not open to many, to open the box at any time over the 18 months period before Mr Rowland's next visit to it in June 1997.

14. The first occasion was in early December 1995, shortly after Mr Al Fayed, learned of Mr Rowland's visit to the deposit box on 6th December. He instructed that it should be opened without Mr Rowland's authority or knowledge. He involved in this enterprise Messrs Mr Macnamara, Loftus, Allen, Dalman, and Handley−Greaves. Mr Macnamara and Mr Allen arranged for Mr Hamilton, a locksmith, to attend and pick open the locks on the compartment door and the deposit box. Mr Macnamara and Mr Allen then instructed Mr Dalman to turn off the security and surveillance systems of the safe depository and to arrange for the depository staff to absent themselves. Mr Macnamara, in instructing Mr Dalman of his part in the enterprise, said by way of reassurance, "We're not going to take anything, we just want to see what's inside", a reassurance that later Mr Loftus repeated to him. In the presence of Mr Macnamara, Mr Loftus, Mr Griffiths Mr Dalman and Mr Handley−Greaves, Mr Hamilton picked open the locks to the compartment and the lock of the box. On Mr Loftus's instructions, no records were kept of Mr Hamilton's attendance or work or payment for it.

15. Mr Loftus and Handley−Greaves then took the opened box to Mr Al Fayed's suite of offices on the fifth floor, where Mr Macnamara and Mr Griffiths had preceded them. Mr Al Fayed, on seeing it, said "Well done, good" and gesticulated at them to take the contents, which included documents, out of the box, and asked for wine to be brought.

16. There, in the presence of Mr Al Fayed, his personal secretary, Mrs Bignell, Mr Loftus and Mr Handley−Greaves, Mr Macnamara and Mr Griffiths examined the contents, wearing for the purpose thin plastic gloves, taken from Harrods Food Hall, to avoid leaving fingerprints. Then, under his, Mr Macnamara's, direction, they copied some of the documents before returning them to the box. They also retained some photographic negatives tapes for copying before later return to the box. While they were in the process of all this Mr Al Fayed walked in and out of his office, and seemed to be excited by some of the documents. When all the copying had been done and the originals had been returned to the box, Mr Macnamara, Mr Loftus and Mr Handley−Greaves returned it to the safe depository. Mr Hamilton then re−locked all the locks and Mr Dalman re−activated all the security and surveillance devices. On Mr Al Fayed's instructions, conveyed through Mr Macnamara, Mr Loftus gave Mr Dalman and the locksmith envelopes provided by Mr Al Fayed containing cash in £50 notes for their part in the break−in.

17. The second occasion, which was on 11th December, again involved Mr Macnamara, Mr Loftus, Mr Allen and Mr Handley−Greaves. Mr Dalman was not on duty on this occasion, but, at Mr Allen's request, had shown him for the purpose the opening and locking procedures for the depository and the compartment containing the safe deposit box. Mr Macnamara told them that Mr Al Fayed wanted a "re−run" so as to have all of the documents in the box copied and some translated. Mr Loftus informed Mr Allen who again arranged for the de−activation of the security and surveillance systems, as on the first occasion. Mr Macnamara instructed or arranged for the instruction to Mr Hamilton, the locksmith, to attend and open the safe compartment and the box. Mr Macnamara, Mr Loftus, Mr Allen and Mr Handley−Greaves were present when Mr Hamilton opened the box, and they again took it to Mr Al Fayed's suite on the fifth floor of the store. There, in Mr Al Fayed's and Mrs Bignell's presence, Mr Macnamara once more examined the contents of the box, again wearing plastic gloves for the purpose. He then handed them to Mr Loftus, who was also wearing plastic gloves, who passed them to Mr Handley−Greaves, who was similarly equipped, for photocopying - a "human chain", as Mr Loftus called it, photocopied all the documents taken from the box. For this purpose a number of the documents had to have their pins or staples removed, causing slight damage to some of the papers. They put to one side two reels of audio−tape for professional copying. It appears that at some stage the latter were cut in half for the purpose of copying. While all this was going on in Mr Al Fayed's office suite on the fifth floor, Mr Allen remained with Mr Hamilton in the safe depository, waiting for the return of the deposit box.

18. When all was completed and everything returned to the box, except for the audio−tapes, Mr Loftus and Mr Handley−Greaves returned it to Mr Allen and Mr Hamilton in the safe depository for re−locking and return to its compartment. And, as before Mr Loftus gave Mr Hamilton an envelope containing cash provided by Mr Al Fayed for his trouble.

19. The photographic negatives taken from the box were taken to a Mr Lippett of a firm called Visions for developing, with instruction to render the invoice to Mr Macnamara. Mr Handley−Greaves, on Mr Macnamara's instructions, took the tapes to a Mr Mills of Network Security for copying and transcription, with instruction that the invoice was to be rendered to Harrods for payment.

20. According to Mr Dalman, in a written statement that he was to give in interview, immediately following his arrest on 5th March 1998, he had shown Mr Allen the opening and locking procedures for the safe depository, the compartment in which Mr Rowland's deposit box was housed and for the box itself. He also volunteered in that written statement that Mr Allen had been involved in more than one opening of the box, and that, on Mr Allen's, instructions Mr Hamilton had provided him, Mr Dalman, with a spare key to fit the lock of the box, opening the possibility that both he and Mr Allen, with the assistance of the locksmith, might have been able at some time to gain access to the box.

21. There is very much less information about what occurred on the further, probably two, openings beyond the return of the photographic films and audio−tapes to the box.

22. The third occasion was on 15th December 1995 when one or more of the appellants must have been involved in breaking into Mr Rowland's deposit box to, at least, replace some of those items.

23. The fourth occasion appears to have been on or after 2nd January 1996 when Mr Mills, the expert who had been engaged to copy the tapes, returned them to Mr Macnamara and Mr Handley−Greaves, which were duly found in the box by Mr Rowland on his supervised visit to the box in June 1997.

24. There was no information before the arresting officers as to who participated in the opening[s] for this purpose. Mr Croxford's submission is that it is unlikely that Mr Al Fayed would have been concerned in either of these incidents of return of copied items to the box.

25. As Mr Stephen Miller QC, on behalf of the police, has pointed out, Mr Loftus's account of these events was never challenged as untrue and, as the police investigation progressed it was confirmed in various respects by others, including Mrs Bignell, and Messrs Hamilton, Mills and Lippett, and also by Mr Dalman in a statement that he was to make to the police on his arrest. Not surprisingly, it was conceded on behalf of the appellants at the stage of closing speeches before Cresswell J that the police had reasonable grounds to suspect that the appellants had played the roles in respect of the first and second occasions of unauthorised interference with the deposit box as Mr Loftus had described them.

26. Before continuing with the main story, I should mention that Mr Loftus also informed the police that Mr Al Fayed had misappropriated, and given to his wife, jewellery taken from the safe deposit box of another user of Harrods safe depository, a Mrs Schwarzchild, without her authority and without accounting to her. Mrs Schwarzchild and others confirmed Mr Loftus's account about this. The relevance of it at the trial, the police maintained, was that it showed that Mr Al Fayed had a propensity to behave dishonestly with other people's property entrusted by them to Harrods for safe−keeping in its safe depository.

27. On 5th June 1997 Mr Rowland opened the deposit box in the presence of his wife and police officers. He and his wife claimed that a number of its contents were missing, including a quantity of emeralds that they valued at about £250,000.

28. In October 1997 Mr Neil Hamilton, then an MP, made a publicly televised statement before a House of Commons Select Committee in which he alleged that Mr Al Fayed and his employees had been involved in breaking into Mr Rowland's safe deposit box, the source of his information being apparently Mr Loftus's first written statement to Mr Rowland's solicitors. Mr Al Fayed repeatedly denied these allegations through a spokesman.

29. In November 1997 Mr Rowland issued proceedings in the Chancery Division against the five appellants and Mr Griffiths, claiming damages for the theft of items taken from the deposit box.

30. In January 1998 the police learned that, despite the previous public denials on behalf of Mr Al Fayed, he and the other appellants had admitted in their pleaded defences in the civil proceedings that they had variously been involved in three unauthorised openings of Mr Rowland's deposit box.

31. Thus, by this time there was a considerable body of information before the police that: 1) in December 1995 and January 1996 the appellants had been involved in interfering with the deposit box and its contents; and 2) in the eighteen months period between December 1995 and June 1997, someone had stolen items from the box and had damaged some items returned to it. Not surprisingly, the suspicions of the police as to who was responsible for the theft or thefts and criminal damage fell upon the appellants.

32. In January 1998 Superintendent Rees wrote to Mr Burton of Burton Copeland, the appellants' then solicitors, asking to inspect certain of Harrods' documents. Mr Burton replied, indicating that in principle he was inclined to advise the appellants to co−operate with that request. However, shortly afterwards, towards the end of January, Mr Burton informed Mr Rees that he had reason to believe that Mr Rowland (contrary to an earlier denial by him to the police) had paid tens of thousands of pounds into a bank account of Mr Loftus.

33. In early February 1998, having accumulated the evidence and information that I have summarised, Mr Rees decided to make arrangements, including with Mr Burton, for the arrest of the appellants with a view to interviewing them about the suspected offences and their suspected involvement in them. On 5th February Mr Burton telephoned Mr Rees giving details of his availability to attend any interviews of the appellants that they police wished to undertake, but asked whether it would be possible for them to take place somewhere other than at a police station. Mr Rees told him that that was not possible. Mr Burton subsequently made a number of representations to him on the telephone, and in writing, urging the police not to interview the appellants at a police station or at all in relation to these matters. He said that they would voluntarily provide finger−prints and submit to a search of their respective premises. He also made a number of representations to Mr Rees' superiors, including Commander Mulvihill, the second respondent, particularly against arrest and interview at a police station.

34. On 19th February 1998, three days after Mrs Bignell made a witness statement to the police of having seen Mr Macnamara, Mr Loftus and Mr Griffiths, photocopying documents in the vicinity of Mr Al Fayed's office and in his presence, Mr Rees made arrangements for the arrest and interview of each of the appellants at Kennington Police Station. He sent details to Mr Burton of the matters to be covered in the interviews and indicated that failure of any of the appellants to attend as arranged would result in arrest. Mr Burton replied by informing Mr Rees that he believed that Mr Loftus had received a further £30,000 from Mr Rowland, and suggested that the police should investigate that matter before interviewing his clients. He also maintained his stance that it was not necessary for the interviewing to take place at a police station. Mr Rees and his superior officers, including Mr Mulvihill, held to the view that it was necessary. Seemingly, they did not investigate, before proceeding with the arrests and interviews, Mr Burton's information about the payments to Mr Loftus.

35. However, towards the end of February 1998 Mr Rees sought the advice in conference of Mr Orlando Pownall, Senior Treasury Counsel at the Central Criminal Court, about Mr Burton's representations with regard to the proposed arrests and interviews. Counsel's advice, which he summarised in writing shortly after the conference, was that he saw nothing in Mr Burton's representations to indicate that arrests or interviews at a police station would be inappropriate.

36. In March 1998, starting with Mr Al Fayed, the appellants attended by arrangement at Kennington Police Station. Officers from Mr Rees's investigation group each arrested one or more of them, purportedly pursuant to section 24(6) of PACE, which empowers a constable to arrest without warrant anyone whom he has reasonable grounds for suspecting to have committed an arrestable offence. Mr Reynolds arrested Mr Al Fayed, Mr Dalman and Mr Handley−Greaves; Mr Taber arrested Mr Macnamara; and Mr Reeve arrested Mr Allen.

37. After arrest each appellant was immediately presented to a custody sergeant, either Mr McErlane or Mr Parfitt, who, in a matter of minutes, having heard from the arresting officer of the circumstances and of the reasons for his suspicion giving rise to the arrest, purportedly exercised his power under section 37(2) and (3) of PACE to authorise the continued detention of each man for the purpose of interview. None of the appellants was searched or put in handcuffs or placed in a cell; and none of them, nor their solicitor, objected at the time to this course of action or represented that, in view of their voluntary attendance at the police station and willingness to be interviewed, there was no need for their continued detention for that purpose.

38. In each case there was then an interview under caution, all of them in the presence of a solicitor, either Mr Burton or one of his colleagues, who advised them not to answer any questions "in view of the limited amount of material which had been supplied about the subject matter of the interview". Each of them followed that advice. However, Mr Dalman, at the start of his interview, produced a prepared written statement in which he confirmed his presence at and involvement in the first breaking open of the deposit box, but denied having had anything to do with its contents. Mr Al Fayed's inteview lasted 43 minutes, Mr Macnamara's 54 minutes, Mr Allen's 26 minutes, and Mr Handley−Greaves's 22 minutes, and Mr Dalman's 46 minutes. Each of the appellants was finger−printed after the interview and then immediately released on bail.

39. In June 2001 the appellants and Mr Griffiths issued these proceedings. There was, as I have said, considerable challenge at the trial about the accuracy and/or reliability of and the information about them in the hands of the police. The appellants did not give evidence. Through their counsel, they accepted that any opening of the deposit box had been unauthorised by Mr Rowland and was wrongful.

The issues

40. As I have said, the appeal raises the same three issues as those before Cresswell J, on each of which he found in favour of the police, and one further issue, namely as to the adequacy of his reasons for so finding in each case. The three substantive issues are:

1) whether the arresting officer in each case, pursuant to section 24(6) of PACE, suspected and had reasonable grounds to suspect the appellant whom he arrested was guilty of theft of, and criminal damage to, some of the contents of Mr Rowland's safe deposit box;

2) if so, whether each officer acted reasonably in the *Wednesbury* sense in exercising his power of arrest under that provision; and

3) whether each of the custody officers acted lawfully, in particular in accordance with sections 37(2) and (3) of PACE, when authorising the appellant's continued detention at the police station for the purpose of interview.

41. Mr Ian Croxford QC, for the appellants, set the scene for all three issues with the following synopsis focused on the circumstances and response of each appellant to the police investigation, namely that, at the time of arrest, each of them: 1) had agreed voluntarily to attend for interview under caution at a police station at a date and time nominated by the police; 2) had attended for, and had taken part in, such an interview; 3) had behaved, on attending at the police station, in a respectable manner; 4) was of good character; 5) had a fixed address known to the police; 6) had previously offered to provide the police with his finger−prints in advance of any interview, an offer that had not been accepted; and 7) had offered to permit the police to search any premises controlled by him before any interview, an offer also not accepted.

Ground 1 - whether each officer suspected and had reasonable grounds to suspect each of the appellants of having committed an arrestable offence

42. Here I have amalgamated the first two of the three requirements of the power of arrest in section 24(6) of PACE identified by this Court in *Castorina v Chief Constable of Surrey* [1996] LGR 241. First, I should set out section 24(6). It provides:

> "Where a constable has reasonable grounds for suspecting that an arrestable offence has been committed, he may arrest without a warrant anyone whom he has reasonable grounds for suspecting to be guilty of the offence."

In *Castorina,* Woolf LJ, as he then was, at 249, identified the three questions posed by that provision:

> "1) Did the arresting officer suspect that the person who was arrested was guilty of the offence? The answer to this question depends entirely on the findings of fact of the officer's state of mind.
>
> 2) Assuming the officer had the necessary suspicion, was there reasonable cause for that suspicion? This is a purely objective requirement to be determined by the Judge if necessary on facts found by a jury.
>
> 3) If the answer to the previous two questions is in the affirmative, then the officer has a discretion which entitled him to make an arrest and in relation to that discretion the question arises as to whether the discretion has been exercised in accordance with the principles laid down × in × *Wednesbury* ×"

43. The main thrust of the appellants' case under this head is not as to Creswell J's finding of fact that each arresting officer suspected the person whom he arrested of having been involved in the theft of and/or damage to the contents of the deposit box, which he did at paragraphs 232−242 of his judgment, but as to the reasonableness of that suspicion.

44. The test of reasonable suspicion, as Mr Croxford acknowledged − though sometimes lost sight of in his detailed submissions − is lower than that of requiring an officer to provide *prima facie* evidence of guilt. It is, as Lord Devlin put it in *Hussein v Chong Fook Kam* [1970] AC 942, PC, at 948B, "a state of conjecture or surmise where proof is lacking". It was for the police to show on a balance of probabilities in relation to each appellant that the arresting officer had reasonable grounds to suspect the commission of the arrestable offences in question. That proposition was not in issue at the trial. What was in issue was, considering each appellant separately, whether the arresting officer had at the time of the arrest reasonable grounds for suspecting, not only that an arrestable offence had been committed, but also that the appellant whom he was arresting had committed it.

45. Cresswell J found against the appellants on this issue. He did so:

> 1) having regard, at paragraphs 18 to 20 of his judgment, to the distinction shown by the authorities of *Hussein* and also *O'Hara v Chief Constable of the Royal Ulster Constabulary* [1997] AC 286 between reasonable grounds for suspicion and having evidence amounting to a prima facie case; and
>
> 2) on the factual basis, as he put it at paragraph 239 of his judgment, "of joint responsibility/joint enterprise", reminding himself for the purpose of the Judicial Studies Board's specimen direction on that concept for a judge directing a jury in a criminal case.

Submissions

46. Mr Croxford acknowledged that there were reasonable grounds for the police to have suspected that an offence of theft or criminal damage had been committed by someone and that the appellants had played the roles on the first two openings of the safe deposit box as described by Mr Loftus. But he submitted that there were no reasonable grounds to suspect that any particular individual was guilty of such an offence or that any of them had been a party to a joint enterprise to commit it. He stressed that Mr Loftus, in his accounts of the first two occasions of the opening of the box, did not describe or allege any theft or any act of criminal damage by any of the appellants. And, Mr Croxford added, although there were reasonable grounds for the police to suspect one or two further openings of the box for the purpose of returning items taken for copying, there were no grounds to suspect the involvement of all the appellants, in particular Mr

Al Fayed, on those occasions, still less of having taken advantage of either of them to steal from the safe deposit box.

47. Mr Croxford submitted that the evidence before Cresswell J, when properly analysed did not satisfy the joint enterprise test in relation to any of the appellants in that there was no evidence before the arresting officers: 1) that any of them individually had committed the offences in question; 2) that there had been any express or implied agreement between them to achieve a common purpose; or 3) that such common purpose was to commit those offences, or involved foresight by one or more of them that another would commit them. He suggested that, the evidence of Mr Loftus and Mrs Bignell, strongly pointed to there having been no theft from the box on the first or second opening. He also pointed to Mr Loftus's mention of Mr Macnamara's observation on the first occasion when the box was opened, "We're not going to take anything, we just want to see what is inside", and to the fact that the police had not treated Mr Loftus as a suspect even though he had acknowledged his presence and involvement on both of those occasions. The highest any evidence going to individual intention or joint enterprise went, he submitted, was to the commission of some civil wrong, such as breach of contract in interfering with Mr Rowland's deposit box, as distinct from some act of criminal dishonesty or damage in relation to it.

48. Mr Croxford complained that Cresswell J did not consider any of those basic matters going to the lack of pointers to any of the appellants having individually committed or having been a party to the commission of any such offence giving rise to their arrest. He said that, had the Judge considered them, he could only have properly concluded that there were no reasonable grounds to decide as he did that the arresting officers could reasonably have suspected a criminal joint enterprise.

49. The police case, as pleaded, was that each arresting officer made the arrest on the reasonably held suspicion that the person whom he arrested had been involved with some or all of the others in the commission of the suspected offences. Mr Stephen Miller QC, on behalf of all the respondents save Mr Rees, and Mr Simon Freeland QC on behalf of Mr Rees, who adopted Mr Miller's submissions on this and the other issues, adhered to that approach in their submissions to this Court. They maintained that the Judge correctly directed himself on the law by reference to *Hussein* and *O'Hara* and as to the facts by considering in some detail, not only the information available to each of the arresting officers of the evidence and information thrown up by investigation as a whole, but also that relative to the suspected involvement in it of each appellant. I shall return shortly to the detail of the Judge's treatment of the matter, when considering the competing contentions of counsel on this issue.

Conclusions

50. As to the law, it is important not to lose sight of the distinction between availability of evidence and information amounting to prima facie proof and

information, maybe falling short of admissible evidence, capable of amounting to reasonable grounds for suspicion for the purpose of section 24(6). This distinction, it seems to me, was often unwittingly blurred by Mr Croxford in his close analysis in argument of the shortcomings of the evidence and information as firm pointers to guilty involvement by each appellant in different parts of the story.

51. To bring home the full force of this distinction, it is helpful to look at some of the relevant dicta in *Hussein* and *O'Hara,* to which the Judge referred, and in other more recent authorities bearing on this issue. In *Hussein,* Lord Devlin said, at 948B−949B:

> "× Suspicion in its ordinary meaning is a state of conjecture or surmise where proof is lacking: 'I suspect but I cannot prove'. Suspicion arises at or near the starting point of an investigation of which the obtaining of prima facie proof is the end. When such proof has been obtained, the police case is complete; it is ready for trial and passes on to its next stage. It is indeed desirable as a general rule that an arrest should not be made until the case is complete. But if arrest before that were forbidden it could seriously hamper the police. ×
>
> ×
>
> Their Lordships have not found any English authority in which reasonable suspicion has been equated with prima facie proof. In *Dumbell v Roberts* [1944] 1 All ER 326, Scott LJ said, at p. 329:
>
> > 'The protection of the public is safeguarded by the requirement, alike of the common law and, so far as I know, of all statutes, that the constable shall before arresting satisfy himself that there do in fact exist reasonable grounds for suspicion of guilt. That requirement is very limited. The police are not called upon before acting to have anything like a prima facie case for conviction;×'
>
> There is another distinction between reasonable suspicion and prima facie proof. Prima facie proof consists of admissible evidence. Suspicion can take into account matters that could not be put in evidence at all. ×. "

52. The House of Lords said much the same in *O'Hara,* in which Lords Steyn and Hope of Craighead, at 293C−D and 298C−E respectively, made clear that the existence of reasonable grounds for an arresting officer's suspicion turns on the whole context and circumstances of the evidence and information available to him.

53. In *Cumming & Ors v Chief Constable of Northumbria Police* [2003] EWCA 1844, this Court, consistently with those authorities, gave a broad meaning to the power of arrest contained in section 24(6) of PACE, so as to allow information of particular opportunity for a suspect to have committed the offence to figure as a relevant consideration when considering whether there was a reasonable ground for suspecting him. It was a case in which the police arrested six men on suspicion of having perverted the course of justice by dishonestly tampering with security film tapes, they being the only six of a number of persons who had had an opportunity to tamper with the tapes at the material time. The Court considered *Hussein* in which, on its facts, there were reasonable grounds for suspecting that a road traffic fatality was culpably caused by one or other of two persons in a vehicle, depending upon which one of them was the driver, which neither admitted. Latham LJ, with whom Brooke LJ and the President agreed, said of the words "facts" in such a context:

> "40 × the word "facts" must not be given a restrictive meaning. It clearly includes information, as was the view of the European Court of Human Rights in *Fox, Campbell and Hartley;* and information can be information obtained from a third party × the decision in *Hussein* is instructive in that the Privy Council clearly took the view that the police were entitled to arrest both, even though only one of them could have been the driver.
>
> 41. In my view, there is nothing in principle which prevents opportunity from amounting to reasonable grounds for suspicion. Indeed in some circumstances opportunity may be sufficient to found a conviction. That would be the case where the prosecution can prove that no one else had the opportunity to commit the offence. The question in the present case is whether opportunity is sufficient to be reasonable grounds for suspecting six people when the likelihood is that it was only one or perhaps two of those six who were responsible. Again there can be nothing in principle wrong with arresting more than one person even if the crime can only have been committed one person: see *Hussein.* Where a small number of people can be clearly identified as the only ones capable of having committed the offence, I see no reason why that cannot afford reasonable grounds for suspecting each of them of having committed that offence, in the absence of any information which could or should enable the police to reduce the number further. ×."

54. In *R (Laporte) v Chief Constable of Gloucestershire* [2004] 1 All ER 874 the Administrative Court adopted a similar approach in the very different context of a claim for judicial review in respect of a police officer's decision to turn back a number of coaches. Each coach contained passengers en route to join a demonstration at a RAF base in Gloucestershire, the officer honestly and

reasonably believing that if the coaches were allowed to proceed, all or some of the passengers would cause breaches of the peace.

55. Mr Croxford acknowledged the difficulty that those authorities pose for his submissions on the question whether each of the arresting officers had reasonable grounds for suspicion pursuant to section 24(6). But he submitted that their reasoning as to the relevance of opportunity to commit the offence in question to an arresting officer's reasonable suspicion should apply only in an exceptional case where those arrested are the *only* persons who had the opportunity to commit the suspected offences. He maintained that this is not such a case, pointing out that Mr Loftus enjoyed similar opportunities to the appellants, and the police did not arrest him; nor did they undertake an exercise of eliminating all others in Harrods HHHwho might have had an opportunity to gain access to the box.

56. Whilst such a submission fits the facts of *Hussein* and *Cumming,* and might be suggested by the closing words of Latham LJ in the above passage from his judgment in *Cumming,* I do not consider that such a mechanistic test of excluding all others save those arrested, should be applied to determining whether opportunity, possibly shared with a number of unidentified others, is a relevant factor when considering whether there are reasonable grounds for suspicion. It is all a matter of degree, in which the strength of the opportunity, whether or not unique to the person or persons arrested, has to be considered in the context of all the other information available to the arresting officer.

57. In identifying Cresswell J's reasoned findings on this and the other issues in the appeal, and in considering the validity and adequacy of them, it is important to note how he structured his judgment. He set out an early stage the key issues for him, the above and other relevant legal principles bearing on them, and then a short account of the investigation and its method of working, including the officers' line of reporting. He followed that by a summary and an assessment of the evidence of each of the witnesses called on behalf of the police, all of whom he found impressive and whose evidence he accepted, and of one witness called on behalf of the appellants, whose evidence he rejected. The main body of his judgment was then given over to an orderly and detailed account of the investigation, including, where necessary, findings of fact, and what the investigations had revealed to the officers conducting it. Then under a section headed "Further Analysis and Conclusions", the Judge drew together all this material as a clear basis for his conclusions of - mostly secondary - fact, and applied to them the relevant principles of law. Those conclusions, though expressed shortly, clearly follow from and are explicable from his comprehensive and logically structured treatment of the matters, both legal and factual in the judgment read as a whole.

58. I should now look in a little more detail at Cresswell J's analysis of, and conclusions on, the issue of the reasonableness of each arresting officer's grounds for suspicion that the person whom he was arresting was guilty of involvement in

theft of and/or criminal damage to the contents of Mr Rowland's deposit box, not just of some interference with them falling short of those offences. The starting points for his conclusions are to be found in paragraph 235 of his judgment, namely Mr Croxford's concessions in his closing speech, which were to be contrasted with much of the case advanced on the appellants' behalf in the course of the trial: 1) that the arresting officers had reasonable grounds to suspect that the offences of theft and of criminal damage of which Mr Rowland had complained had been committed by someone; and 2) that Mr Al Fayed and his colleagues had been involved as described by Mr Loftus on the first two occasions of the interference with the box and its contents.

59. Then, before considering the case in respect of each appellant individually, Cresswell J reminded himself, at paragraphs 243 to 249 of the following matters: the objectivity of the test and the applicable legal principles that he had earlier set out, in particular Lord Devlin's description of suspicion in *Hussein* as "conjecture or surmise where proof is lacking"; and the above limited, but significant, concessions of Mr Croxford in his closing speech. In continuing, in paragraphs 246 and 247 of his judgment, to deal generally with the matter, he clearly had regard to what I might call the broad "opportunity bracket" of 18 months from December 1995 to June 1997 for commission of the offences suspected, thus not tying them to any of the four occasions of which the officers had specific evidence and/or information. And, as to opportunity, he clearly included all the appellants and excluded Mr Loftus, observing that "it ×[was] hard to believe that × if he was the thief or one of the thieves he would have had any sensible reason for coming forward ×". Finally, he adopted the approach in *O'Hara* that the evidence and information before the police officers, including the arresting officers, had to be looked at "as a whole", which revealed not only the breaking into Mr Rowland's safe deposit box on at least four occasions, but also the unrelated and dishonest breaking into Mrs Schwarzchild's box. He then returned, in paragraph 246(3) to the critical matter on all that material, the distinction between reasonable suspicion and prima facie proof:

> "As Lord Devlin pointed out in *Hussein's* case × in underlining the distinction between reasonable suspicion and prima facie proof, prima facie proof consists of admissible evidence. Suspicion can take into account matters that could not be put in evidence at all. Thus by way of example only, the arresting officers were entitled to have regard to the evidence (insofar as it concerned a particular claimant) as to the Schwarzschild safe deposit box. ×."

60. From that analysis, his finding of fact in paragraph 247, when read with that in paragraph 239, inevitably followed, namely that each arresting officer reasonably suspected, in the case of each claimant arrested, that he was guilty of the offences for which he was arresting him, and that the basis for that reasonable suspicion was "joint responsibility/joint enterprise" as described in the Judicial Studies Board's specimen direction for juries in criminal offences.

61. Cresswell J went on to deal with this issue in relation to each appellant individually. He did so, as he said in paragraph 249, to "identify and examine some of the more significant materials" produced by the investigation, but with the rider that they "should be seen in the light of the surrounding circumstances as described earlier in the judgment and in the context of all materials in" the investigation papers before him.

62. The Judge concluded his analysis by looking in some detail at the highlights of the evidence and information before the investigating, including the arresting, officers, and concluding in each case:

> "× that a reasonable man would have been of the opinion that, having regard to the information which was in the mind of the arresting officer, there were reasonable grounds for suspecting Mr ×.to be guilty of theft and criminal damage jointly with others. I emphasise the distinction between reasonable suspicion and prima facie proof. Several of the matters referred to above were highly suspicious."

63. Thus, the Judge comprehensively and clearly identified the matters which gave rise, in his view, to reasonable suspicion of each appellant's involvement jointly with one or more of the others in the theft of and/or criminal damage to the contents of Mr Rowland's deposit box at some time over the 18 month period following the first interference with it in December 1995 and his supervised opening of it in June 1997. Taking each case in turn, as Mr Croxford painstakingly did in his submissions, it may have fallen short of prima facie proof, but that is not what section 24(6) of PACE requires.

64. In my view, the Judge was not only entitled to form that view of the facts, he was right to find that the arresting officer, in the case of each appellant had ample - certainly reasonable - grounds for suspecting that each one of them had been a party to a criminal joint enterprise to commit the offences for which they were arrested. As Mr Miller observed in the course of his submissions, the information before the officers showed a series of contributory factors which, when aggregated, gave rise to reasonable grounds for suspicion.

Ground 2 - whether each of the arresting officers' exercise of his power to arrest under section 24(6) of PACE was *Wednesbury* unreasonable

65. Each appellant's case under this issue was that the arresting officer had not exercised properly or at all his discretion whether to arrest, having regard to the cooperation offered by each of them, and in the light of section 29 of PACE. This cooperation included, as I have said, offers to attend voluntarily at a police station for interview, to provide finger−prints and to allow the police to search his premises, and the fact of his voluntary attendance at the time and at the police station designated. Section 29 provides, so far as material:

> "Where for the purpose of assisting with an investigation a person attends voluntarily at a police station × without having been arrested −
>
> (a) he shall be entitled to leave at will unless he is placed under arrest;
>
> (b) he shall be informed at once that he is under arrest if a decision is taken by a constable to prevent him from leaving at will"

66. Mr Rees was not one of the arresting officers, and the Judge did not address the question of any liability on his part in respect of the appellants' claims. However, he was, as I have indicated, very much concerned with the arrangements for interviewing the appellants, with the question whether the interviews should be at a police station or elsewhere, and as to whether it would be necessary for the officer or officers concerned with the interview of each appellant to consider arrest before interviewing him. His concern was such that he sought and obtained the advice of Mr Pownall as to arrest of Mr Al Fayed, advice to the effect that he, Mr Pownall, could foresee no justifiable criticism of a decision to arrest Mr Al Fayed and, it would seem, the other appellants at a police station for the purpose of interview.

67. Mr Pownall, in a written advice of 3rd March 1998 confirming his advice in conference with Mr Rees as to the then proposed arrest of Mr Al Fayed, recorded the following under the heading "The reasons given by Superintendent Rees for arrest and interview":

> "(a) The preferred operational strategy of the Metropolitan Police is to arrest a suspect and interview him at a police station.
>
> (b) If a suspect is particularly vulnerable, such as a child or somebody who is mentally or physically unwell there may be sensible reasons for making alternative arrangements.
>
> (c) A[n] interview at a police station gives the police a degree of control over the suspect[‘]s movement. Should an interview occur without arrest somewhere other than at a police station the interviewee could leave the interview whenever he wishes.
>
> [I interpolate that, as Mr Rees also said in conference and in evidence, that to arrest at that point would leave the police open to criticism that they were arresting simply to persuade an interviewee to answer questions.]
>
> (d) Although solicitors acting on Mr Al Fayed's behalf have indicated that he would provide fingerprints without the

> need for arrest there would be nothing to stop him changing his mind.
>
> (e) An interview room at a police station has proper tape−recording facilities.
>
> (f) It is intended to arrest others in connection with the enquiry who are not as prominent as Mr Al Fayed. It might be contended that they also be afforded the same privilege [sic];
>
> (g) In a case such as this the police must be seen to be acting in an even−handed way. To do otherwise would create a precedent whereby prominent individuals could demand the same exceptional treatment; and
>
> (h) I am told that arrangements are in place that will ensure Mr Al Fayed is not subjected to the ‘media−circus' about which fears have been expressed."

68. Mr Rees, consistently with Counsel's account of his instructions to him, said in evidence that it was "normal procedure in the Metropolitan Police for suspects to be interviewed under arrest". The other four respondents indicated much the same approach in their pleaded case below:

> "× the preferred operational strategy of the Metropolitan Police was a reference to the preferred police strategy to be adopted in the case. Further, it is admitted and averred it is normal police practice to arrest persons suspected of arrestable criminal offences at a police station."

69. Mr Croxford distilled and criticised this approach of all the respondents as one of treating a decision not to arrest as a privilege and/or exceptional, namely a policy of arresting all those whom they suspected of having committed an arrestable offence unless there was some exceptional reason, such as age or infirmity, to militate against doing so. He pointed also to the special circumstance in Mr Al Fayed's case that his arrest was, as the officers knew it would be, immediately the subject of widespread − and damaging - media coverage. He maintained before Cresswell J, and again to this Court, that, given the level of cooperation offered by each of the appellants, it was not necessary for the police to arrest any of them for the purpose of interviewing them. And, applying Woolf LJ's third requirement in *Castorina* (see paragraph 42 above), he submitted that it was *Wednesbury* unreasonable of each arresting officer to arrest either: 1) in failing to exercise any discretion at all, simply following a "preferred operational strategy"; or 2) in following that strategy to the exclusion or in the face of the circumstances of the case, in particular, the potential interviewee's cooperation.

70. Cresswell J rejected that argument. He held, at paragraphs 260−266 of his judgment, that the officers had not taken into account a general policy "to arrest a

suspect and interview him at a police station, rather than conduct × an interview without arrest", but had simply adopted "the preferred operational strategy × in the present case". He added that, despite the references to making an exception for the infirm or otherwise vulnerable, Mr Rees and each of the officers had taken into account all the relevant circumstances of the particular case. This is how he reasoned the matter in paragraphs 262 and 263 of his judgment:

> "262. As to the allegation that the defendants took into account matters which they ought not to have taken into account, namely a fictitious ‘preferred Metropolitan Police operational strategy' to arrest a suspect and interview him at a police station, rather than conducting an interview without arrest, I find that no such matter was taken into account. On 25 February 1998 Mr Rees asked Miss Hyams to obtain Treasury Counsel's opinion on [inter alia] the preferred operational strategy of the Metropolitan Police to arrest Mr Al Fayed and his colleagues at a police station. I find that the reference in the file note to ‘the preferred operational strategy of the MPS' meant in context the preferred operational strategy of the MPS in the present case.
>
> "263. As to the allegation that the defendants took into account matters which they ought not to have taken into account namely a ‘normal' Metropolitan Police practice to arrest all those suspected of having committed an arrestable offence, save those who were infirm or vulnerable, without regard to the circumstances of the particular case, I find that each of the arresting officers (and Mr Rees) weighed all the circumstances of this particular case with care (including without limitation all the points made orally and in the extensive correspondence by Burton Copeland). Further legal advice was sought from the Metropolitan Police Solicitor's Department and from Senior Treasury Counsel. Mr Pownall was asked to advise as to whether Mr Rees should exercise his discretion in favour of arrest or in favour of what was proposed by Mr Burton. The arresting officers did not say ‘I always arrest when I have reasonable grounds for suspecting a person to be guilty of an arrestable offence' (see *Neilson v Attorney General* [2001] 3 NZLR 433, at 441, Richardson P). The many points made by Mr Burton were weighed by the × team with DI Taber acting as devil's advocate. The arresting officers were entitled to take into account a concern that if the claimants were not arrested and walked out in the course of an interview, any attempt to arrest them at that stage would or might be questionable or open to the subject of challenge. ×
>
> 266. The discretion was exercised in accordance with *Wednesbury* principles. The decisions in each case to

> arrest were not perverse. The arresting officers exercised their discretion in each case. They did not fail to take account of the relevant. They did not take account of the irrelevant."

Submissions

71. Mr Croxford submitted that the section 24(6) power of arrest should only be exercised on the ground of necessity, since that would represent the minimum interference with suspect's human rights, in particular his Article 5 right to liberty. For the reasons that I have mentioned, he said that there was no necessity here. However, it should be noted that Article 5 says nothing about necessity in the context of arrest on reasonable suspicion of the commission of an offence, and is expressed, if anything, in more flexible terms than section 24(6). After providing in Article 5(1) that no one shall be deprived of his liberty save in a number of cases and in accordance with a procedure prescribed by law, it includes as one of those cases:

> "(c) the lawful arrest or detention of a person effected for the purpose of bringing him before the competent legal authority on reasonable suspicion of having committed an offence or when it is reasonably considered necessary to prevent his committing an offence or fleeing after having done so;"

72. Mr Croxford also sought to draw support for his proposition of necessity in the context of a section 24(6) arrest from the Philips Report. But, as is plain from paragraphs 3.77 and 3.78 of the Report, the Commission stopped short of imposing such a criterion at the arrest stage, reserving it to the subsequent stage of decision at the police station whether to detain in custody after arrest − the genesis of the specific requirement of necessity embodied in section 37(2) and (3) of PACE (see paragraph 86 below).

73. Apart from lack of necessity, Mr Croxford's first complaint on this issue was, as I have summarised it in paragraph 69 above, that each of the arresting officers had failed to exercise any discretion when deciding to arrest, but had done so, as he always did, simply because he reasonably suspected the person whom he was arresting to have committed the offences in question. Mr Croxford rightly identified a wealth of authority showing that such an approach, if it was the case in any of these arrests, would have been unlawful: *Cumming*, per Latham LJ at paras 42−44; *Paul v Chief Constable of Humberside Police* [2004] EWCA Civ 308, per Brooke LJ, at paras 34 −37; and *Neilson v A−G* [2001] 3 NZLR 433, CA, per Richardson P, giving the judgment of the Court at paras 30 and 40.

74. Mr Croxford submitted that the Judge's reasoning, in the passages from his judgment set out above, for his rejection of the appellants' case in this respect, was not adequate or faithful to the respondents' pleaded case or their evidence and

that called on their behalf as to the generality of the policy that they followed in their arrests of the appellants, namely that it was "normal police practice to arrest persons suspected of arrestable criminal offences". He said that the policy, so expressed, was an abdication of discretion in that they appeared to have regarded the exercise of their power of arrest as something to be done as a matter of course, without regard to its discretionary nature. Such an approach, he submitted was irrational, and, therefore, unlawful in that it failed to satisfy the third ingredient necessary for lawfulness of an arrest stipulated by Lord Woolf in *Castorina*, namely whether, if there were reasonable grounds for suspecting that the person arrested was guilty of an arrestable offence, the officer's exercise of his discretion to arrest was *Wednesbury* reasonable. In approaching that question, he pointed out that the law has moved on since Cresswell J gave judgement, and urged the Court to apply the more vigorous and intrusive review, including considerations of proportionality, that the House of Lords has indicated as appropriate where Convention rights are in play, notably by Lord Steyn in *R (Daly) v Home* Office[2001] UKHL 26, [2001] 2 AC 532, paras 26−28; by Lord Bingham of Cornhill and Lord Hope of Craighead in *R v Shayler* [2002] UKHL 11, [2003] 1 AC 247, at paras 33 and 75−78 respectively; and by Lord Bingham in *Smith* at 554D, "the more fundamental the duty, the greater the scrutiny".

75. Mr Croxford's second complaint under this issue is that, if, contrary to his first submission, the arresting officers exercised discretion when making the arrests, such exercise was *Wednesbury* irrational having regard to the circumstances, namely: 1) there was no urgency to arrest − as there was, for example, in the *Cumming* case (see per Latham LJ at para 44) - here the investigation had taken many months; 2) each appellant had agreed voluntarily to attend at a police station for interview and had offered to provide finger−prints and submit to police searches of his premises; 3) each appellant had duly attended at the police station on the date and at the time arranged and indicated his readiness to be interviewed; and 4) in such circumstances, the police would have derived no advantage to their investigation by arresting them.

76. Mr Croxford submitted that there was, therefore, no *necessity* to arrest any of the appellants in order to interview him under caution, nor for the purpose of detaining him in custody after arrest. He dismissed the various explanations of Mr Rees and the other respondents (see paragraphs 67 and 68 above) for their references to "the preferred operational strategy" as "elusive". And, as to their reliance on arrest as a means of exercising "legitimate" control over the appellants whilst interviewing them, he pointed out that they could have recourse, in the unlikely event of it proving necessary, to section 29 of PACE, which expressly contemplates the use of a section 24(6) power to arrest an un−arrested person who seeks to walk out of the interview. As to Cresswell J's acceptance nevertheless, towards the end of paragraph 263 of his judgment that, notwithstanding that power, the officers' exercise of it in the circumstances might be "questionable or open to or the subject of challenge", he submitted that those were irrelevant considerations.

77. Mr Croxford and Mr Philip Marshall QC, who appeared with him on behalf of the appellants, added that, if there is any ambiguity about the breadth of a constable's discretion in exercising his powers of arrest and/or detention under the provisions of PACE, or even if there is no such ambiguity, section 3(1), when read with section 6(1) and (3)(a), of the Human Rights Act 1998 ("HRA"), requires the courts to construe the ambiguity in a Convention compliant manner even where that might involve giving a meaning other than the natural and ordinary meaning to the statutory words and whether or not the statute being interpreted preceded the enactment of the HRA. They cited, in support of those well established propositions: *R v A* [2001] UKHL25, [2001] 3 All ER 1, per Lord Steyn at para 44; *R v DPP, ex p Kebilene* [1999] 3 WLR 972, per Lord Cooke at 987 C - E; *Brown v Stott (Procurator Fiscal, Dunfermline)* [2001] 2 All ER, 97; and *Re S (children: care plan) Re W (children: care plan)* [2002] UKHL 12, [2002] 2 All ER 192, per Lord Nicholls at para 37.

78. Mr Croxford submitted that Cresswell J, while appearing to have accepted the principle that exercise of the section 24(6) power of arrest was discretionary notwithstanding the satisfaction of the first two *Castorina* principles, failed to explain how he was able to conclude at paragraph 263 of his judgment that each arresting officer did exercise discretion. He complained, in particular, that the Judge provided no analysis for his conclusions in respect of each individual appellant.

79. Mr Miller submitted that the Cresswell J was entitled to find, on a proper reading of Mr Rees' and the arresting officers' evidence, that they had not followed some general policy as to arrest regardless of the circumstances, but had, as they all maintained, considered that the "preferred operational policy" was appropriate in the circumstances of each case. He added that, far from blindly following some general arrest policy, Mr Rees and his colleagues had agonised over the matter − in particular as to the apparently cooperative approach of each of the appellants to the prospect of interview − sufficiently to debate it with fellow officers and to seek the advice of Senior Treasury Counsel. He said that Counsel's advice favouring interview was a factor that the officers were obviously entitled to take into account.

80. Mr Miller referred in particular to one of the matters put to Counsel, namely the view of the House of Lords in *Holgate−Mohammed* , that a relevant factor to the exercise of this discretion is the legitimate advantage to be obtained from arrest in the sense of control it gives or is perceived to give to the police in securing, and in the conduct of, an interview, a matter that the Judge clearly had in mind. He, Mr Miller, disagreed with Mr Croxford's suggestion as to the irrelevance of the concern of Mr Rees' and the arresting officers' that, recourse, as contemplated by section 29, to their section 24(6) power to arrest an un−arrested suspect if he decided to walk out of an interview before its completion, would lay them open to challenge or criticism. He maintained that such concern was capable of being relevant, despite the professions of willingness by the appellants to cooperate; since there could be no guarantee against changes of mind provoked by the dynamics of interview. Finally, Mr Miller referred to the obligation established

by this Court in *Plange v Chief Constable of South Humberside* 1992] 156 LG Rev 1024 that it is for the claimant to establish on *Wednesbury* principles that the decision to arrest in any particular case was unlawful for want of proper exercise of discretion; and he referred to the observation of Parker LJ in that case that "it will only be in very exceptional cases that the condition precedent [in section 24(6) reasonable grounds to suspect] being satisfied, a *Wednesbury* challenge can succeed".

Conclusion

81. Before I express, by way of summary, some propositions of law and turn to my conclusion on this issue, I should consider the matter touched on by Latham LJ in *Cumming* of the effect, if any, of recent Convention jurisprudence on the ambit of the *Wednesbury* discretion allowed to arresting officers. In doing so, it is of interest to record the following pre−Convention reasoning of Lord Diplock in *Holgate−Mohammed*, at 445C and 444G−H, when introducing "[t]he compromise which the law had by that stage evolved for the accommodation of the two rival public interests" of the liberty of the subject and bringing criminals to justice:

> "So, applying *Wednesbury* principles, the question of law to be decided by your Lordships may be identified as this: 'Was it a matter Detective Constable Offin should have excluded from his consideration as irrelevant to the exercise of his statutory power of arrest, that there was a greater likelihood (as he believed) that Mrs Holgate−Mohammed would respond truthfully to questions about her connection with or knowledge of the burglary, if she were questioned under arrest at the police station, than if, without arresting her, questions were put to her by Detective Constable Offin at his own home from which she could peremptorily order him to depart at any moment ×"

82. Whilst the liberty of the subject, carrying with it an entitlement to freedom from arbitrary arrest and detention, now enshrined in Article 5 is of the greatest importance, it should be remembered that it expresses what has long been a well established and rigorously applied principle of our common and statutory law. Both Article 5, in paragraph (1) (c), and our domestic law provide the same or similar "compromise", as Lord Diplock called it, between those two public interests. When considering, in the balance of those interests, the "reasonableness" of a police officer's use of a power to arrest in reliance on his reasonably held suspicion that the subject of his arrest has committed an offence, against that individual's entitlement to liberty expressly subject to that legitimate public interest, it is difficult, as Latham LJ indicated in *Cumming*, to see by what intellectual mechanism the ambit of *Wednesbury* discretion given to the suspecting and arresting officer should be reduced. The unknown, and the relative risk of public and/or private harm, whichever way the discretion is exercised, are mostly incapable of precise identification at that stage, as distinct from later when all or more is revealed in the further course of the investigation.

In any event, cases such as these, where the subject's loss of liberty is known to be for a relatively short period for the purpose of an interview to which he was, in any event, prepared to submit, and which may or may not lead to him being charged, do not seem a logical or proportionate basis for narrowing the *Wednesbury* reasonableness test for exercise of the power to arrest − certainly not so as to substitute for it a test of necessity. However, that is not to dismiss the possibility that *Wednesbury−plus* reasonableness in this context might approach the test of necessity where the intrusion on a person's liberty is of an egregious and/or public a nature and /or for such length of time and/or accompanied with harsh treatment.

83. With those observations in mind it may be helpful for me to set out a number of, mostly unoriginal, propositions that I derive from the authorities:

1) In determining all *Castorina* questions the state of mind is that of the arresting officer, subjective as to the first question, the fact of his suspicion, and objective as to the second and third questions, whether he had reasonable grounds for it and whether he exercised his discretionary power of arrest *Wednesbury* reasonably.

2) It is for the police to establish the first two *Castorina* requirements, namely that an arresting officer suspected that the claimant had committed an arrestable offence and that he had reasonable grounds for his submission - *Holgate Mohammed* , per Lord Diplock at 441F−H, and *Plange* , per Parker LJ.

3) If the police establish those requirements, the arrest is lawful unless the claimant can establish on *Wednesbury* principles that the arresting officer's exercise or non−exercise of his power of arrest was unreasonable, the third *Castorina* question -*Holgate−Mohammed,* per Lord Diplock at 446A−D; *Plange,* per Parker LJ*;* and *Cumming,* per Latham LJ at para. 26.

4) The requirement of *Wednesbury* reasonableness, given the burden on the claimant to establish that the arresting officer's exercise or non−exercise of discretion to arrest him was unlawful, may, depending on the circumstances of each case, be modified where appropriate by the human rights jurisprudence to some of which I have referred, so as to narrow, where appropriate, the traditionally generous ambit of *Wednesbury* discretion − *Cumming,* per Latham LJ at para 26. It is not, as a norm, to be equated with necessity; neither Article 5 nor section 24(6) so provide. The extent, if at all, of that narrowing of the ambit or lightening of the burden on the claimant will depend on the nature of the human right in play - in this context one of the most fundamental, the Article 5 right to liberty. In my view, it will also depend on how substantial an interference with that right, in all or any of the senses mentioned in paragraph 82 above, an arrest in any particular circumstances constitutes. The more substantial the interference, the narrower the otherwise generous *Wednesbury* ambit of reasonableness

becomes. See the principles laid down by the House of Lords in *R v. SSHD, ex p Bugdaycay* [1987] AC 514, and in *R v SSHD, ex p Brind* [1991] 1 AC 696, see e.g. per Lord Bridge of Harwich, at 748F−747B. Latham LJ had also to consider this aspect in *Cumming,* where, following Lord Diplock in *Mohammed−Holgate,* at 444G−445C, he said at paragraphs 43 and 44:

> "43. × it seems to me that it is necessary to bear in mind that the right to liberty under Article 5 was engaged and that any decision to arrest had to take into account the importance of this right even though the Human Rights Act was not in force at the time. × The court must consider with care whether or not the decision to arrest was one which no police officer, applying his mind to the matter could reasonably take bearing in mind the effect on the appellants' right to liberty. ×
>
> 44. × It has to be remembered that the protection provided by Article 5 is against arbitrary arrest. The European Court of Human Rights in *Fox, Campbell and Hartley* held that the protection required by the article was met by the requirement that there must be 'reasonable grounds' for the arrest. I to not therefore consider that Article 5 required the court to evaluate the exercise of discretion in any different way from the exercise of any other executive discretion, although it must do so × in the light of the important right to liberty which was at stake."

5) It is a legitimate, but not on that account necessarily *Wednesbury* reasonable use of the power, to arrest in order to interview and/or to seek further evidence - section 37(2) and, *Holgate−Mohammed,* per Lord Diplock at 445E−G.

6) It may be *Wednesbury* reasonable to use the section 24(6) power of arrest as a means of exercising some control over a suspect with a view to securing a confession or other information where there is a need to bring matters to a head speedily, for example to preserve evidence or to prevent the further commission of crime − see e.g. *Cumming,* per Latham LJ at para 44.

84. On my reading of Cresswell J's judgment and of the evidence before him, he correctly applied those principles to his determination of this question and adequately reasoned that determination. First, in his review and analysis of the evidence, he had to determine on a wealth of police evidence variously expressing how Mr Rees and the arresting officers regarded and applied in this case the normal practice or "the preferred operational strategy" of arrest before interview. It is plain from a reading of the evidence that each of the officers, while acknowledging some such normal practice or approach to the exercise of the power, insisted that its application depended in each case on its particular circumstances and did so in the arrest of each of these appellants, evidence that

Cresswell J expressly accepted. It is plain that Mr Rees and his fellow officers were exercised by the effect on their decision that the appellants had offered to attend voluntarily at the police for interview and to provide finger prints etc. And it is a testament to their concern as to what they should do in the light of those offers that they debated it among themselves and that Mr Rees sought the advice of Senior Treasury Counsel. And it is plain from their evidence, read as a whole, that their concerns in the public interest, which Counsel had endorsed, were: 1) a legitimate interest in getting the most out of the interviews, which they felt would be the case if they took place under arrest at a police station; 2) the wish to avoid any difficulties that could have resulted from arrest of an un−arrested appellant who attempted to walk out of an interview, and 3) given the public persona of Mr Al Fayed, the fact that it would have been invidious to treat him or any of the appellants differently in this respect. In my view, all of those evidenced concerns, when put alongside the officers' insistence that they only applied the so−called normal policy after considering whether it was appropriate on the facts of each case, fell well within the ambit of *Wednesbury* reasonableness, however rigorous a scrutiny it should now attract. In my view also, Cresswell J was entitled, as he did, to accept that evidence and, on a *Wednesbury* basis the reasonableness of the concerns that led each of the arresting officers to exercise his power of arrest.

Ground 3 - the lawfulness of the use of the power under section 37 of PACE to detain the appellants following their arrest

85. Section 37(1)(b) of PACE requires a police station custody officer, before whom a person arrested for an offence without a warrant or under a warrant backed for bail is brought, to determine whether there is sufficient evidence to charge him with the offence for which he has been arrested, and provides that he may detain him at the station for such period as is necessary to enable him to do so.

86. Section 37(2) of PACE requires the custody officer to release an arrested person if he determines that there is insufficient evidence to charge him with the offence for which he was arrested, unless he -

> "× has reasonable grounds for believing that his detention without being charged is necessary to secure or preserve evidence relating to an offence for which he is under arrest or to obtain such evidence by questioning him ×"

Section 37(3) provides:

> "If the custody officer has reasonable grounds for so believing, he may authorise the person arrested to be kept in police detention."

These provisions implement recommendations of the Phillips Commission, in paragraphs 3.75 - 3.79 of its Report. Despite the use of the permissive word

"may" in section 37(3), there does not appear to be much room for a custody officer's exercise of discretion if he has reasonable grounds for believing that continued detention without charge is *necessary* for one or more of the reasons set out in section 37(2). The use of the word "may" in that context may have a confining effect rather than imposing or bestowing upon a custody officer a further discretion after he has passed the necessity threshold. That is, it may simply confine the custody officer's power as to the manner of its exercise, namely to authorise continued detention *by the police* . A genuine and bona fide belief in the necessity of continued detention on the part of the custody officer is not enough. Consistently with Article 5(1)(c) of the Convention, the test is an objective one, namely whether he had reasonable grounds for such belief; see *Murray v United Kingdom* (1994) 19 EHRR 193, para 50, and *Fox, Campbell and Harltey v United Kingdom* (1991) 13 EHRR157, at paras 31−32.

87. The appellants' case in summary was that the custody officer who authorised the detention of each appellant following arrest failed to comply with section 37(2) and (3) of PACE because he could not have reasonably believed that detention was "necessary" as required by those provisions, and that, in any event, he failed, in doing so, properly or at all to exercise whatever discretion is given to him by section 37(3).

88. Despite the slightly narrower wording of Article 5(1)(c), in that it does not expressly provide for detention for the purpose of obtaining evidence, the European Court has held that, provided there are reasonable grounds for suspecting that an offence has been or will be committed, a person may be arrested and detained in good faith for questioning in order to obtain evidence; see *Brogan v United Kingdom (1988)* 11 EHRR 117 and *Murray v United Kingdom* (1994) 19 EHRR 193.

89. Cresswell J, in paragraphs 272−279 of his judgment, made the following findings of fact on the evidence before him on this issue in relation to each appellant. Each custody officer was informed that the appellant had attended the police station voluntarily and had been arrested because the arresting officer had reasonable grounds for suspecting that he had committed offences of theft and criminal damage. The arresting officer provided a brief outline of the circumstances giving rise to the arrest, including the mention of several unauthorised openings between December 1995 and June 1997 of Mr Rowland's safe deposit box at Harrods and the suspicion that they had led to theft of, and criminal damage to, items in the box. Evidence and material obtained in the police investigation since June 1997 had led the arresting officer to believe that there were reasonable grounds to suspect that the appellant whom he had arrested to be guilty of those offences. Whilst the arresting officer would have referred generally to the nature and extent of the investigation and what it had produced in the way of evidence and information, he would not have detailed the evidence relating particularly to the individual appellant. He would probably have explained that the appellant had played a part in breaking into the deposit box and was suspected of guilt of the offences on the basis of joint enterprise. And he

informed the custody officer that the arrest had been made in order to obtain further evidence by questioning.

90. Continuing with Cresswell J's findings of fact in the case of each appellant, the custody officer, in accordance with the provisions of section 37(2) and (3), determined that he did not have before him sufficient evidence to charge the appellant, but that, in the light of the information given to him by the arresting officer, he authorised his continued detention for the purpose of interview. He did so because he had reasonable grounds for believing that his detention without charge was necessary in order to obtain evidence by questioning.

91. On those findings of fact, Cresswell J held, at paragraph 279 of his judgment:

> "× Given the information provided by the arresting officer (and the absence of any representation to the contrary by the solicitor for the claimant concerned) I find that this decision of the custody officer in each case was reasonable. It was certainly not unreasonable, in the sense that no custody officer applying his common sense to information before him, could reasonably have reached that decision."

In so concluding, the Judge had clearly in mind the decision of this Court in *Wilding v Chief Constable of Lancashire* (*CA*, unreported 22 May 1995) to which he had referred at the beginning of this section of his judgment, and to which I shall return.

Submissions

92. Mr Croxford submitted, for all the reasons of fact that he had advanced in relation to the second issue, that, objectively speaking, there was no necessity and there were no reasonable grounds for continued detention under section 37(3). He characterised the evidence of each of the custody officers as simply that of "booking in" the suspected appellant with whom he was dealing, so as enable the proposed interview to start as quickly as possible − all as had been arranged. The evidence did not show, he submitted, any process of consideration, appellant by appellant, whether and how section 37(2) and (3) detention was justified, in particular its necessity.

93. Moreover, he submitted that each officer had failed to consider relevant matters, in particular the appellant's voluntary attendance at the police station for interview and the availability of arrest contemplated by section 29 should it prove necessary. He submitted that each officer had also considered two irrelevant matters. The first of those was the reference by each of them in their evidence, in addition to and following their assertions of reasonable belief in need for continued detention, to the following provision in Code C, para 11.1:

> "Following a decision to arrest a suspect, they [sic] must not be interviewed about the relevant offence except at a police station or other authorised place of detention ×"

Mr Croxford said that that provision was irrelevant to the issue whether the appellant should be *detained* at the police station for interview, since it simply provided for the venue of an interview once a person is under arrest. The second claimed irrelevant matter was their reference in their evidence to the absence of any challenge from the appellants or their solicitor to the continued detention at the time. Mr Croxford said that, challenge or no, the custody officer's duty under section 37(2) and (3) was to consider whether continued detention was necessary for any of the purposes specified in that provision.

94. Mr Miller challenged Mr Croxford's characterization of the evidence given by the two custody officers.

Conclusion

95. I have to say, after going through the custody officers' witness statements and the transcripts of their evidence and also that of Mr Reynolds, one of the arresting officers, I regard Mr Croxford's description of their account as somewhat of a caricature and the Judge's findings of fact well supported. The procedure before the custody officer, which Mr Croxford critically described as a mere "booking in" procedure, was undoubtedly brisk, as the practicalities of the procedure would normally dictate. But the evidence before the Judge indicated more of the essentials of what took place on each occasion than does Mr Croxford's labelling of them, either in cross−examination of the officers or in his submission to this Court. In my view, Cresswell J's account of what took place on each occasion accurately reflects the totality of the evidence before him. And, as Mr Miller commented in his submissions, this evidence was given five years after the events to which it related, and it is understandable that the custody officers were unable to be more specific about the details of their exchanges with the arresting officers. However, the gist of the exchanges was plain from of the evidence before the Judge, and certainly sufficient to justify his findings of fact.

96. The essential question is; "Were those findings of fact sufficient for Cresswell J's conclusion that the decision of the custody officer in each case of the necessity to authorise continued detention for questioning was *Wedmesbury* reasonable?" The question prompts a return to *Wilding.* In that case, this Court had to consider a claim by a woman for wrongful arrest and unlawful detention by police officers who had reasonably suspected her of burglary of the house of her former partner. In interview by the police, she denied the offence and made assertions that prompted the officers to contact the complainant to ask him to attend the police station to deal with them before continuing with the interview. Within about two hours after the complainant had been contacted and had made a statement, the police decided that there would be no further enquiries. They released the woman without charge, initially on bail, and subsequently did not charge her with any

offence. On the issue whether it had been necessary, by reference to section 37(2) and (3) of PACE, to detain her in custody while they made those further enquiries, Beldam LJ, with whom Nourse and Kennedy LJJ agreed, held that in such circumstances a court:

> "× should ask itself the question ... whether the decision of the custody sergeant was unreasonable in the sense that no custody officer, acquainted with the ordinary use of language and applying his common sense to the competing considerations before him, could reasonably have reached that decision. Applying that test in this case, I bear in mind that what was being suggested was a comparatively short period of detention, so that the officers, having checked with × the complainant × whether or not there had been, for example, one telephone call about money or whether the appellant did in fact owe him any money, might then continue the interview, or restart the interview, for the purpose they had contended they had, which was obtaining evidence relating to the offence by questioning her.
>
> Looking at the matter from that standpoint, it seems to me that the custody officer could reasonably, in the circumstances of this case, have come to the conclusion that he had reasonable grounds for believing that the detention of the appellant without being charged was necessary within the meaning of the section. ×"

97. Mr Croxford and Mr Marshall sought to minimise the relevance of that authority to the circumstances of this case by saying that it simply decided that there is a margin of appreciation as to the meaning of the word "necessary" in this context and that a custody officer should have regard to all the circumstances known to him when applying that part of the test. They complained that the Court had not expressly considered the application of *Wednesbury* principles, still less the *Wednesbury plus* principles that now govern the reasonableness of decisions involving fundamental human rights. And, they suggested that Beldam LJ's words do not give a general or clear definition of the word "necessary" for the purpose. They drew on the following canon of construction articulated by Purchas LJ in *Hill v Chief Constable of South Yorkshire* [1900] 1 WLR 946, at 952, as an example of the general approach to interpretation of statutory provisions like section 37 affecting the liberty of the subject:

> "where statutory provisions which provide rights to police constables to interfere with the liberty of the subject are concerned, those provisions ought to be construed strictly against those purporting to exercise those rights."

98. However, the term "liberty of the subject" can mean many things, and can vary considerably on the facts as to the strength of the principle that it so nobly articulates. The reality, as Beldam LJ's words in *Wilding* illustrate, is that a

custody officer may, as a matter of common sense and fairness to the suspect as well as in the public interest, conclude that a short period of further detention is necessary to resolve the matter it is his duty to investigate. Here, the arresting officers having formed the view that each appellant should be arrested at the police station for the purpose of interview, and having communicated that view and the basic facts and grounds giving rise to it, to each custody officer, it is difficult to see on what basis it can be said that the custody officers acted *Wednesbury* or *Wednesbury plus* unreasonably in considering it necessary to authorise continued detention for that very purpose.

99. As to Mr Croxford's complaint that each of the custody officers failed to take into account relevant considerations, namely the voluntary attendance at the police station of the person whose continued detention he had to consider, or the safeguard envisaged by section 29 in the event of that person - if not detained to walk out of the interview, the first is not supported by the evidence expressly accepted by the Judge and the second is peripheral.

100. As to the first of the claimed irrelevant considerations, the custody officers' reference to Code C, para 11.1, whether they misunderstood it or not, it added little of significance to the main reason that each gave for his decision, namely reliance on the information provided by the arresting officer and application of the words of section 37(2). The effect of the Code was, in any event, that if the suspect remained under detention, he had to be interviewed at a police station. As to the second, the fact that neither the appellants nor those advising them objected to being interviewed under formal detention, while not in itself an indicator of necessity, was also no compelling contra−indication of necessity, any more than it had been to their original arrest.

101. As Mr Miller observed in his submissions, section 37(2) and (3) would be unworkable if, in a complicated investigation, a custody officer were required to ask for chapter and verse of the evidence and/or information that had prompted an officer to arrest a suspect before he, the custody officer, determined on detention without charge. It is also unrealistic in this case to suggest that the custody officers should have determined that the appellants should be released for interview regardless of their arrest, when the whole purpose of the arrests, as communicated to them, was − within the intention of section 37(2) − to interview them in controlled circumstances at the police station. It is true that a custody officer's function under these provisions is to introduce an independent filter as to whether continued detention without charge is necessary and, if so, whether he should authorise it in the police station. But, in conducting that exercise, he is not required to inquire into the legality of the arrest and he is entitled to assume that it was lawful; see *DPP v L*, The Times, February 1, 1999, D.C. He is entitled to have regard to the arresting officer's assessment of the need for arrest for the purpose of interview. He is not bound by that assessment, but nor is he required to test it forensically as if it were an adversarial process.

102. Despite the ringing calls of Mr Croxford and Mr Marshall to the fundamental right of "the liberty of the subject" and the *Daly* line of cases, the application of such a principle and such jurisprudence must be fact−sensitive. Here, the arrests and the short detention afterwards for the purpose of interview were little more than symbolic. They were not accompanied by any objectionable features. In practical terms the appellants were all in exactly the same position as they would have been as if treated as volunteers throughout. There was minimal interference to their liberty, a relevant factor, as the Court acknowledged in *Wilding*, and, on the issue of reasonableness of belief, no less relevant and no more deserving of a readily identifiable higher level of scrutiny than in pre−Convention days. In such circumstances, it was, in my view, entirely reasonable - certainly *Wednesbury* − or to the extent applicable *Wednesbury plus* − reasonable - for the custody officers to take the view that continued detention for the purpose of interview was necessary, as provided for in sections 37(2) and (3) PACE. For the Court to take any different view in such circumstances so as to enable and reward wholly disproportionate claims such as these would be an affront to the public interest and a travesty of the private interests that Article 5 and its domestic counterparts are designed to protect.

103. In the same vein, and prompted by Tuckey LJ and Jackson J, I add the following observations. Whilst the courts must be vigilant to detect and deal with any abuses of power or arbitrary arrests by the police, in this case, the problem is the other way round. The appellants, led and directed by Mr Al Fayed, engaged in conduct, which Mr Croxford acknowledged was, and described as, "reprehensible", and which I regard as a scandalous breach of trust. The Metropolitan Police had good reason to suspect all of them of having been involved in stealing, and causing criminal damage to, some of the contents of Mr Rowland's safe deposit box, which he had entrusted to Harrods for safe−keeping. The police had sound reasons for arresting and questioning each of them under caution, and the officers concerned did so in the most considerate and least intrusive manner possible. It is plain they went to immense lengths to ensure that they were acting lawfully and otherwise correctly at each stage of the process.

104. The claims by Mr Al Fayed and the other appellants for damages for wrongful arrest and false imprisonment had no merit in law or on the facts. But even if the claims had been well−founded, the measure of damages for less than an hour's questioning in a police station would have been very small. The inconvenience and disruption that each of them suffered would have been the same, whether he attended the police station for interview and finger−printing voluntarily (which the appellants say should have happened) or under arrest (as actually happened). It follows, in my view, that this whole litigation has been wholly disproportionate and a gross waste of public and private resources.

105. For all those reasons, I would dismiss each of these appeals.

Lord Justice Tuckey:

106. I agree.

Mr Justice Jackson:

107. I also agree.