Neutral Citation Number: [2020] EWHC 1567 (QB)

Case No: QB-2019-004216

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 17/06/2020

Before:

MR JUSTICE CHAMBERLAIN

- -

Between:

Rochaun Archer	**Claimant**
- and -	
The Commissioner of Police of the Metropolis	**Defendant**

- -
- -

Richard Hermer QC & Tim James-Matthews
(instructed by **Bhatt Murphy Solicitors**) for the **Claimant**
Adam Clemens (instructed by **Weightmans LLP**) for the **Defendant**

Hearing dates: 04 June 2020

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Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

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MR JUSTICE CHAMBERLAIN

Mr Justice Chamberlain :

Introduction

1. The matters now in dispute in this claim raise two sets of issues:

   (a) Is s. 38(1)(b)(ii) of the Police and Criminal Evidence Act 1984 ("PACE") incompatible with Article 5 of the European Convention on Human Rights ("ECHR") insofar as it purports to authorise the detention of minors in their own interest? If so, should a declaration of incompatibility under s. 4 of the Human Rights Act 1998 ("HRA") be made?

   (b) Was the Claimant's detention overnight from 22-23 February 2012 contrary to Article 5 ECHR and therefore unlawful? If so, how much (if anything) should he be awarded in damages under s. 8 of the HRA?

Background

2. On 17 February 2012, the Claimant was 15 years old. He and two friends were involved in an incident at a chicken shop in Woolwich. He was struck on the head and stabbed to his back and head by persons he described as members of a local gang, the Deptford Boys. He received treatment at King's College Hospital. At 6.50 am on 22 February 2012, the Claimant was arrested at his home in Charlton on suspicion of violent disorder and possession of an offensive weapon. He was taken to Plumstead Police Station, where he was placed in a cell at 7.25 am. Various investigations were made during the course of the day and at 7.45 pm the Claimant was charged with the two offences for which he had been arrested.

3. At 7.53 pm, the custody officer, Sergeant Peter Smith, refused bail. The custody record reads as follows:

> "Reason(s) for refusing bail are that it is believed necessary to further detain the person for their own protection, that the detained person has been arrested for a non-imprisonable offence and it is believed necessary to further detain to prevent physical injury to another person, that the detained person has been arrested for an imprisonable offence and it is believed necessary to further detain in order to prevent the commission of a further offence.
>
> The grounds are Dp [sc. detained person] has been involved in a 'gang' related fight where he has sustained injuries that required hospital treatment. It is feared that if released on bail there will be repercussions where he may sustain further injuries or inflict violence upon his original intended victims."

4. At §2 of his witness statement of 17 October 2018, Sgt Smith said that he had "no recollection of Mr Archer or his detention", but that in making the statement he had referred to the custody record, which he paraphrased in his statement. In a second witness statement dated 10 April 2019, Sgt Smith said this:

> "4…There was a real problem with gang violence and knife crime in the Borough at that time and his detention in secure police custody was necessary for his own protection and to prevent further offences.
>
> 5. I did not like keeping youngsters in custody but sometimes there were no other options in the circumstances. In Mr Archer's case there was no viable alternative. He could not be put in local authority care because at that time the local authority did not have secure facilities. It was not appropriate in the circumstances to release him to the care of his parents because it was self-evident that they were unable to control him…"

5. On the morning of 23 February 2012, the morning after his arrest, the Claimant was taken to Bexley Youth Court, where he was remanded in custody. I was informed by the parties that the Youth Court's records are no longer available, so the basis for the remand is not known. He was thereafter detained at Medway Secure Training Centre until 30 March 2012, when he was granted bail by the Crown Court, subject to a condition that he reside with his aunt in North London and to an electronically monitored curfew. The case was set down for trial on 13 April 2012. On that day, however, it was discontinued. The case against the Claimant's assailants did proceed. Two of them were convicted and sentenced to 18 months' imprisonment.

6. The Claimant's claim was issued in the Central London County Court against the Commissioner of Police of the Metropolis ("the Commissioner") and the Crown Prosecution Service ("the CPS"). The claim against the CPS was discontinued in October 2018. On 4 November 2019, permission was granted to claim a declaration of incompatibility under s. 4 of the Human Rights Act 1998 in respect of s. 38(1)(b)(ii) of PACE, as well as a declaration that the Claimant's detention by the police on 22-23 February 2012, for about 13 hours, violated his Article 5 rights, and compensation for the breach pursuant to Article 5(5) ECHR. The claim was transferred to the High Court.

7. In light of the newly pleaded claim for a declaration of incompatibility, the claim was notified to the Secretary of State for the Home Department pursuant to CPR r. 19.4A. On 11 February 2020, however, the Government Legal Department indicated in an email that she did not wish to be joined.

8. On 9 March 2020, by consent, Stewart J ordered that the claim be set down for hearing on the basis that the dispute about whether s. 38(1)(b)(ii) of PACE is incompatible with Convention rights "can be determined without the requirement for live evidence".

The hearing

9. In advance of the hearing, I invited counsel for both parties to consider two authorities not referred to in their skeleton arguments: the decision of the European Court of Human Rights ("the Strasbourg Court") in *IA v France* (1/1998/904/1116), 23 September 1998; and the Law Commission's 2001 report, *Bail and the Human Rights Act 1998* (Law Com No. 269). Counsel for both parties were able to consider these and address them in their submissions at the hearing, which took place using remote video-conferencing. I invited supplemental written submissions on four further points: whether a refusal of bail under s. 38(1)(b)(ii) would be incompatible with Article 5 in "all or nearly all cases" (so as to satisfy the test for a declaration of incompatibility in *R (Joint Council for the Welfare of Immigrants) v Secretary of State for the Home Department* [2020] EWCA Civ 542, [117]-[118]; whether it was a logical consequence of the Claimant's argument that para. 3 of Parts I and II of Schedule 1 to the Bail Act 1976 would also be incompatible with Article 5; whether damages would be available under s. 8 of the HRA in the event that s. 38(1)(b)(ii) was incompatible with Convention rights; the effect, if any, of the decision of the Grand Chamber of the Strasbourg Court in *Buzadji v Moldova* (2016) 42 BHRC 398. I was greatly assisted by prompt and comprehensive written submissions on behalf of both parties on all these matters.

10. Submissions at and after the hearing helped to narrow down the area of dispute. In the Defence and in his skeleton argument, Mr Adam Clemens for the Commissioner had relied on Article 5(1)(b), (c) and (d) ECHR. In oral argument, however, he concentrated almost exclusively on Article 5(1)(c). I have done the same. I should explain briefly why Article 5(1)(b) and (d) did not loom large in the argument.

11. In correspondence prior to the hearing, the Commissioner had suggested that the detention could be justified under Article 5(1)(b) as effected "in order to secure the fulfilment of any obligation prescribed by law", the obligation in question being the obligation of the police "to protect minors in their lawful custody". That was always a circular argument. In any event, however, Mr Clemens sensibly accepted that the decision of Leggatt J in *Serdar Mohammed v Ministry of Defence* [2014] EWHC 1369 (QB), [311]-[313], was authority for the proposition that the phrase "obligation prescribed by law" in Article 5(1)(b) referred to an obligation of the detained person, not the detaining authority. So, even if the police had a legal obligation to protect the Claimant, it could not justify his detention under Article 5(1)(b). Mr Clemens did submit that, insofar as the detention was based on the need to prevent *the Claimant* from committing further offences, it could be justified as effected to secure the fulfilment of *his* obligation not to commit those offences. I doubt whether the obligation not to commit further offences (even specifically contemplated ones) could qualify as an "obligation prescribed by law" for the purposes of Article 5(1)(b), but even if it does,

Article 5(1)(b) would add nothing, because it is common ground that detention in order to prevent a person from committing further offences is in principle permitted under Article 5(1)(c).

12. As to Article 5(1)(d), the Claimant's detention overnight in a police cell was plainly not "for the purpose of educational supervision". If it was "lawful detention [of a minor] for the purpose of bringing him before the competent legal authority", then – since it is accepted that he was reasonably suspected of having committed an offence – Article 5(1)(d) adds nothing to Article 5(1)(c).

The statutory scheme for the detention of arrested persons

13. The powers of the police to detain a person arrested for an offence are conferred by Part IV of PACE. This has been subject to amendments since the date of the Claimant's detention, but the amendments are not material. Part IV begins with s. 34(1): "A person arrested for an offence shall not be kept in police detention except in accordance with the provisions of this Part of this Act". Section 34(2) imposes a duty on the custody officer to order a person's immediate release from custody if at any time he becomes aware that the grounds for the detention of that person have ceased to apply and he is not aware of any other grounds on which the continued detention of that person could be justified. A person appointed as a custody officer must be of at least the rank of sergeant, though if such a person is not readily available, an officer of any rank may perform his or her functions: s. 36(3) and (4).

14. Section 37 deals with the duties of the custody officer before charge. Section 37(1) imposes a duty to determine in respect of a person detained after arrest whether there is "sufficient evidence to charge that person with the offence for which he was arrested" and confers on the custody officer the power to "detain him at the police station for such period as is necessary to enable him to do so". If the custody officer determines that there is not sufficient evidence, the person arrested must be released: s. 37(2). If the custody officer has reasonable grounds for believing that the person's detention without being charged is necessary to secure or preserve evidence relating to an offence for which the person is under arrest, or to obtain such evidence by questioning the person, he may authorise the person arrested to be kept in police detention: s. 37(3).

15. Section 38 deals with the duties of the custody officer after charge. It provides, so far as material, as follows:

> "(1) Where a person arrested for an offence otherwise than under a warrant endorsed for bail is charged with an offence, the custody officer shall, subject to section 25 of the Criminal

Justice and Public Order Act 1994, order his release from police detention, either on bail or without bail, unless—

(a) if the person arrested is not an arrested juvenile—

(i) his name or address cannot be ascertained or the custody officer has reasonable grounds for doubting whether a name or address furnished by him as his name or address is his real name or address;

(ii) the custody officer has reasonable grounds for believing that the person arrested will fail to appear in court to answer to bail;

(iii) in the case of a person arrested for an imprisonable offence, the custody officer has reasonable grounds for believing that the detention of the person arrested is necessary to prevent him from committing an offence;

(iiia) in a case where a sample may be taken from the person under section 63B below, the custody officer has reasonable grounds for believing that the detention of the person is necessary to enable the sample to be taken from him;

(iv) in the case of a person arrested for an offence which is not an imprisonable offence, the custody officer has reasonable grounds for believing that the detention of the person arrested is necessary to prevent him from causing physical injury to any other person or from causing loss of or damage to property;

(v) the custody officer has reasonable grounds for believing that the detention of the person arrested is necessary to prevent him from interfering with the administration of justice or with the investigation of offences or of a particular offence; or

(vi) the custody officer has reasonable grounds for believing that the detention of the person arrested is necessary for his own protection;

(b) if he is an arrested juvenile—

(i) any of the requirements of paragraph (a) above is satisfied (but, in the case of paragraph (a)(iiia) above, only if the arrested juvenile has attained the minimum age); or

(ii) the custody officer has reasonable grounds for believing that he ought to be detained in his own interests;

> (c) the offence with which the person is charged is murder.
>
> (2) If the release of a person arrested is not required by subsection (1) above, the custody officer may authorise him to be kept in police detention but may not authorise a person to be kept in police detention by virtue of subsection (1)(a)(iiia) after the end of the period of six hours beginning when he was charged with the offence."

16. Section 25 of the Criminal Justice and Public Order Act 1994 limits the powers of the police and courts to grant bail in cases where a person has been charged with or convicted of homicide or rape after a previous conviction for such an offence. It is not material to the issue in this case.

17. Decisions by courts about the detention of persons accused of offences are in general governed by the Bail Act 1976 ("the 1976 Act"). Section 4(1) provides:

> "A person to whom this section applies shall be granted bail except as provided in Schedule 1 to this Act."

Schedule 1 contains a list of exceptions, which are applicable to most non-summary offences punishable by imprisonment: see paras 1 and 1A. Part I of Sch. 1 to the 1976 Act contains a list of exceptions applicable to those accused or convicted of an offence punishable with imprisonment. Part II contains a list of exceptions applicable to those accused or convicted of non-imprisonable offences. Paragraph 3 of each Part is in the same terms:

> "The defendant need not be granted bail if the court is satisfied that the defendant should be kept in custody for his own protection or, if he is a child or young person, for his own welfare."

The law

Article 5 ECHR

18. Article 5 ECHR provides materially as follows:

"(1) Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law:

(a) the lawful detention of a person after conviction by a competent court;

(b) the lawful arrest or detention of a person for non-compliance with the lawful order of a court or in order to secure the fulfilment of any obligation prescribed by law;

(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;

(d) the detention of a minor by lawful order for the purpose of educational supervision or his lawful detention for the purpose of bringing him before the competent legal authority;

(e) the lawful detention of persons for the prevention of the spreading of infectious diseases, of persons of unsound mind, alcoholics or drug addicts or vagrants;

(f) the lawful arrest or detention of a person to prevent his effecting an unauthorised entry into the country or of a person against whom action is being taken with a view to deportation or extradition.

…

(3) Everyone arrested or detained in accordance with the provisions of paragraph 1(c) of this Article shall be brought promptly before a judge or other officer authorised by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release pending trial. Release may be conditioned by guarantees to appear for trial.

…

> (5) Everyone who has been the victim of arrest or detention in contravention of the provisions of this Article shall have an enforceable right to compensation."

The relevant case law on Article 5(1)(c) and (3): general principles

19. The interpretation of Article 5(1)(c) has caused difficulties for many years. One topic of debate in the case law was whether *any* detention of a person under that provision had to be "effected for the purpose of bringing him before the competent legal authority", even if its purpose was to prevent him from committing an offence rather than because he was suspected of already having committed one. Another question was whether a person could be subject to preventive detention under Article 5(1)(c) other than in the context of criminal proceedings against him. This turned in part on the function, in the case of preventive detention, of bringing the detained person before the competent legal authority: was it for the purpose of deciding whether he had committed an offence or could it be for the wider purpose of examining the legality of the deprivation of liberty?

20. In 1961, the Strasbourg Court decided *Lawless v Ireland (No. 3)* (1979-80) 1 EHRR 15, which arose from the detention without trial of a member of the IRA. At [14], the Court held that "paragraph 1(c) of Article 5 can be construed only if read in conjunction with paragraph 3 of the same Article, with which it forms a whole". Read in that way, the "plain and natural meaning" of Article 5(1)(c) was that every detention of a person under that provision had to be "effected for the purpose of bringing him before a competent legal authority". The person detained was to be brought before the "competent legal authority" *either* "for the purpose of examining the question of deprivation of liberty" *or* "for the purpose of deciding on the merits". This was in harmony with the purpose of the Convention, which was to protect the freedom and security of the individual against arbitrary detention or arrest.

21. In some subsequent cases, the Strasbourg Court held that detention under Article 5(1)(c) had to be "in the context of criminal proceedings": *Ciulla v Italy* (1991) 13 EHRR 346, [38]; *Jecius v Lithuania* (2002) 35 EHRR 16, [50]. In *Ostendorf v Germany* (2013) 34 BHRC 738, a chamber of the Strasbourg Court held by a majority that it applied only to pre-trial detention and that a detained person must be brought before a court for trial and not merely for the purpose of examining the legality of preventive detention: see at [82]-[85]. In *R (Hicks) v Commissioner of Police for the Metropolis* [2017] UKSC 9, [2017] AC 256, however, the UK Supreme Court declined to follow that line of case law and instead adopted the reasoning of the minority in *Ostendorf*. The appellants in *Hicks* were arrested to prevent anticipated breaches of the peace. That, the Court held, was permissible under Article 5(1)(c). A person detained pursuant to that provision, even where the detention was for preventive purposes, still had to be detained "for the purpose of bringing him before the competent legal authority" (as the Strasbourg Court had held in *Lawless*), but the qualification contained in those words was "implicitly

dependent on the cause for detention continuing long enough for the person to be brought before the court": see at [38].

22. *S v Denmark* (2019) 68 EHRR 17 arose from short-term preventive detention by the Danish authorities of persons suspected of being football hooligans prior to a match. In its judgment, the Grand Chamber of the Strasbourg Court drew attention at [73] to three strands of reasoning which could be derived from the Court's case law on Article 5:

> "the exhaustive nature of the exceptions, which must be interpreted strictly, and which do not allow for the broad range of justifications under other provisions (arts 8-11 of the Convention in particular); the repeated emphasis on the lawfulness of the detention, both procedural and substantive, requiring scrupulous adherence to the rule of law; and the importance of the promptness or speediness of the requisite judicial controls."

At [77], the Court noted that where a person was detained under the first limb of Article 5(1)(c) (on reasonable suspicion of having committed an offence), the requirement that detention be free from arbitrariness means that detention must not only be in conformity with national law; it must also be "necessary in the circumstances". As regard the requirement to justify pre-trial detention under Article 5(3), there must be "relevant and sufficient reasons" and the justification for any period of detention, however short, must be "convincingly demonstrated by the authorities". There is also a requirement to consider alternative means of ensuring the detained person's appearance at trial.

23. On the question of preventive detention, the Grand Chamber in *S v Denmark* endorsed the Supreme Court's view in *Hicks*, holding at [116] as follows:

> "The Court is therefore of the general view that in order not to make it impracticable for the police to fulfil their duties of maintaining order and protecting the public, provided that they comply with the underlying principle of art. 5, which is to protect the individual from arbitrariness, the lawful detention of a person outside the context of criminal proceedings can, as a matter of principle be permissible under art. 5(1)(c) of the Convention."

At [123], the Court said:

> "art. 5 cannot be interpreted in such a way as to make it impracticable for the police to fulfil their duties of maintaining order and protecting the public, provided that they comply with

> the underlying principle of the provision, which is to protect the individual from arbitrariness".

It followed that the requirement that the detention of a person be "for the purpose of bringing him before the competent legal authority", as the UK Supreme Court had said, "implicitly depends on the cause of detention continuing long enough for the person to be brought before a court": [125]. This was balanced by the safeguards available under Article 5(3) and (5) and by the requirement under Article 5(1) that detention should not be "arbitrary": [126]-[127]. As to these safeguards, the requirement that detention be "effected for the purpose of bringing [the detained person] before a competent legal authority" applied in all cases, but should be applied "with a degree of flexibility so that the question of compliance depends on whether the detainee, as required by art. 5(3), is intended to be brought promptly before a judge to have the lawfulness of his or her detention reviewed or to be released before such time": [137].

24. It is possible to derive from the Strasbourg and domestic case law these relevant propositions about the interpretation of Article 5(1)(c) and (3):

(a) The Convention attaches great importance to the right to liberty and security. The list in Article 5(1) of categories in which a person may be deprived of his liberty is therefore to be regarded as exhaustive and the categories are to be narrowly interpreted: *S v Denmark*, [73]. See also *Secretary of State for the Home Department v JJ* [2007] UKHL 45, [2008] 1 AC 385, [5] (Lord Bingham); *Austin v Commissioner of Police of the Metropolis* [2009] UKHL 5, [2009] 1 AC 564, [13] (Lord Hope).

(b) Article 5(1)(c) must be read with Article 5(3), with which it forms a whole. Read in that way, Article 5(1)(c) authorises detention of a person on three bases: (i) on reasonable suspicion of having committed an offence; (ii) when it is reasonably considered necessary to prevent his committing an offence; or (iii) when it is reasonably considered necessary to prevent his fleeing after having done so. But detention on any of these bases must be "effected for the purpose of bringing him before the competent legal authority": *Lawless v Ireland (No. 3)*, [14]; *S v Denmark*, [105], [106], [118] and [137].

(c) But this requirement must be interpreted flexibly so as to require only that the person is "intended to be brought promptly before a judge" if the cause of detention lasts long enough to enable that to happen: *S v Denmark*, [137].

(d) The aim of bringing the detained person before the competent legal authority is *either* with a view to trial (in a case where he is reasonably suspected of having committed an offence) *or* to examine the legality of his detention (in the case of preventive detention): *Lawless v Ireland (No. 3)*, [14]; *S v Denmark*, [129], [137].

(e) The case law of the Strasbourg Court imposes the requirement, additional to the express terms of Article 5(1) and (3), that detention must be free from arbitrariness. This requirement in turn imposes substantive safeguards: (i) that there are "relevant and sufficient reasons" for detention; (ii) that alternative means of securing the detained person's appearance at trial have been considered; (iii) that the justification for any period of detention,

however short, has been convincingly demonstrated; and (iv) whether the national authorities displayed "special diligence" in the conduct of the proceedings: *S v Denmark*, [77].

(f) Article 5 should not be interpreted in such a way as to make it impracticable for the police to fulfil their duties of maintaining order and protecting the public, provided that they comply with the underlying principle of Article 5, which is to protect the individual from arbitrariness. This applies both when deciding what counts as a deprivation of liberty (*Austin v Commissioner of Police of the Metropolis*, [34] (Lord Hope); *Austin v UK* (2012) 55 EHRR 14, [56]) and when interpreting the scope of the exceptions in Article 5(1): *Hicks*, [29] and [38]; *S v Denmark*, [116], [123].

The Law Commission report *Bail and the Human Rights Act 1998* and *IA v France*

25. The Law Commission's 2001 report *Bail and the Human Rights Act 1998* (Law Com No. 269) considered the impact of the Human Rights Act 1998 on the law governing decisions taken by the police and the courts to grant or refuse bail in criminal proceedings. The report examined the various grounds on which bail may be refused under Article 5. At §2.29, under the heading "Detention must be for a legitimate purpose", the following appears:

> "The ECtHR has recognised that pre-trial detention may be compatible with the defendant's right to release under Article 5(3) where it is for the purpose of avoiding a real risk that, were the defendant released, (1) he or she would (a) fail to attend trial; (b) interfere with evidence or witnesses, or otherwise obstruct the course of justice; (c) commit an offence while on bail; or (d) be at risk of harm against which he or she would be inadequately protected; or (2) a disturbance to public order would result."

Numerous authorities were cited for each of the "legitimate purposes" at (1)(a)-(c) and (2). The sole authority given for (1)(d) was *IA v France*, [108].

26. In *IA v France*, the Strasbourg Court considered the legality of the detention on remand by the French authorities of a man (IA) detained on suspicion of the murder of his wife. The complaint alleged a violation of Article 5(3): [94]. The period of detention on remand which fell to be taken into account was 5 years and 3 months: [98]. The Court noted as follows at [102]:

> "The persistence of reasonable suspicion that the person arrested has committed an offence – a point which is not contested in the present case – is a condition *sine qua non* for the validity of the continued detention, but, after a certain lapse of time, it no longer suffices; the Court must then establish whether the other grounds cited by the judicial authorities continue to justify the deprivation of liberty. Where such grounds are 'relevant' and

> 'sufficient', the court must also ascertain whether the competent national authorities displayed 'special diligence' in the conduct of the proceedings…"

The Court then considered the various grounds relied upon by the French authorities to justify detention. One of them was "the need to protect the applicant". At [108], the Court said this:

> "The Court accepts that in some cases the safety of a person under investigation required his continued detention, for a time at least. However, this can only be so in exceptional circumstances having to do with the nature of the offences concerned, the conditions in which they were committed and the context in which they took place."

The Court went on to find that the protection of the applicant could not justify the detention of the applicant on the facts of the case.

27. Part V of the Law Commission's report deals in more detail with detention for the defendant's own protection (whether by a court under para. 3 of Parts I or II of Sch. 1 to the 1976 Act or by the police under s. 38(1)(a)(vi) of PACE). At §§5.2-5.5, it says this:

> "5.2 We provisionally concluded that a refusal of bail for the defendant's own protection can be compatible with the Convention, but only if there are exceptional circumstances and (perhaps) only if those exceptional circumstances relate to the nature of the alleged offence and the conditions or context in which it is alleged to have been committed. We provisionally proposed that guidance be issued to reflect this. We invited comments on what form such guidance might take, and asked for information on how often the power to refuse bail for this purpose is used, in what circumstances and, in particular, whether it is commonly used to guard against self-harm as distinct from harm from others.
>
> 5.3 Our provisional conclusions were based on the only case of which we were aware in which the ECtHR has considered the lawfulness of detention pending trial on the ground of protecting the defendant from harm, *IA v France*. The applicant had been charged with the murder of his wife. He had been continuously detained for over five years, partly because the judicial authorities feared that his wife's family would attack him. The ECtHR held that there are cases in which 'the safety of a person under investigation requires his continued detention, for a time

> at least'. It is thus a true 'ground' for denying bail, rather than a reason for concluding that a ground is substantiated. The ECtHR held that, on the facts of that case, the ground was not made out.
>
> 5.4 Having concluded that the protection of the defendant was capable of being a relevant and sufficient reason for detention, the Court added, without further explanation:
>
> 'However, this can only be so in exceptional circumstances having to do with the nature of the offences concerned, the conditions in which they were committed and the context in which they took place.'
>
> 5.5 Although these words would not seem to encompass a risk of self-harm unconnected to the circumstances of the offence, we warned that it would be unwise to rely too heavily on one rather enigmatic statement, particularly since the possibility of self-harm had not arisen in that case."

28. The report indicates at §5.6 that there was "broad agreement" among respondents to the consultation that detention for the defendant's own protection was capable of being compatible with the Convention. The Justices' Clerks' Society, the Law Society and the CPS had been clear that the power, though used infrequently, was used not only to protect from harm by others but also to protect the defendant from self-harm. At §5.8, the report records the doubts of some respondents as to whether it was possible to reach any conclusion on the compatibility of this species of detention with Article 5, given the "sparse authority" on the point. The Foreign and Commonwealth Office and Home Office "thought the better view was that the point had not been sufficiently tested in the [Strasbourg Court]". The Law Commission did, however, express a view. It said this:

> "5.10 We conclude that a refusal of bail for the defendant's own protection, whether from harm by others or self-harm, can be compatible with the Convention where"
>
> - detention is necessary to address a real risk that, if granted bail, the defendant would suffer harm by others or self-harm, against which detention could provide protection, and

- there are exceptional circumstances in the nature of the alleged offence and/or the conditions or context in which it is alleged to have been committed.

> 5.11 Given the absence of authority, we can presently see no reason why a decision of a court to order detention because of a risk of self-harm should not be compatible with the ECHR even where the circumstances giving rise to the risk are unconnected with the alleged offence, provided that the court is satisfied that there is a real risk of self-harm, and that a proper medical examination will take place rapidly so that the court may then consider exercising its powers of detention under the Mental Health Act 1983."

29. The report had made clear at §1.31 that, because of s. 6 of the HRA, "a court may exercise its discretion to detain the defendant under paragraph 3 [of Part I or Part II of Schedule 1 to the 1976 Act] only where the more restrictive requirements of the Convention are met".

30. At §§9A.17-9A.27, the Law Commission noted the lack of any power for either a custody officer or a court to impose bail conditions, as opposed to refusing bail altogether, for the defendant's own protection. This was said to be problematic and a recommendation was made to empower the police and the courts to impose "such conditions as appear necessary for the defendant's own protection, consonant with the exception to the right to bail at paragraph 3 of Part 1 of Schedule 1 to the Bail Act." That recommendation was given effect by the Criminal Justice Act 2003, which inserted a new sub-paragraph (ca) into s. 3(6) of the 1976 Act, permitting the imposition on a defendant of bail conditions "for his own protection or, if he is a child or young person, for his own welfare or in his own interests".

Buzadji v Moldova

31. The passage from [108] of *IA v France* quoted at §26 above has almost never been cited by the Strasbourg Court. However, in *Buzadji v Moldova*, the Grand Chamber said this:

> "86. While paragraph 1(c) of Article 5 sets out the grounds on which pre-trial detention may be permissible in the first place (see *De Jong, Baljet and Van den Brink v. the Netherlands*, 22 May 1984, §44, Series A no. 77), paragraph 3, which forms a whole with the former provision, lays down certain procedural guarantees, including the rule that detention pending trial must not exceed a reasonable time, thus regulating its length.

> 87. According to the Court's established case-law under Article 5§3, the persistence of a reasonable suspicion is a condition *sine qua non* for the validity of the continued detention, but, after a certain lapse of time, it no longer suffices: the Court must then establish (1) whether other grounds cited by the judicial authorities continue to justify the deprivation of liberty and (2), where such grounds were 'relevant' and 'sufficient', whether the national authorities displayed 'special diligence' in the conduct of the proceedings (see, among many other authorities, *Letellier*, cited above, §35, and *Idalov v. Russia* [GC], no. 5826/03, §140, 22 May 2012). The Court has also held that justification for any period of detention, no matter how short, must be convincingly demonstrated by the authorities. When deciding whether a person should be released or detained, the authorities are obliged to consider alternative means of ensuring his or her appearance at trial (ibid.).
>
> 88. Justifications which have been deemed 'relevant' and 'sufficient' reasons (in addition to the existence of reasonable suspicion) in the Court's case-law, have included such grounds as the danger of absconding, the risk of pressure being brought to bear on witnesses or of evidence being tampered with, the risk of collusion, the risk of reoffending, the risk of causing public disorder and the need to protect the detainee (see, for instance, *Stögmüller v. Austria*, 10 November 1969, §15, Series A no. 9; *Wemhoff*, cited above, §14; *Tomasi*, cited above, §95; *Toth v. Austria*, 12 December 1991, §70, Series A no. 224; *Letellier*, cited above, §51; and *I.A. v. France*, 23 September 1998, §108, Reports of Judgments and Decisions 1998-VII)."

Submissions for the Claimant

32. For the Claimant, Richard Hermer QC submitted that the "exhaustive" nature of the exceptions in Article 5(1), and the need to interpret them narrowly, had been emphasised in both the domestic authorities and the case law of the Strasbourg Court. The only decision in which the Strasbourg Court had been willing to entertain a justification falling outside the strict terms of the exceptions was *Hassan v United Kingdom* (App. No. 29750/09), 16 September 2014, where the Grand Chamber found it necessary to read Article 5 in situations of armed conflict as permitting detention authorised as lawful by the Third and Fourth Geneva Conventions. That reading was required by Article 31(3)(c) of the Vienna Convention on the Law of Treaties and had no application to the present case.

33. As to Article 5(1)(c), the power in s. 38(1)(b)(ii) of PACE to detain a juvenile "in his own interests" was "unconnected to the expeditious processing of the criminal complaint". Focussing on the facts of this case, there was "simply no relationship between detention to prevent 'further injuries' to the detained person and whether or not the detained person will (at some stage) be brought before a court". Mr Hermer submitted that nothing in *IA v France* was inconsistent with this analysis. *IA* was a challenge based on Article 5(3), not Article 5(1). The court was considering the question whether pre-trial detention which had admittedly been lawful at its inception had continued for a reasonable time. There was no suggestion in the court's judgment that the need to protect a detainee provides a distinct legitimate purpose for detention under Article 5(1). Mr Hermer submitted that the Law Commission's report does not take matters any further, since the only authority there cited is *IA*. Similarly, Mr Hermer submitted that *Buzadji* does not assist. It establishes only that, in determining whether the length of pre-trial detention is "reasonable" for the purposes of Article 5(3), it is permissible to have regard to a range of factors, including the need to protect the detainee. *Buzadji*, like *IA*, does not provide any support for the proposition that the need to protect the detainee provides an autonomous basis for authorising a deprivation of liberty under Article 5(1)(c). Even if *IA* or *Buzadji* could be read as providing support for the proposition that detention for a person's own protection could in principle be compatible with Article 5(1)(c), Mr Hermer submitted that the detention in the present case could not, in the absence of any assessment by Sgt Smith of the risks to the Claimant (as opposed to a generalised assertion that such risks existed).

34. Mr Hermer submitted that the Claimant was entitled to relief in the form of a declaration of incompatibility in respect of s. 38(1)(b)(ii) of PACE, a declaration that the Claimant's detention violated his Article 5 rights and damages under s. 8 of the HRA. He invited me to assess these in the sum of £5,000.

35. Mr Hermer did not accept that it followed as a logical consequence of his argument that para. 3 of Parts I and II of Schedule 1 to the 1976 Act were "on their face" incompatible with Article 5. This was because the 1976 Act was not the source of any power to deprive a person of his liberty, but merely set out the principles governing the exercise of the power when it arises. Thus, Sch. 1 to the 1976 Act merely set out the cases in which (by way of derogation from the general right to bail in s. 4) a defendant "*need not* be granted bail". Mr Hermer accepted that a decision by a court to remand a defendant in custody for "own protection" reasons would, on his argument, be incompatible with Article 5. The same would be true of any grant of conditional bail where the conditions amounted to a deprivation of liberty. But most grants of conditional bail and any grant of unconditional bail would be lawful. So, there would be no need for a declaration of incompatibility in relation to the 1976 Act.

Submissions for the Commissioner

36. For the Commissioner, Mr Adam Clemens submitted that detention of a juvenile for his own protection, or in his own interest, can be justified under Article 5. He relied

primarily on Article 5(1)(c). Here, the detention was justifiable both in order to prevent the Claimant from committing further offences and for his own protection. As to the latter, it is permissible to look to the underlying rationale of the provision, as the House of Lords did in *Austin* and the Supreme Court did in *Hicks*. Detention for the Claimant's own protection or in his own interests was in this case "inextricably related to, and dependent on, the facts of lawful detention and fear of commission of a further offence", given that "the commission of a further offence involving an attack by the claimant on others necessarily risked his being injured". Mr Clemens submitted that the Claimant's contrary position results in the "arbitrary release of those at risk into the community". That would offend the need to give a pragmatic construction to Article 5(1)(c). Mr Clemens relied on *IA* and *Buzadji* as authority for the proposition that a short detention for the detainee's own protection will not offend article 5, where the denial of bail is based on a genuine and honestly held concern for a juvenile's well-being.

37. Mr Clemens conceded that, if the Claimant is correct that "own protection" detention cannot be compatible with Article 5, a declaration of incompatibility in respect of s. 38(1)(b)(ii) must follow. He added, however, that in that case para. 3 of Parts I and II of Schedule 1 to the 1976 Act would also be incompatible. The regimes governing police bail (under PACE) and bail at court (under the 1976 Act) are symmetrical and complimentary. The fact that it has never been suggested that the "own protection" and "own interests" provisions of the 1976 Act are incompatible with Article 5 shows how unlikely it is that the equivalent provisions of PACE are incompatible.

38. Mr Clemens accepted that, if the detention was contrary to Article 5, damages are due under s. 8 of the HRA whether or not a declaration of incompatibility is also made. He submitted, however, that the Claimant should receive only nominal damages on the basis that he would have been detained in any event. In the alternative, he invited me to assess damages in the sum of £2,500.

Discussion

How far does the Claimant's argument go?

39. Section 38(1)(a)(vi) of PACE authorises the detention of an adult "for his own protection". By s. 38(1)(b)(i), that ground applies also to an arrested juvenile. This suggests that s. 38(1)(b)(ii), which uses the words "in his own interests", must have been intended to authorise detention in a broader category of cases. The distinction may matter in another case, but it does not matter here, because the primary ground of Sgt Smith's decision to detain was "own protection". I have accordingly concentrated on the compatibility with Article 5 of detention on that narrower ground.

40. The Claimant's central argument was that Article 5(1)(c) precludes any detention of a person for his own protection. If that argument were well-founded, the consequence

would be that s. 38(1)(a)(vi) and, insofar as it authorises detention for the detainee's own protection, (b)(ii) would be incompatible with Article 5. Moreover, since Article 5(1) makes no distinction between detention by the police and detention by courts, a further consequence would be that any detention on the "own protection" grounds in para. 3 of Parts I and II of Sch. 1 to the 1976 Act would also be incompatible with Article 5. Mr Hermer accepted as much, though he did not accept that it would be necessary to grant a declaration of incompatibility in relation to the latter provisions.

41. Although it is important to understand the scope of the Claimant's argument at the outset, I do not accept that Mr Clemens's argument is assisted by the absence of any previous suggestion that para. 3 of Parts I and II of Sch. 1 to the 1976 Act is incompatible with the Convention. The fact that an argument has not previously been advanced is, in general, a neutral consideration. If Mr Hermer's argument were well-founded, I would not be deterred from saying so by its potentially wide-ranging consequences.

Is the detainee's own protection a valid reason for continuing to detain a person held on suspicion of having committed an offence under Article 5(1)(c)?

42. The starting point for Mr Hermer's argument is that the list in Article 5(1) of cases in which a person may be deprived of his liberty is "exhaustive" and must be "narrowly interpreted". That proposition has been vouchsafed repeatedly by both domestic and Strasbourg authority: see §24(a) above. Insofar as *Hassan v UK* can properly be seen as an exception to it, it is one which has no significance outside the very particular context of detention in armed conflict which is permissible under international humanitarian law. It is also well established that any detention of a person under Article 5(1)(c) must be "effected for the purpose of bringing him before a competent legal authority": see §24(b) above. Mr Hermer's argument seeks to derive from these premises the conclusion that no detention will be compatible with Article 5 if the reason why it is considered necessary to resort to it is not expressly mentioned in Article 5(1).

43. In my judgment, however, the conclusion does not follow from the premises. To say that X must be done *for the purpose of Y* is not equivalent to saying that X may only be done if it is *necessary to achieve Y*. To take a mundane example, I can walk to work or take the tube. If I decide to take the tube, my tube journey is still taken *for the purpose of getting to work*, even though it was not *necessary* to achieve that purpose. By the same token, a custody officer dealing with a person charged with a criminal offence has two options – grant bail or refuse it. She may take the view that the arrested person would be likely to attend court even if released. If, in that circumstance, she decides to refuse bail for some other reason, the person's detention is still "effected for the purpose of bringing him before the competent legal authority" because the intended end point of the detention is an appearance before a criminal court. The detained person is still,

to use the formulation adopted by the Grand Chamber in *S v Denmark*, "intended to be brought promptly before a court": see §24(c) above.

44. This explains why most of the recent cases in which compliance with the "purpose" requirement has been contentious (including *Ostendorf, Hicks* and *S v Denmark*) have been cases of detention in order to prevent the commission of offences in the future – i.e. cases in which the intended end point is not a criminal trial. These cases have given rise to the need for a "flexible" reading under which the "purpose" requirement is satisfied provided that the detainee is intended to be brought promptly before a court if the cause of his detention lasts long enough to enable that to happen. In the more usual case, where a detainee is held on suspicion of having committed an offence, pre-trial detention is likely to satisfy the "purpose" requirement without difficulty – because national law will invariably make clear that the intended end point of such detention is a criminal trial.

45. It does not follow, of course, that pre-trial detention will necessarily be compatible with Article 5. This is because, in addition to the "purpose" requirement and the need for continuing reasonable suspicion that the detainee has committed an offence, there are requirements imposed by the express words of Article 5(3) and by the case law interpreting it. These include – as a corollary of the principle that detention must not be "arbitrary" – the need for "relevant and sufficient reasons" for detention: see §24(e). An examination of the reasons held by the Strasbourg Court to qualify as "relevant and sufficient" demonstrates that detention may be permissible even in cases where it is not necessary to secure the detained person's attendance at court. For example, a person detained on suspicion of having committed an offence may be detained in order to prevent him from interfering with evidence or witnesses, or otherwise obstructing the course of justice, even if there is no doubt that he would appear before the court of his own accord if released. The need to prevent him from obstructing justice on its own supplies a reason to detain that is "relevant and sufficient" in Article 5 terms. The same is true of the need to prevent a disturbance to public order. There were already many Strasbourg authorities supporting both of these as "legitimate purposes" for pre-trial detention when the Law Commission reported in 2001. The Grand Chamber's decision in *Buzadji* confirms at [88] that in 2016 they were still regarded as such.

46. Against this background, the Strasbourg Court's conclusion in *IA v France* that "own protection" is also in principle capable of supplying a "relevant and sufficient" reason for detention is in no way anomalous. A person who is detained on suspicion of having committed an offence with a view to being brought promptly before a court, but whose detention is regarded as necessary for his own protection, is still being detained "for the purpose of bringing him before the competent legal authority". This is so even if, but for the need to protect him, detention would have been unnecessary. The Law Commission rightly pointed out that the legitimacy of "own protection" detention was supported by only one authority, but it is striking that in the 19 years since its report, there has been no authority to the contrary. The Grand Chamber's judgment in *Buzadji*

confirms at [88] that, in 2016, *IA* was regarded as authority for the proposition that "own protection" could in principle be a "relevant and sufficient" reason for detention.

47. Mr Hermer's riposte that *IA* and *Buzadji* were dealing with complaints under Article 5(3) provides no compelling answer to this analysis. As the Strasbourg Court has made clear since its judgment in *Lawless v Ireland (No. 3)* in 1961, Article 5(1)(c) must be read together with Article 5(3), with which it forms a whole. As *Buzadji* shows, a person's own protection is not only capable of being "relevant" when deciding whether he has been detained compatibly with Article 5(3); it may also be "sufficient". If, as Mr Hermer submitted, detention could never be effected for any reason other than those expressly mentioned in Article 5(1), "own protection" could never be a "sufficient" reason for detention. Nor could the need to prevent an obstruction of justice or avoiding a disturbance of public order. Yet the Strasbourg Court has confirmed that they are. In my judgment, this confirms that Mr Hermer's submission is wrong.

48. My interpretation of Article 5 flows from the language used, interpreted in accordance with the Strasbourg and domestic authorities. It is also consistent with the need (recognised by both the Strasbourg Court and the domestic courts) to avoid making it "impracticable for the police to fulfil their duties of maintaining order and protecting the public": see §24(f) above. There are, of course, other ways of protecting a person believed to be in danger from the criminal acts of others than detaining him. In an extreme case, where the police are aware of a "real and immediate" threat to the detained person's life or safety, the police may be under an operational duty to provide some form of protection. But there will be many less extreme cases, where the threat does not rise to that level and where resources do not permit the kind of protection that would be necessary to address the risk identified. If Mr Hermer's submission were correct, in that situation Article 5 would prevent a custody officer from authorising the detention, even for a short time, of a person suspected of a criminal offence, even if she genuinely and reasonably fears that releasing him may lead to his suffering serious injury in circumstances closely connected with the offence for which he was initially detained. I would be loath to interpret the Convention in that way, unless compelled to do so by authority. As I have shown, such authority as exists is to contrary effect.

49. I therefore conclude that the continued detention of a person held on suspicion of having committed an offence is in principle capable of being justified under Article 5(1)(c) and (3) ECHR on the basis that it is necessary for his own protection.

<u>Under what circumstances will "own protection" detention be permissible under Article 5(1)(c)?</u>

50. In the absence of other authority, the only guidance from Strasbourg as to the limitations on "own protection" detention is to be found in the first two sentences of [108] of the judgment in *IA*. Those sentences contain two limitations. First, detention of a person

for his own protection will be permissible only for a short period ("for a time at least"). The precise length of time will depend on the circumstances, but the longer the detention, the longer the gap between the original offence and release and, therefore, the less likely the circumstances surrounding that offence will generate a risk of reprisal or other danger. Furthermore, where the detainee is a child, international law requires that detention be "used as a measure of last resort and *for the shortest appropriate period of time*": see Article 37(b) of the United Nations Convention on the Rights of the Child ("CRC"), reflecting Article 13.1 of the United Nations Standard Minimum Rules for the Administration of Juvenile Justice. It is well established that the ECHR is to be interpreted where possible in accordance with the CRC: see e.g. *ZH (Tanzania) v Secretary of State for the Home Department* [2011] UKSC 4, [2011] 2 AC 166, [23]-[25] (Lady Hale).

51. Second, "own protection" detention will be justifiable only in "exceptional circumstances having to do with the nature of the offences concerned, the conditions in which they were committed and the context in which they took place". It would be wrong to be too prescriptive about what kinds of cases might satisfy this condition, but it is plain that a generic concern for a detainee's safety will not suffice. The concern must arise from the nature, circumstances and context of the offences which the detainee is suspected of having committed. As to nature, this will mean that the offences are ones which involve an inherent danger to the person committing them or are of a kind capable of attracting reprisals. As to circumstances and context, "own protection" detention will require a focus on the particular factual circumstances in which those offences were committed and on the characteristics of the detainee. Relevant factors are likely to include the age and maturity of the detainee and, in a case where there is a danger of reprisals, the characteristics of those from whom the detainee requires protection. It will also be necessary to consider whether any of them are themselves in custody or are likely to be taken into custody.

52. A third important limitation flows not from the terms of *IA*, but from the general principle that consideration should be given to alternatives to detention: *S v Denmark*, [77]. Detention for a detainee's own protection will be necessary only if there are no reasonably available means other than detention to afford protection. This is more likely to be so where detention is authorised for a short period. The longer the period of detention, the more time is available to the police to arrange and implement protective measures short of detaining the person at risk.

53. Because custody officers are public authorities for the purposes of s. 6 of the HRA, they are obliged to exercise the discretion conferred on them by s. 38(1)(a)(vi) and (b)(ii) of PACE subject to these limitations, as the Law Commission noted at §1.31 of its report in 2001. If they do not, the detention will be unlawful. The same is true for courts exercising the discretion conferred by para. 3 of Parts I or II of Sch. 1 to the 1976 Act.

Was the Claimant's detention lawful?

54. The best evidence of the reasons for Sgt Smith's decision to refuse the Claimant bail on 22 February 2012 is to be found in the contemporaneous custody record. Indeed, given that in his first witness statement he says that he has no recollection of the Claimant or his detention, it is the only reliable evidence of those reasons. Although some further evidence is given in Sgt Smith's second witness statement, there is no explanation as to the basis on which he is able to give that evidence, given his lack of recollection about the case. I have accordingly placed no weight on that second statement.

55. The first reason given in the custody record was that it was "necessary to further detain the person for their own protection". This is consistent with the Commissioner's pleaded case that the "primary" reason for detention was the Claimant's own protection. Sgt Smith went on to record that the Claimant had been involved in a gang fight in which he had sustained injuries requiring hospital treatment and that repercussions were feared, namely, that the Claimant "may sustain further injuries or inflict violence upon his intended victims". Sgt Smith's entry in the custody record is not to be read like a statute. It is to be interpreted against the factual background that would have been known to him. This included the facts that: (i) the Claimant was 15 years old; (ii) the gang fight referred to in the custody record had taken place 5 days previously in Woolwich; (iii) this was in a part of South East London close to Plumstead Police Station (where the Claimant was being held) and close to his home address in Charlton (where he had been arrested); (iv) the Claimant had identified his assailants as members of a local gang, the Deptford Boys; (v) the Claimant had just been charged with violent disorder and possession of a bladed article arising out of the fight; (vi) it was now about 8pm on a winter's evening; and (vii) the Claimant was to be brought to court on the following morning.

56. In my judgment, the Claimant's detention for his own protection in these circumstances was compatible with Article 5 ECHR. I have considered and applied the three principles set out at §§50-52 above.

57. First, the detention was for a short period, about 13 hours overnight, until the Claimant could be brought to court.

58. Second, although the reasons given in the custody record are concise, they were sufficient, given the short period of detention being authorised, to demonstrate that Sgt Smith had based his assessment of the need to protect the Claimant on a consideration of the specific circumstances and context of the offence and not merely on generic considerations. The offences with which the Claimant was charged had taken place recently, in the context of gang violence, close to the Police station and to his home. These considerations, all of which are contained in the papers before Sgt Smith, were

sufficient to give rise to a real risk that the Claimant might be attacked if he were released. The fact that he had recently suffered injuries caused by stabbing and requiring hospital treatment provided a basis for thinking that, if attacked, there was a real risk that he might suffer serious injury or death. These are, in my view, "exceptional circumstances having to do with the nature of the offences concerned, the conditions in which they were committed and the context in which they took place" (as required by the Strasbourg Court in *IA*). Although this fact was not known to Sgt Smith at the time, it is not without significance that when the Claimant was bailed by the Crown Court some 5 weeks later, it was subject to a condition that he reside with his aunt in North London. It is also noteworthy that, some months after that, on 5 July 2012, the Claimant's solicitors wrote to an officer at Plumstead Police Station pointing out that the Claimant was at risk of attack, given his involvement in the proceedings in which two gang members were convicted.

59. Third, although there was no express consideration of protective measures short of detention, it is difficult to see how it would have been possible to devise and implement such measures in the very short overnight period between Sgt Smith's decision to refuse bail and the Claimant's appearance at Bexley Youth Court on the following morning. Although it is in general important that adequate reasons should be given addressing each of the limitations on the power to detain, it is also important not to apply the limitations in a way which would "make it impracticable for the police to fulfil their duties of maintaining order and protecting the public": see §24(f) above.

60. Thus far, I have concentrated on the "primary" reason for the Claimant's detention – his own protection. For the reasons I have given, this basis for his detention was, in my judgment, compatible with Article 5. The concern that the Claimant might himself commit offences was, as the Claimant concedes, also a valid reason to detain him. It is therefore not necessary to consider the potentially difficult questions that might have arisen had only one of the reasons been legitimate.

Other matters

61. In the light of my conclusions, the question whether a declaration of incompatibility would have been appropriate does not arise. The same is true of the question whether, had a declaration of incompatibility been made, damages could also have been awarded. The jurisdiction of a domestic court to award damages in that situation seems to me to be doubtful, given that s. 8(1) of the HRA enables the court to grant relief in relation to the act of a public authority only if the act is unlawful; that acts incompatible with Convention rights are unlawful only if made so by s. 6(1); and that s. 6(2)(b) provides that s. 6(1) does not apply where "in the case of one or more provisions of, or made under, primary legislation which cannot be read or given effect in a way which is compatible with the Convention rights, the authority was acting so as to give effect to or enforce those provisions". But this is a point of general importance and it would be wrong to decide it in a case where it does not matter.

62. Since I have concluded that the Claimant's detention was compatible with Article 5 ECHR, the claim for damages fails. It is not, therefore, necessary to address the issues that would otherwise arise in relation to quantum.

Conclusion

63. For these reasons, I conclude that:

(a) ss. 38(1)(a)(vi) and (b)(ii) of PACE are not incompatible with Article 5 ECHR insofar as they authorise detention for the detainee's own protection;

(b) the Claimant's detention overnight from 22-23 February 2012 was not incompatible with the Claimant's rights under Article 5 ECHR.

64. The claim will therefore be dismissed.