

# **REPORT ON THE CASE OF "JANE LAPORTE VS THE CHIEF CONSTABLE OF GLOUCESTERSHIRE POLICE"**

**House of Lords 23-25 October 2006**

*(as recollected from notes by several Fairford coach passengers who attended the hearing)*

The Fairford Coaches case reached the House of Lords on 23-25 October, 2006. This is an account of what took place. This document is an honest account, but there may be factual inaccuracies or points that were misunderstood. This is meant to act only as a report about the hearing. To learn more about the arguments and laws that the case is concerned with, you may wish to look at the press releases (<http://www.fairfordcoachaction.org.uk>).

## **WHO WAS THERE?**

### **OUR BARRISTERS**

**Ben Emmerson QC** of Matrix Chambers argued our case at the House of Lords.

**Michael Fordham QC** of Blackstone Chambers. Mike argued our case at both the lower courts, but at the House of Lords, Mike didn't speak at the hearing, he just took notes and assisted Ben with our case.

**Rabinder Singh QC** of Matrix Chambers argued the case for the human rights organisation Liberty (Liberty intervened on our behalf in this case).

### **OUR SOLICITORS**

**John Halford** of Bindmans (who has been with this case from the first day).

**Alex Gask** of Liberty.

### **THEIR BARRISTERS**

There appeared to be 8 barristers at the hearing supporting the police, but I can only say for sure that the following three barristers argued the case on behalf of their clients.

**Simon Freeland QC** of 5 Essex Court was the Barrister for Gloucestershire Police.

**Edward Faulks** of 1 Searjeant's Inn was the Barrister for Thames Valley Police.

**David Pannick QC** of Blackstone Chambers was the Barrister for Metropolitan Police. Pannick is now involved in the Austin/Saxby v. Metropolitan Police case concerning the mass detention of Mayday protestors for 7 hours at Oxford circus - this case is due to be heard by the Court of Appeal in January 2007. Pannick has written about recent cases concerning article 5 of the European Human Rights Convention in a paper presented in 2005.

### **THE LAW LORDS\***

**Lord Bingham of Cornhill (Senior Lord of Appeal in Ordinary) – he chaired this hearing and sat in the centre.**

**Lord Rodger of Earlsferry (sat second from the left)**  
**Lord Carswell (sat second from the right)**  
**Lord Brown of Eaton-under-Heywood (sat on the far left)**  
**Lord Mance (sat on the far right)**

\*Please Note - Law Lords are members of the House of Lords, but they act as the highest legal authority in England and Wales and don't actually participate in votes at the House of Lords. The most senior justice is known as Senior Lord of Appeal in Ordinary (currently Lord Bingham of Cornhill).

*"There are 12 Lords of Appeal in Ordinary (or law lords). They are equivalent to supreme court judges in other countries and when the new UK Supreme Court comes into operation in 2008 the law lords will become the first justices of the Supreme Court. Law lords are appointed by The Queen on the advice of the Prime Minister, usually from the ranks of the senior appeal court judges in each part of the UK."*  
(this info was from <http://www.parliament.uk/documents/upload/HofLBpJudicial.pdf> which has further details on the matter).

Although the Law Lords have the right to act as "political" Lords, in practice they have a purely judicial role. The House of Lords is the highest court of appeal available within the England and Wales.

## **SUMMARY OF THE DAYS**

The Law Lords didn't dwell on the factual issues of the case. For Judicial Review cases, the facts must be agreed by both parties. These facts are submitted in a document agreed by both parties. The parties are supposed to use these facts to support their case. At the House of Lords, the case was almost entirely to do with matters of law, and in particular the impacts a particular ruling might have on future interpretations.

### **DAY 1- - - - -**

The hearing began with our case being argued by Ben Emmerson. Ben spoke all day. The setting was a informal affair compared to the High Court and the Court of Appeal. The Barristers and Law Lords all wore robes, but the Law Lords didn't wear wigs. The Law Lords were not positioned high above the group but simply on a slightly raised section of floor. The room was relatively small and only had limited room for members of the public. The seats were almost completely full on the first day, but everyone was able to get a seat. The case was chaired by Lord Bingham. Bingham was amazingly alert and focused throughout the hearing. It was amazing to see. It would appear that absolutely no detail escapes him. It was also clear throughout that he wasn't going to let on any bias even if he had made up his mind on the first day.

Ben introduced the broad framework of the case and then discussed the laws that applied to the case. Specifically, the case centred on the question of Breach of Peace powers. The Breach of Peace powers are historical powers that we have inherited from before the time when police forces existed, and they probably predate the existence of a national Parliament. They are common-law powers (as opposed to statutory powers which parliament introduces) that existed for all subjects to use for the purpose of maintaining the "Queen's/King's Peace". The Breach of Peace powers can be used when there is violence or danger to people or property (provided the owner is present). The preventative application of this power (i.e. action taken to prevent a breach of the peace) is the key question for our case. Ben argued that with the exception of two cases, "all the preceding cases speak with one voice", namely that imminence is the trigger for using Breach of Peace powers in a preventative manner.

Ben stressed that Breach of Peace powers are not powers held by the Police, but general powers that all civilians have the option and duty to use. Breaching the Peace is not a crime in English Law. There isn't even a penalty for breaching the peace – one is simply arrested until they can be taken before a competent legal authority (magistrates court) and "bound over" not to commit a similar breach within a certain period. If a second breach takes place within the set period, the subject breaching the peace will be fined an amount set by the magistrates. In theory, a civilian could lawfully detain a police officer for "Breach of Peace". If the officer's actions did constitute a breach of peace, the officer would be bound over by the magistrates to prevent future breaches. Our case is important because it provides the opportunity to ground the Breach of Peace powers in limits that are clear.

Ben argued that the threshold for Breach of Peace is imminence. There was some discussion of whether the seriousness of violence threatened would provide a different imminence threshold for Breach of Peace powers, but Ben pointed out that statutory powers concerning the far more serious crime of murder still use imminence as their trigger. Action cannot be taken to prevent a murder unless the murder is imminent.

Gloucestershire's argument suggested the correct test for Breach of Peace is reasonableness – a far more flexible test. Ben pointed out that the Reasonableness test can only be accurately applied after the fact, and a civilian would have a very hard time knowing when they were within their rights to use Breach of Peace powers in a preventative manner. Ben said that both approaches (reasonableness and imminence) "are logical", but the decision of which test is appropriate must take into account that this is a power that civilians can use, and if it is misapplied it is a very coercive and forceful power. Ben argued that "By adopting the reasonableness test, this runs the risk of promoting disorder rather than preventing it".

Although there was some discussion of the particular facts of our case, Ben focused on the Breach of Peace law and the previous judgements concerning its application. In order to correct some factual inaccuracies introduced by Gloucestershire's written argument, Ben also submitted a short document at the end of the day which identified factual inaccuracies relied upon in Gloucestershire's argument and the agreed evidence which supported the correct facts. This left more time to address the points of law.

## **DAY 2- - - - -**

Today Ben concluded his arguments concerning our appeal and the police's cross-appeal. Ben pointed to an article by Prof Richard Stone which closely examined Breach of Peace powers. Ben pointed out that "Breach of the Peace leads to an individual being bound over to keep the peace – that's the remedy. That's the key to where the common law powers lie."

Examining the forced return of the coaches, Ben pointed out that "Breach of the Peace cannot conceivably be said to be imminent throughout the duration of the journey."

Regarding the question of detention and deprivation of Liberty, Ben said "Did the detention constitute restriction of liberty under Article 5? The passengers were deprived of liberty as surely as if they'd been locked in the back of a police van."

At one point Lord Bingham asked what Ben proposed the police should have done if you "Assume you're wrong on your appeal." (the appeal was over the right to attend the demonstration, and the cross-appeal was over the right not to be detained). To this, Ben replied that the passengers "should be told they can't go to Fairford and (then they could) decide how to spend the afternoon."

Liberty's intervention followed, and it was argued by Rabinder Singh QC. Rabinder's submissions were strong and clear. Because he focused on particular legal cases and the range of precedents for various interpretations, they would be difficult to summarise within this document. One very interesting thing that he stated was five "reasons for the assembly" in a democratic society —1) individual self fulfilment, 2) to allow the truth to emerge from the "marketplace" of ideas, 3) to keep the government in check, 4) to allow a peaceful valve for expression of discontent, 5) to avoid tyranny by the majority.

Next, Simon Freeland QC for Gloucestershire introduced the counter-appeal. Freeland's arguments seemed very disordered and were often difficult to follow. Here are snippets but the overall thrust of the argument wasn't clear enough to easily summarise. Freeland presented an argument that Lambert might not have known that these coaches were "the coaches" identified in London. This was impossible to understand even though he raised it twice. Even the Law Lords didn't seem to grasp what he was trying to argue.

Freeland argued that the police *could* have stopped the passengers in London, but that Lambert (the Gloucestershire officer in charge of the operation) made a policy decision that the coaches should be stopped in Lechlade. At this point, Freeland seemed to have difficulty explaining why Lambert made this decision.

**Lord Brown:** why wait till the layby to stop the coaches?

**Freeland:** ...

**Lord Carswell:** [London is] not in his territory.

**Freeland:** Yes, and there was a resources issue.

**Lord Rogers:** Could he have given an order sooner?

**Freeland:** No. The order at 10.45 is a reasonable and proportionate response.]

Freeland argued for an "all embracing test of reasonableness", and claimed that imminence alone was both illogical and unreasonably rigid. He said that the imminence test was inconsistent with the demands of modern policing (which require maximum flexibility). Freeland repeatedly returned to this idea that reasonableness is the basic feature to justify preventive action at common law. At one point, one of the Lords (Mance?) challenged Freeland as to whether there was the need for any statutory powers at all if police merely had to justify that the actions they had taken were reasonable.

Freeland suggested that the protests were an ideal opportunity for protestors to be infiltrated by terrorists, and that a terrorist attack was foreseeable at the base. This was one of the justifications given for the action taken against all the coach passengers. This argument didn't seem to explain why preventative action hadn't been taken against the 3,000-5,000 people who attended the demonstration.

Freeland tried to argue that the coach passengers were uncooperative. As evidence, he pointed to the fact that some passengers provided their names during searches. When it was determined that there was no legal duty to provide names, Lord Bingham suggested that the passengers behaviour could be put down to "good old British bloody-mindedness" rather than anything more sinister.

When mentioning the offensive items seized from the coaches, Freeland sought to point out to the Lords that Ben had failed to mention the scissors that were found. We ended up asking ourselves, how could a pair of scissors possibly justify a mass detention?

Freeland described a sliding scale of Breaches of Peace, from mild (queue jumping, "mild fisticuffs", domestic spats), to the very serious ("threat to national security by many who would create widespread disorder and where there are limited resources" to control). He argued that both the miners strike case (Moss), and our case are examples of the latter form

of Breach of Peace. Using a reasonableness test, intervention is justified at an earlier threshold with the more serious forms of Breach of Peace. Freeland argued that a "serious" Breach of Peace would involve a statutory law being violated, and that in this case the police feared a crime of some sort.

Freeland argued that the threshold of reasonableness for Breach of Peace would be an "evolution of the law that is based on principle" and that it would be unprincipled if the common-law were not allowed to develop.

### **DAY 3- - - - -**

Freeland continued his arguments on the third day.

When Freeland tried to argue that Detention on the coaches was not an actual deprivation of Liberty because there was residual liberty within the confines of the coaches, Lord Bingham pointed out that similar liberty exists within a locked police cell.

The short case for Thames Valley was argued by Edward Faulks. Faulks asked the Lords "not in any way to emasculate" the very valuable power of Breach of Peace as this is often the most practical and sensible power for police to employ.

The Metropolitan police's case was argued next by barrister David Pannick QC. Pannick was articulate, coherent, and focused. He argued that the Lords should be careful not to limit the Breach of Peace powers as they serve an important purpose of filling in gaps within statutory law, allowing police to act when they would otherwise be powerless. Pannick asked that the question of deprivation of liberty (article 5 of the Human Rights act), not be ruled on in this case. Pannick explained that if an action was not reasonably and proportionately exercised, then it breaches Article 5 of the Human Rights Convention, and that some of the Article 5 problems can be resolved by looking at the purpose of the action taken.

Finally, Ben concluded the hearing by making his closing remarks. At this point he submitted 3 reply notes concerning issues that had come up during Days 1 and 2. These should be available via the Fairford Coach Action website. Ben argued against using Breach of Peace powers as a "foam to fill cracks" left in statutory law, as these gaps were likely left by lawmakers for a good reason. Ben argued that Breach of Peace was designed as a remedy for relatively minor events, and that statutory law has been developed to address serious offences. Ben argued that the test of Imminence for Breach of Peace leads to minimal intrusion and allows action/intervention only when there is certainty. Ben's summing up arguments were extraordinary. It would be great to have a written transcript to furnish here.

### **SELECTED QUOTES FROM EACH OF THE DAYS**

Finally, here are some quotes the hearing as hastily written down by coach passengers who attended the hearing.

#### **QUOTES FROM BEN EMMERSON QC**

##### **Stating the case:**

*"The fundamental right of citizens to come together and demonstrate is essential for democracy"*

*"Lambert's actions failed to reconcile public order with peaceful protest. His actions were premature and indiscriminate."*

*"The decision to detain was exorbitant and disproportionate."*

*"The section 12 order in place allowed protestors to process from Fairford to the Bell-mouth of the airbase, well away from the perimeter fence. Any individual departing from this route would have been liable to arrest under S12(7)."*

*"The law should define as clearly as possible the time in which one citizen can take steps to prevent another of a breach of the peace. "*

**Imminence:**

*"The power to detain under common law must be as close as possible to when the citizen sees it as their duty to intervene to prevent violence, i.e. when it is imminent, in the immediate future. Otherwise it will undermine public order, not promote it."*

*"In relation to powers to prevent a breach of the peace which fall short of arrest, a sliding scale of imminence is inconsistent with authority and contrary to principle. Such a sliding scale leads to a new common law test of reasonableness, where the only guiding test is, Was it reasonable in the circumstances?"*

*"If reasonableness is to be substituted, for an individual contemplating action, the reasonableness of their actions can only be tested ex post facto."*

*"All the authorities (with the exception of Moss) have imminence as the test for action short of arrest. Otherwise this would incentivise detention short of arrest."*

**Nexus:**

*"Obviously there is a link between imminence and nexus. Precisely because an action is premature, means you are unable to distinguish between demonstrators."*

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**QUOTES FROM SIMON FREELAND'S SUBMISSIONS**

*"[the police] regret that the decision to turn the coaches back interfered with Articles 10 and 11. But they did this in order to protect life."*

**Freeland:** The coaches had to be escorted back to London or they would have found the first route back to Fairford.

**Lord Carswell:** Wouldn't that depend on whether the drivers were in cahoots?

**Freeland:** Yes.

**Lord Carswell:** Drivers with licences are not going to fall out with the police.

**Lord Mance:** Would you accept that imminence implies inevitability? There's a risk, yes, of a breach of the peace, but clear unavoidability?

**Freeland:** Kevin Lambert says it's inevitable.

**Lord Mance:** But that can't be right. There was no sign they were going to abandon the bus. If they did, the police could follow them.

**On Judicial review vs individual damages claims**

*"This type of claim could be dealt with far more justly if witnesses were questioned orally. You have no advantage of this. The approach taken by the lower courts is to accept Kevin Lambert's statements and the reasonableness of Kevin Lambert's beliefs to be taken as unchallenged."*

### **On imminence**

*"There is an illogicality of a strict requirement of imminence. Timing shouldn't be the only relevant factor. A degree of flexibility is needed in modern day policing."*

### **On Nexus**

*"This is not a separate requirement. It's relevant to reasonableness."*

### **On lack of co-operation from passengers**

**Freeland:** The passengers behaved suspiciously. Some concealed their identities.

**Lord Bingham:** Section 60AA doesn't require names to be given.

**Freeland:** Their identities were concealed by disguises. The claimant refused to give her name and address.

**Lord Mance:** When questioned under S60, are you told you don't have to give your name?

**Freeland:** No, they were asked, so some co-operation was sought.

**Lord Mance:** Were they told?

**Freeland:** .....

**Lord Bingham:** But you see the police could say that it was unco-operative, or one could say that it was good old British bloody-mindedness. If I don't have to give it, I'm not going to.

### **On Freeland's over-arching test of reasonableness**

**Lord Mance:** The police, in all formulations, have other powers – that all exist at common law. Therefore no other laws are necessary.

**Freeland:** I'm trying to provide a coherent test for Breach of the Peace that doesn't rely on imminence and nexus.

**Lord Bingham:** So, the police may do whatever they think reasonable to prevent any crime?

### **On why passengers were not arrested**

**Lord Bingham:** After the search at Lechlade, would the police have been justified in arresting Ms Laporte?

**Freeland:** Arguably justified. But Kevin Lambert decided that arrests shouldn't be made at Lechlade.

**Lord Bingham:** But if they were entitled to arrest, surely it would be their duty to?

### **On whether all the passengers were Wombles:**

**Freeland:** Kevin Lambert believed the passengers on the coaches were the Wombles.

**Lord Bingham:** He thought they were *all* Wombles? Does he say that in his affidavit?

**Freeland:** No

**Lord Mance:** He can't have thought they were all Wombles because three speakers *were* allowed to proceed to Fairford.

**Freeland:** Yes, some *were* allowed.

**Lord Bingham:** There's nothing to suggest they were all Wombles.

### **And, back to why passengers not arrested at Lechlade**

**Lord Bingham:** He didn't think it justified to arrest in the layby. Why?

**Freeland:** It would have been disproportionate and unreasonable.

**Lord Brown:** He wanted to do something that would work?

**Freeland:** Yes.

**Lord Rogers:** Perhaps arrest might be the only way to stop an athletic chap.

**Freeland:** Yes, he might well be entitled to arrest.

**Lord Rogers:** So was it just a question of practicality?

**Freeland:** Yes...and reasonableness.

### **On whether alternative actions were considered**

**Lord Rogers:** Suppose Lambert was in the layby, and apprehended a breach of the peace and says that anyone who disobeys will be arrested. Do you object?

**Freeland:** There are three points to this: (1) there is no evidence that that would be a remote possibility. Kevin Lambert wasn't there. (2) Yes, it's a possibility. But it wouldn't be proportionate. He was determined not to arrest. It would have been a logistical nightmare.

**Lord Bingham:** Why was detaining them on coaches more proportionate than sitting in a layby?

**Freeland:** Realistically, they weren't.

**Lord Bingham:** Assume it's made clear, "you're not going to the demo".

**Lord Mance:** Does Lambert address this hypothesis. He only contemplates arresting the whole lot. Not the possibility of not going on.