

APPELLANT'S REPLY NOTE I:
BREACH OF THE PEACE

The constraints of Judicial Review

1. Mr. Freeland submitted that in determining the issues arising in this appeal, Your Lordships are disadvantaged by the absence of a record of a full civil trial in which the evidence could be tested in cross-examination. In fact, of course of any party to judicial review proceedings can seek an order for cross-examination, but neither side did so here.
2. Both of the courts below considered this objection, and both ruled that in the event there were no critical disputes of fact. Lord Woolf observed that “as often proves to be the case, judicial review is a satisfactory procedure for determining the outcome of the issues that conventionally would be deal with differently” (para. 29).
3. The reality is that the use of judicial review puts the Respondent in a favourable position since his evidence is to be taken as it stands.
4. However, the inferences to be drawn from the facts are a matter of argument. Mr. Freeland advanced a number of arguments as to the inferences which should and should not be drawn from the evidence (such as the submission about the “London coaches” referred to in the 10.45 log entry) which are, in our submission, contrary to the evidence adduced on his client’s behalf. Those issues are addressed in Reply Note III.

Honest and reasonable belief

5. It follows from the nature of these proceedings that the reasonableness of the action taken by the Respondent’s officers is to be judged according to the evidence adduced on his behalf, together with any unchallenged evidence adduced on behalf of the Appellant.
6. It also follows that there is (and can be) no challenge to Mr. Lambert’s good faith. When he states that he believed a certain fact, that is to be taken as his honest belief.

7. But questions of the reasonableness of his belief, and as to the reasonableness of the steps he took, are for the court. They are to be judged objectively. As Sedley LJ explained in the *Redmond-Bate* case, they are to be judged on the facts as CS Lambert honestly believed them to be, and without the benefit of hindsight. But they are not to be judged according to a *Wednesbury* standard of review. The court is, in this context, the arbiter of reasonableness.
8. Nor does the appellate process impose constraints on the scope of Your Lordships' review. Mr. Freeland submitted more than once that the decisions of the courts below on this issue were "findings of fact". They are not. They are objective judgments made on the basis of an undisputed factual framework. The issue for Your Lordships, of course, is whether judged objectively, there were reasonable grounds for the beliefs CS Lambert honestly held.
9. It may be helpful briefly to identify the different stages at which objective evaluations of reasonableness arise in this appeal:
 - (a) No issue arises in relation to the imminence of a breach of the peace at Lechlade. CS Lambert does not contend that it was his (honest) belief that a breach of the peace was imminent at that stage. So there is no question of evaluating the grounds on which any such belief might have been based.
 - (b) It was CS Lambert's honest belief that a breach of the peace would have been imminent as soon as the protestors arrived at Fairford. There is a dispute as to whether that belief was reasonable on the information available to him.
 - (c) CS Lambert asserts that he honestly believed, after the events at Lechlade, that the passengers shared a collective intent to breach the peace. There is a dispute as to whether that belief was reasonable.
 - (d) Finally, there is a dispute as to whether the action he took in (i) turning the protestors away and (ii) confining them in the coaches on the journey back to London was an objectively reasonable response to an anticipated breach of the peace.

A temporal limitation?

10. Mr. Freeland's primary case is that the concept of imminence, and the words "about to happen" are flexible concepts, not constrained by any strict temporal limitation. Rather, the sole and overriding test is one of reasonableness. If a decision is – having regard to all the circumstances (including the nature of the threat, and its proximity in place and time) – reasonable then it is to be regarded as imminent/about to happen. It is difficult to see why this should be so. A substantive justification of the merits of a decision is a different process from an assessment of when it may lawfully occur.
11. The Appellant respectfully submits that the concept of imminence, by its nature, is a means by which we evaluate the passage of time. That is not of course to suggest that it points to any fixed period of minutes or hours. Naturally, the word takes colour from its context. But, as May LJ put it in the Divisional Court (at para. 38) "there must be a limit beyond which the concept of imminence will not stretch". That limit is necessarily a temporal limit.
12. Moreover, there is no room for ambiguity with the words "about to happen". It is true that these words must also be applied with common sense and realism in their factual and legal context. But the factual and legal context here is a last resort remedy to deal with a relatively minor but urgent threat to public peace.
13. Nor is it, in our submission, appropriate to give an artificial construction to the concept of imminence by reference to especially grave analogies such as a planned bombing or a mass murder. The law has other remedies to deal with these situations (such as a powers of arrest for conspiracy). Breach of the peace is concerned with conduct for which the remedy is nothing more than a bindover. That is the context from which the words must draw their colour. A reliable guide to the meaning of the concept of imminence *in this context* cannot be derived from other (much graver) situations for which breach of the peace powers would be wholly inapposite.

14. For all of Mr. Freeland's references to national security and terrorism, the fact remains that Mr. Lambert's action was reasoned, recorded and defended as action to prevent a breach of the peace.

Imminence on the present facts

15. The authorities require that the person taking action must have (a) an honest belief (b) on reasonable grounds, that a breach of the peace is imminent (however that term is defined). In the present case, the Respondent fails at the first hurdle. Mr. Lambert did not himself believe that a breach of the peace was imminent at Lechlade (see his 10.45 log entry).
16. Subject to Mr. Freeland's argument that the log does not mean what it says (which we address in Note III) that conclusion deprived him of the power (or relieved him of the duty) to act.

Reasonableness rather than imminence

17. One of the difficulties with substituting a general test of reasonableness for the temporal tests laid down in the authorities is that it provides no clear yardstick by which an individual contemplating action can predict *at the time he acts* whether or not what he is proposing to do is lawful.
18. It is particularly important when one is considering *a legal duty* for the law to give clear guidance as *when* that duty arises. Otherwise the individual who is subject to that duty cannot know when he is required to act, or when he may become liable for breach of his duty. He must be able to ascertain with reasonable clarity whether events have reached *the point in time* at which he is required by law to intervene. A general test of reasonableness makes this very difficult.
19. Mr. Freeland has submitted that CS Lambert would have been in breach of his duty if he had not taken action when he did. Breach of duty has serious consequences for a police officer. The duty to prevent a breach of the peace may be a 'duty of imperfect obligation' for a citizen – but it is a disciplinary offence for a constable. On the authorities as they stand, there is a clear limitation. It would be an unjust and retrograde step to substitute a duty to intervene which has no clear

temporal index – one which can only be judged retrospectively in the light of all the circumstances.

20. As Lawton and Templeman LJ said in the *CEGB* case, a police officer cannot be criticised for failing to act unless *or until* the point has arrived at which he has a duty to intervene. And, as those judges also held, a police officer has no duty (and no power) to intervene in a self-help eviction unless *and until* a breach of the peace occurs or is about to occur. This is a temporal limitation which circumscribes the officer's duty and it is idle to pretend otherwise.
21. *CEGB*, of course, was a case in which a chief constable stood accused of dereliction of duty. If Mr. Freeland were right, the Chief Constable of Devon and Cornwall must have been under a legal obligation to intervene whenever it was objectively reasonable to do so. The respective rights and duties of the parties would not have been susceptible to the sort of clear guidance that the Court of Appeal was able to provide in that case.

Section 24 of PACE

22. In answer to a question from Lord Brown, Mr. Freeland submitted that the words 'about to happen' in section 24 of PACE have the same 'elasticity' as the test he propounds for the common law breach of the peace powers. In other words, there is no requirement of imminence under section 24 (nor, apparently even of nexus). All that is required is an overall exercise of the power of arrest which is reasonable having regard to all the circumstances.
23. That obviously cannot be right since it would be contrary to the clearly stated intention of Parliament. In the unlikely event that Parliament had intended the anticipatory power of arrest conferred by section 24 to be exercisable whenever it was reasonable to make an arrest that is what the statute would say.
24. But the very fact that the two concepts are not the same exposes the difficulties with Mr. Freeland's submissions as to the common law power. If a test of reasonableness is not the same as test of imminence in section 25 (about to happen) then the same must be true for powers of arrest to prevent a breach of the peace. Indeed there are

more compelling arguments for a flexible approach where true criminal offences are liable to be committed.

25. Mr. Freeland's thesis is that the gravity of the harm to be prevented will affect the point in time at which it is reasonable to intervene. It is, he says, not surprising that the law should insist on real imminence where a relatively trivial domestic incident is concerned. But if murder was the act to be prevented, then (so he submits) one could properly say that the murder was imminent hours or days before it is expected to occur. That indeed is the inevitable logic of his argument for introducing flexibility in the common law powers.
26. But when it is viewed through the prism of section 24, the illogicality of this position is laid bare. Assume two individuals set off together from London to Edinburgh. One is going there to commit a murder, the other to shoplift. If Mr. Freeland's approach were right, then at the moment when they left London together, the murder would be "about to happen" but the shoplifting would not. That is not a coherent and rational approach to the development of the law.

Section 3 of the Criminal Law Act 1967

27. This provision is irrelevant and inapplicable. It was not the basis for CS Lambert's decision to turn the coaches back. Nor could it have been. It provides a defence (to civil or criminal liability) for actions involving the use of *physical force*. The decision to turn back the coaches (which is the decision in issue on this part of the appeal) did not involve, on any view, the application of force.

Use of force is essential to section 3

28. In *R v Jones* [2006] 2 WLR 772 the appellants were each alleged to have committed offences of either criminal damage or aggravated trespass (which involved the cutting of fences, and the physical obstruction of activities being conducted at military bases). Lord Bingham (at 787, para 25) expressed "some doubt whether section 3 was ever intended to apply to conduct like the appellants' which, although causing damage to property in some cases, was entirely peaceable and involved no violence of any kind". Lord Bingham noted that the Law Commission had considered that the forcing open

of a door might constitute the use of force, whereas Buxton LJ in *Hutchinson v Newbury Magistrates Court* (2000) 122 ILR 499 had understood section 3 to have been introduced to deal with physical force to the person. In the event, Your Lordships House was content to proceed on the assumption that the force used on the facts was sufficient (the courts below having proceeded on that footing). As Lord Hoffmann put it (at p. 800 para. 71):

“There is much to be said for the view that offences against property have their own provisions for justification...and that ‘force’ in section 3 means force against persons committing crimes or escaping arrest. But I am willing to assume for the sake of argument that chaining oneself to railings or putting sugar into the petrol tanks of lorries involves the use of force for the purposes of section 3 of the 1967 Act.”

29. The Appellant submits that if there was any room for doubt in *Jones*, where physical acts (including damage to property and physical obstruction) had occurred, there is none here. The decision to turn the protestors simply cannot be characterised as a use of force. What is under challenge is a decision and nothing more. Unless or until it became necessary to enforce that decision through the use of reasonable force, the conditions for the operation of section 3 could not even arguably come into play.

Section 3 as an analogy

30. Nor can Mr. Freeland derive any analogical support from section 3. In order to make good his argument he would have to be able to demonstrate that there was no requirement of imminence or nexus inherent in the application of section 3. Yet, there is no authority for this proposition. Lord Hoffmann in *Jones* (at p. 802, para. 81) described self-help remedies (including section 3) in these terms:

“In a moment of emergency, when individual action is necessary to prevent some imminent crime or to apprehend an escaping criminal, it may be legitimate, praiseworthy even, for the citizen to use force on his own initiative.”

And Lord Bingham (at para. 35) considered it “all but unarguable” that the personnel whose actions were being obstructed at Fairford and Marchwood bases were themselves committing crimes of aggression “or that there was a sufficient nexus between the conduct of these appellants” and the conduct they were seeking to prevent. Imminence and nexus are aspects of the protection afforded by section 3.

31. If analogies from different branches of the law governing self-help remedies of this kind are helpful (which the Appellant disputes) then reference may be made to the Court of Appeal decision in *Jones* which considered related issues concerning the defence of necessity (duress of circumstances). Latham LJ (at para. 51(iii) and 53) referred to the established principle that “*imminent* peril of death or serious injury to the defendant, or those for whom he has responsibility, is an essential element of both types of duress”.

The requirement for a crime under domestic law

32. *Jones* stands as authority for the proposition that section 3 is confined to the use of force to prevent a crime recognised as such by domestic law. It is common ground that this does not encompass breach of the peace.
33. However, Mr. Freeland’s attempt to answer that objection exposed another serious flaw in the Respondent’s argument. He says that even if breach of the peace is not a crime for this purpose, CS Lambert also reasonably suspected that (some of) the passengers intended to commit specific crimes that could have engaged the operation of section 3. Mr. Freeland cited criminal damage and aggravated trespass.
34. It is worth examining that proposition because it illustrates the Appellant’s arguments well. Assume that the only item found was a single tin of red paint. If Mr. Lambert could identify the owner, and if he reasonably suspected that the paint was to be used to commit criminal damage, then his powers of arrest would be determined by section 24 of PACE. He would not be able to arrest the individual for substantive criminal damage because it would not be “about to happen” (*cf.* the anticipated breach of the peace).

35. However, if he could identify two or more people involved in the plan, he would be able to arrest those individuals for an offence of conspiracy. But he would certainly not be able to arrest the rest of the passengers on the coach. Nor could he, in our submission, arrest all the passengers merely because he was unable to identify the owner of the can. That would not afford grounds to suspect them individually or collectively.
36. Applying that principle to the actual facts, the question becomes whether (in the light of the prior intelligence and the limited number of 'offensive' items found on the coaches) there would have been reasonable grounds to arrest all of the passengers on suspicion of being party to a conspiracy? Applying *Cumming*, the Appellant submits not. There could be no reasonable basis for suspecting 120 people of being party to a conspiracy.
37. For precisely the same reason, there were on the facts of this case no reasonable grounds for inferring a collective intent (as CS Lambert says he did).

The constable's duties

38. Mr. Freeland relies on the constable's oath as setting out the duties incumbent on a police officer – to keep the peace and prevent crime. In light of his assertion that conduct amounting to a breach of the peace will often be a crime he accepts that the general test of reasonableness must apply to the constable's duty to prevent crimes as well as his duty to prevent a breach of the peace.
39. This led him to agree with the proposition that a police officer is under a common law duty to do anything he reasonably considers to be reasonable to prevent crime or a breach of the peace. One might add "...even if it interferes with fundamental rights". Unless expressly prevented by statute he would, for example, have power to turn someone away, to search people and premises, and to confine someone in a vehicle and drive them half way across the country. And a private citizen would have similarly extensive and undefined powers at least in relation to an anticipated breach of the peace.

40. Given the increasing recognition over the last 60 years of the need to protect the rights of the individual from arbitrary interference by the state, and the corresponding recognition of the need for police powers to be carefully circumscribed, and attended by appropriate safeguards, the prospect of police powers limited only by a general requirement of reasonableness, judged after the event, seems so extreme that it tends towards absurdity. But it is, on examination, no more extreme in principle than the argument that Mr. Freeland advances before Your Lordships, and no more extreme in practice than the actions he seeks to defend.

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