Neutral Citation Number: [2021] EWCA Civ 1662

Case No: A2/2020/1171

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT
QUEEN'S BENCH DIVISION
Mr Justice Chamberlain
QB-2019-004216

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 12/11/2021

Before:

PRESIDENT OF THE QUEEN'S BENCH DIVISION
LORD JUSTICE HOLROYDE
and
LADY JUSTICE CARR

- -

Between:

ROCHAUN ARCHER	**Appellant**
- and -	
THE COMMISSIONER OF POLICE OF THE METROPOLIS	**Respondent**
-and-	
Liberty **Just for Kids Law**	**Interveners**

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- -

Richard Hermer QC and Tim James-Matthews (instructed by **Bhatt Murphy Solicitors**) for the **Appellant**
Andrew Warnock QC and Adam Clemens (instructed by **Weightmans LLP**) for the **Respondent**
Caoilfhionn Gallagher QC and Donnchadh Greene (instructed by **Liberty** and **Just for Kids Law**) for the **Interveners**

Hearing dates: 11 & 12 May 2021

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Approved Judgment

Dame Victoria Sharp P.:

Introduction

1. This appeal concerns the lawfulness of the police detention of a juvenile for his own protection or in his own interests under section 38 (s. 38) of the Police and Criminal Evidence Act 1984 (PACE). The appellant contends that the provisions in s.38 entitling a custody officer to decline to order a person's release from police detention for such reasons are incompatible with Article 5 of the European Convention of Human Rights (Article 5) (the Convention).

2. In a judgment dated 17 June 2020, Chamberlain J (the Judge) concluded that the continued detention of a person held on suspicion of having committed an offence under s. 38 is in principle capable of being justified under Article 5 on the basis that it is necessary for his or her own protection and further, that the appellant's detention was lawful on the facts. The appellant challenges both conclusions.

3. The appellant's central argument of principle is that Article 5(1)(c) precludes any detention of a person for his own protection. The consequences would be that s. 38(1)(a)(vi) and, in so far as it authorises detention for the detainee's own protection, s. 38(1)(b)(ii) would be incompatible with Article 5. Since Article 5(1) makes no distinction between detention by the police and detention by the courts, detention on the "own protection" grounds in paragraph 3 of Parts 1 and II of Schedule 1 to the Bail Act 1976 would likewise be incompatible with Article 5.[1]

4. This is the judgment of the court, for which purpose it has had the benefit of submissions from Mr Hermer QC and Mr James-Matthews for the appellant, Mr Warnock QC and Mr Clemens for the respondent, and Ms Gallagher QC and Mr Greene for the interveners, Liberty and Just for Kids Law (the Interveners).

The Facts

5. On 17 February 2012 the appellant, then aged 15 years, was the subject of a violent attack in a takeaway restaurant known as "Sam's Chicken" in Woolwich. He and two of his friends were confronted by a group of four male youths. One of those youths struck the appellant to the head and stabbed him to his back and head. The appellant received hospital treatment for his injuries.

6. At 6.50am on 22 February 2012 the appellant was arrested at home in relation to this incident on suspicion of violent disorder contrary to s. 2(1) and (5) of the Public Order Act 1986 and possession of an offensive weapon contrary to s. 1(1) of the Prevention of Crime Act 1953. He was conveyed to Plumstead Police station and placed in a cell at around 7.25a.m. The reasons for his detention were recorded as follows:

> "To obtain evidence by questioning, To secure or preserve evidence"

He was to be (and was) observed at least every 30 minutes. His mother attended the police station as the appellant's appropriate adult. He saw his solicitor in consultation

[1] These provisions are the subject of proposed repeal (see the Police, Crime, Sentencing and Courts Bill 2021).

at approximately 11.05am. At approximately 11.20am an inspector's review was carried out and "continued detention…authorised as there are reasonable grounds to believe that it is necessary in order [t]o obtain evidence by questioning". The inspector recorded that he was "happy that this is being dealt with expeditiously".

7. The appellant was interviewed in the presence of his mother and solicitor between approximately 11.40am and noon. He relied on a prepared statement identifying that he was the victim in the attack. He went on to say:

> "…I thought [one of the four male youths] may have a gun. I did take the knife from my friend only to scare the boys so that they would go away."

He stated that he did not want to be shot or have any further assaults on him. Everything he did he believed to be reasonable in the circumstances. He then made no comment in answer to questions.

8. Post-interview he was returned to his cell. Observations at least every 30 minutes continued. The appellant appeared alert and moving normally or asleep. He refused a meal at around 1.30pm but accepted food and drink at approximately 6.45pm.

9. The appellant was then charged at 7.45pm. The detention log contains the following entry by Police Sergeant Smith at 7.53pm:

> "Bail refused - Detained Person Informed
>
> Detained to appear at Bexley youth Court on 23/2/12
>
> Charged.
>
> Bail refused.
>
> 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 [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.
>
> BAIL REFUSED."

10. A further entry by Police Sergeant Smith at 7.54pm reads similarly:

> "Custody Officer Review - Initial Review After Charge/Change in Circumstances
>
> Review - Conducted at 1953
>
> Reminded of right to free legal advice
>
> Detention after charge authorised as I have reasonable grounds to believe that detention is necessary because 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 detained person is a juvenile and it is believed that they ought to be detained in their own interests..
>
> The grounds are Dp 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.
>
> BAIL REFUSED."

It was then recorded that the appellant's next court appearance would be at 9.30am the following day.

11. The appellant continued to be monitored throughout the night. He appeared to sleep on and off until approximately midnight after which he was asleep until approximately 8am the next day. A custody officer review was carried out at 4.30am. Further detention was authorised for the same reasons as before.

12. The appellant was duly taken to Bexley Youth Court in the morning of 23 February 2012. He was remanded into custody (for reasons which can no longer be confirmed due to the loss of the court log). He was detained at Medway Secure Training Centre until 30 March 2012 when he was granted bail by the Crown Court at Croydon on condition that he reside with his aunt in North London and be subject to an electronically monitored curfew.

13. It was the appellant's position throughout that he was the victim of targeted, unprovoked violence from a criminal gang known as the "Deptford Boys". He had been subject to a number of violent attacks, often involving knives, prior to this incident as a result of having previously co-operated with the prosecution of and given evidence against a violent associate of the "Deptford Boys".

14. The proceedings against the appellant were discontinued on the day of trial (on 13 April 2012). Two of his assailants were subsequently convicted and sentenced to 18 months' imprisonment (or detention).

15. On 18 April 2012 DC Wylie of the Violent and Organised Crime Unit for Greenwich Police wrote a strong letter in support of the re-housing of the appellant outside the Royal Borough of Greenwich where the appellant currently lived. He detailed the appellant's association with an active street gang known as the "Cherry Boys" and that gang's long-standing rivalries with two other street gangs, namely "T Block" and the

"Deptford Boys". Both those gangs attended the area where the appellant lived with his mother and he would be considered a target for them to attack. Of greater concern was the number of occasions over a period of 18 months on which the appellant had been targeted personally and attacked with knives. DC Wylie commented that the incident on 17 February 2012 could "easily have proved fatal". DC Wylie concluded his letter by stating:

> "I consider that if [the appellant] continues to reside within the Royal Borough of Greenwich he will be the victim of further violent assaults. Due to the severity of previous attacks, and the violent offending histories of those who seek to harm [him], I believe that his life is at risk."

16. The appellant was attacked and hospitalised again on 10 September 2012 and moved out of the Borough three days later.

The history of the claim

17. The claim has a convoluted history. Proceedings were issued in May 2012 in the Central London County Court against the respondent and the Crown Prosecution Service (the CPS). Time for service of Particulars of Claim was extended whilst the appellant's police claim was investigated. Particulars of Claim were then served in May 2013. The claim as originally pleaded was for personal injury, aggravated and exemplary damages for false imprisonment, malicious prosecution, negligence, breaches of the Human Rights Act 1998 (the HRA) (Articles 2, 3, 5 and 8 and 14 of the Convention) and for race discrimination in breach of the Race Relations Act 1976 and/or Equality Act 2010, arising from the acts and omissions of the respondent's police officers and arising from the acts and omissions of the CPS. The appellant also sought a declaration that his rights under Articles 2, 3, 5, 8 and 14 of the Convention had been breached and that he had been the subject of race discrimination. In respect of his claims for wrongful arrest, detention and malicious prosecution giving rise to unjustifiable infringements of the appellant's rights primarily under Article 8, but also Article 5, it was alleged that a decision to deny police bail was capable of engaging both Articles and for which the respondent would be liable; a decision to prosecute and maintain a prosecution again was capable of engaging both Articles for which both the respondent and the CPS would be liable. As part of the claim under Article 5 it was alleged that the decision to detain the appellant to protect him from others was not a lawful ground for detention permitted under Article 5. The appellant sought "just satisfaction" for the alleged breaches of his human rights, including damages for 38 days in custody.

18. In his original but not his amended Particulars of Claim (see para 20 below) some of the relevant background facts relied on by the appellant were as follows:

> "3. From May 2010 onwards the [appellant] became the victim of serious physical violence and intimidation at the hands of youths who were members of gangs operating in South London known as 'the Deptford Boys' and 'T-Block'. The [appellant] is not a member of any gang.
>
> 4. Prior to February 2012 the [appellant] was attacked on the following occasions:

a. On 2nd May 2010 the [appellant] was attacked on his way to school, apparently on the basis that he attended a rival school to his assailants. The [appellant] was unable to identify the attackers although the incident was reported to the First Defendant' officers;

b. On 3rd July 2010 the [appellant] was attacked by a group of males in the Charlton area. The matter was reported to the First Defendant's officers and the [appellant] identified one of the assailants who pulled a knife on him. That assailant is known to the First Defendant's officers as an extremely dangerous gang member;

c. On 27th September 2010 the [appellant] was attacked by a group of boys in a shop in the Greenwich area. The assailants were identified on CCTV and the [appellant] informed the First Defendant's officers that one was also an assailant in the 27th May 2010 incident. All are known by the First Defendant's officers as gang members linked with the assailant identified in the 3 July incident;

d. On 30th October 2010 the [appellant] received threats on Facebook warning him not to give evidence against those who had just been charged with the attack of 27 September 2010;

e. On 7th December 2010 the three assailants from the 27 September incident were tried and acquitted notwithstanding that the [appellant] attended Court and gave evidence;

f. On 17 January 2011 the [appellant] was attacked with a knife in toilets at his school;

g. On 26th January 2011 the [appellant] attended court for the trial of the assailant charged with the attack on 3 July 2010, who was acquitted;

h. On 26 March 2011 the [appellant] was attacked by a group of males on the Cherry Orchard estate in Greenwich. The incident was reported to the First Defendant's officers by a member of the public. Officers attended and spoke to the [appellant] near the scene, when he declined to make a formal allegation. The [appellant] was treated in hospital for injuries to his face. The [appellant]'s mother informed the First Defendant's officers that one of the attackers was involved in a previous attack and that her son was too afraid to give evidence against them;

i. On 13 October 2011 the [appellant] was arrested at school for possession of a knife. In interview he explained that he carried the knife for personal protection. He was charged, pleaded guilty and received a referral order.

> j. On 30 November 2011 the [appellant] was attacked by a group he identified as being connected with the 'Deptford Boys'. The attack occurred after he had been identified whilst travelling on a bus. The [appellant] was beaten including by a brick to his head and a knife. He was treated at Queen Elizabeth Hospital. He reported the incident to First Defendant's officers. On 16th January 2012 the [appellant] informed the First Defendant's officers that he did not wish to continue with a prosecution;
>
> k. On 10 September 2012, i.e. after the events giving rise to this claim, the [appellant]was attacked and stabbed eight times. He remained in hospital for four days and upon discharge moved for his own protection to live with extended family out of the area.
>
> 5. From at least July 2010 onwards the First Defendant's officers were aware that the [appellant] was a victim of gang violence. Following the attack of 30 November ·2011 the First Defendant's officers assessed the threat to his safety to be significant and took several measures to seek to reduce the risk by for example providing security apparatus to his family's flat and advising his family to relocate. The First Defendant's officers considered that the [appellant] was at risk at least in part as a result of having co-operated with two prosecutions of gang members.
>
> 6. Accordingly by the date of the material events giving rise to this claim the [appellant] was known by the Defendant to be a highly vulnerable child not least by virtue of the repeated serious physical attacks and intimidation to which he had been subjected and the persisting threat to his life and bodily integrity."

19. Following service of defences, the claim was stayed pending the outcome of the proceedings in *SXH v The Crown Prosecution Service* (*SXH*). Following the judgment of the Supreme Court in *SXH* in April 2017 ([2017] UKSC 30), the claim revived. However, in the light of *SXH*, it was discontinued as against the CPS (in October 2018).

20. Upon the appellant then indicating that he intended to amend his remaining claim against the respondent to seek a declaration of incompatibility under s. 4 of the HRA, the action was transferred to the High Court. On 4 November 2019, more than 7 years after the matters complained of, permission was granted to the appellant to amend his claim. The Amended Particulars of Claim wholly substituted the original and now sought a declaration of incompatibility in respect of s. 38(1)(b)(ii), as well as a declaration that the appellant's detention by the police for around 13 hours on 22/23 February 2012 had violated his Article 5 rights. His claim was not that his detention was outwith the power provided for by s. 38(1)(b)(ii) of PACE but rather that that power is incompatible with Article 5. He sought compensation for the breach pursuant to Article 5(5).

21. The Secretary of State for the Home Department, having been notified of the newly pleaded claim for a declaration of incompatibility pursuant to CPR 19.4A, indicated that she did not wish to be joined to the action.

22. The respondent amended the Defence in response to the new claim. In relation to Police Sergeant Smith's decision to refuse bail, the respondent averred:

> "The [appellant]'s detention was appropriately reviewed. He was charged at 19.45 hrs with violent disorder and possession of an offensive weapon. Bail was refused by PS Smith, primarily on the basis that the [appellant]'s continued detention was desirable and necessary in his own interests for his own protection and because it was considered that his parents could not properly control or protect him, and when a social services care placement was not available…"

23. Two witness statements were served in the action from Police Sergeant Smith, one dated October 2018 and one dated April 2019. Police Sergeant Smith had by then retired (in September 2017). Unsurprisingly, by this time he had no recollection of the appellant or his detention. Police Sergeant Smith referred to the custody record and in his first witness statement stated:

> "6. I considered my duties under [s.38] and refused bail. [The appellant] was to be detained to appear at Bexley Youth Court on 23 February 2012.
>
> 7. It was considered necessary to detain [the appellant] for his own protection and to further detain him to prevent physical injury to another person. Further, that it was necessary to further detain to prevent the commission of a further offence. The grounds being that [the appellant] had been involved in a gang related fight where he had sustained injuries that required hospital treatment. It was feared that if released on bail there would be repercussions where he may sustain further injuries or inflict violence upon his original intended victim…
>
> 9. I conducted a review at 19.53 following charge. Detention after charge was authorised as I had reasonable ground to believe that detention was necessary. [The appellant] had been arrested for, and charged with, an imprisonable offence and it was believed necessary to further detain in order to prevent the commission of a further offence. [The appellant] was a juvenile and it was believed that he ought to be detained for his own interests. [the appellant] had been involved in a gang related fight where he had sustained injuries that required hospital treatment. It was feared that if he was released he may sustain further injuries or inflict violence upon his original intended victims…"

24. In his second witness statement[2], and in response to the appellant's amended claim, Police Sergeant Smith commented upon his understanding of the interaction between the HRA and PACE. He stated that a detainee's rights under the HRA were always in his mind and became part and parcel of his role. He went on to state:

> "4….There was a real problem with gang violence and knife crime in the Borough at that time and his detention in secure 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 [the appellant'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…"

25. The parties agreed (and on 9 March 2020 Stewart J ordered) that the claim be set down for hearing on the basis that the appellant's claim could be determined without the need for oral evidence.

The Judgment

26. The hearing before the Judge lasted a day. In advance of the hearing, the Judge had invited the parties to consider additional authority and the Law Commission's 2001 report, *Bail and the Human Rights Act 1998* (Law Com No. 269). Following the hearing, he also invited written submissions on further points that had arisen. By the end of the exercise, the respondent, who had originally relied on Articles 5(1)(b), (c) and (d), focussed "almost exclusively" on Article 5(1)(c).

27. The Judge endorsed that approach: even if the police had a legal obligation to protect the appellant, that could not justify the appellant's detention under Article 5(1)(b) (see *Serdar Mohammed v Ministry of Defence* [2014] EWHC 1369 (QB) ("*Serdar*") at [311] to [313]). And even if the obligation of the appellant not to commit further offences qualified as an "obligation prescribed by law" for the purpose of Article 5(1)(b) (which the Judge doubted) and detention was necessary to prevent the appellant from committing those offences, Article 5(1)(b) added nothing: it was common ground that detention in order to prevent a person from committing further offences is in principle permitted under Article 5(1)(c). Similarly, Article 5(1)(d) added nothing to Article 5(1)(c) on the facts.

28. Having considered the relevant statutory scheme in PACE, Article 5 and relevant case law (including *IA v France* (1/1998/904/1116) 23 September 1998 ("*IA*") and *Buzadji v Moldova* [2016] 42 BHRC 298 ("*Buzadji*"), followed by a summary of the parties' respective submissions, the Judge turned to his analysis.

[2] The Judge declined to place any weight on this second witness statement – there was no explanation as to the basis on which Police Sergeant Smith was able to give the evidence in question. So far as necessary, the respondent challenges that refusal by way of Respondent's Notice.

29. He stated at the outset that he would concentrate on s. 38(1)(b)(i), namely detention for own protection, rather than the broader ground of detention in own interests, since that was the primary ground for PS Smith's decision to detain. He reflected on the consequence of the appellant's central argument, namely that Article 5(1)(c) precludes any detention of a person for his own protection. If correct, s. 38(1)(a)(vi) and, in so far as it authorises detention for own protection, (b)(ii) would be incompatible with Article 5, as would the relevant provisions in the Bail Act 1976.

30. He then addressed the question of whether the detainee's own protection was "a valid reason for continuing to detain a person held on suspicion of having committed an offence under Article 5(1)(c)".

31. He accepted Mr Hermer's starting point, namely that the list in Article 5(1) of cases in which a person may be deprived of his liberty is exhaustive and to be narrowly interpreted. However, he did not accept the proposition that from these premises it followed that no detention will be compatible with Article 5 if the reason why it is considered necessary to resort to detention is not expressly mentioned in Article 5(1):

> "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…"

A custody officer might take the view that the arrested person would be likely to attend court even if released. If she decided to refuse bail for some other reason, the detention is still "effected for the purpose of bringing him before the competent legal authority" because attendance before a criminal court is the "intended end point of the detention". The detainee is intended to be brought promptly before a court (see *S v Denmark* [2019] 68 EHRR 17 ("*S v Denmark*") (at [137])). This explained why most of the recent cases in which compliance with the "purpose" requirement had been contentious had been cases of detention in order to prevent the commission of offences in the future i.e. cases in which the intended end point was not a criminal trial.

32. The Judge added that it did not follow that pre-trial detention would necessarily be compatible with Article 5: in addition to the "purpose" requirement and the need for continuing reasonable suspicion that the detainee had committed an offence, the express words of Article 5(3) and the case law interpreting it demonstrated that there were also requirements that there be "relevant and sufficient" reasons for detention (relying on *S v Denmark* at [77]). Against this background, reasoned the Judge, the conclusion in *IA* that "own protection" was in principle capable of supplying a "relevant and sufficient" reason, adopted in *Buzadji* at [88], was in no way anomalous. The fact that *IA* and *Buzadji* were dealing with complaints under Article 5(3) provided no compelling answer to this analysis, since Article 5(1)(c) "must be read together with Article 5(3), with which it forms a whole" (relying on *Lawless v Ireland (No 3)* (1979-80) 1 EHRR 15 ("*Lawless*") at [14]).

33. The Judge stated that his interpretation flowed from the language used, interpreted in accordance with the Strasbourg and domestic authorities. It was also consistent with the need (recognised by the courts) to avoid making it "impracticable for the police to fulfil their duties of maintaining order and protecting the public" (relying on *Austin v Commissioner of the Police of the Metropolis* [2009] UKHL 5; [2009] 1 AC 564 ("*Austin 1*") at [34]; *Austin v UK* [2012] 55 EHRR 14 *("Austin 2*") at [56]; *R (Hicks) v*

Commissioner of the Police of the Metropolis [2017] UKSC 9; [2017] AC 256 ("*Hicks*") at [29] and [38]; *S v Denmark* at [116] and [123]).

34. He therefore concluded 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) on the basis that it is necessary for his own protection".

35. He turned to his next question, namely under what circumstances "own protection" detention would be permissible under Article 5(1)(c). Based on the guidance in *IA* (at [108]), international law and the general principle that consideration should be given to alternatives to detention (see *S v Denmark* (at [77]), the Judge identified three limitations. He stated that detention for own protection will be permissible:

    i) only for a short period of time, the precise length of which would depend on the circumstances;

    ii) 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";

    iii) only if there are no reasonably available means other than detention to afford protection.

36. On the facts here, the Judge was satisfied that the appellant's detention, which he accepted had been effected primarily for his own protection, was compatible with Article 5. It was for a short period; there were exceptional circumstances; although there was no express consideration of protective measures short of detention, it was difficult to see how it would have been possible to devise and implement such measures in the very short overnight period in question.

37. The Judge also noted that the additional concern that the appellant might himself commit offences, as was conceded for the appellant, was also a valid reason to detain him.

38. In these circumstances, the claim was dismissed.

Grounds of appeal

39. Three grounds of appeal are advanced:

    i) The Judge erred in concluding that s. 38(1)(a)(vi) and (b)(ii) of PACE were not incompatible with Article 5. Those provisions purport to authorise a deprivation of liberty outwith the purpose for which such a deprivation may lawfully be effected pursuant to Article 5(1)(c) (Ground 1);

    ii) The Judge erred in concluding that the appellant's detention on 22/23 February 2012 was not incompatible with his rights under Article 5. The primary basis for that detention was s. 38(1)(a)(vi) and (b)(ii) of PACE and, for the reasons given in Ground 1, that is a deprivation of liberty outwith the purpose for which such a deprivation may lawfully be effected pursuant to Article 5(1)(c) (Ground 2);

iii) In the alternative, if the Judge was correct that detention for one's own protection is compatible with Article 5(1)(c), the Judge erred in concluding that, on the evidence which was before him, the appellant's detention was justified on that basis.

Overview of the parties' submissions

The appellant's position in summary

40. For the appellant, the exhaustive nature of the exceptions in Article 5 is emphasised, and they are to be interpreted narrowly (see *S v Denmark* at [73] and *Secretary of State for the Home Department v JJ and others* [2007] UKHL 45; [2008] 1 AC 385 at [5] and [35]). Only in one case, *Hassan v United Kingdom* (Application No 29750/09) 16 September 2014 (GC) ("*Hassan*") (followed by two Supreme Court decisions arising out of similar factual circumstances: *Al-Waheed v Ministry of Defence* [2017] AC 821 and *Serdar*), has the European Court of Human Rights been willing to entertain a justification for detention falling outside those specified in Article 5(1)(a) to (f). The approach in *Hassan* (which arose in the context of international armed conflict and the Third and Fourth Geneva Conventions) can have no arguable relevance to the facts of the present case.

41. Against this background, the primary position for the appellant is simple: the appellant's detention was effected for the purpose of his own protection. Detention for that purpose is not permitted under Article 5(1)(c), which only permits detention if its purpose is to bring the person before the court.

42. The respondent's counter-argument is said to require an interpretation of purpose that is divorced from the actual reason for detention. It is contrary to the plain and natural meaning of the phrase "effected for the purpose of", which must refer to the active reason for detention. Those words are to be construed according to their ordinary meaning in their context and in the light of the object and purpose of the provision from which they are drawn. The court is to have regard to the fact that the context of the provision is a treaty for the effective protection of individual human rights, taking into account any relevant rules and principles of international law applicable in relations between contracting states (see *Saadi v United Kingdom* (Application No 13229/03) 29 January 2008; 2008 47 EHRR 17 ("*Saadi*") at [61]). The respondent's interpretation requires an unnatural reading of the words and is inconsistent with the requirement to protect against arbitrary detention.

43. More particularly under Grounds 1 and 2 it is said:

i) That the Judge gave an overly expansive meaning to the words "effected for the purpose" of bringing someone before the competent legal authority. The effect of his construction is to obviate the need for any inquiry as to the reason for a deprivation of liberty at all – at least where it may be expected (in a basic temporal sense) that the person may be brought before a competent legal authority at some time after the deprivation of liberty. The Judge's analogy (of deciding to take the tube to travel to work) is inapposite: in that example, both walking and taking the tube are actions designed to bring about the outcome of getting to work). Detention in one's own interests or for one's own protection

is not designed to bring someone before the court. Whether or not the detained person is subsequently brought before a court is logically distinct and separate;

ii) That the Judge erred in deriving any support for his expansive approach to Article 5(1)(c) from the decisions in *IA* and *Buzadji*. Those decisions addressed the question of whether the protection of the detainee was a relevant and sufficient reason for the length of pre-trial detention (for the purpose of Article 5(3)); they did not provide any support for the proposition that the protection of the detainee provided a lawful basis for a deprivation of liberty under Article 5(1) (either as an independent ground or through an expansive reading of Article 5((1)(c)). Indeed, so much was explicit in *Buzadji* at [84] where the exhaustive nature of the exceptions in Article 5(1)(a) to (f) was affirmed. Article 5(3) is to be read *subject* to Article 5(1) – it presumes that detention has already been effected for a lawful purpose. Where detention is not effected for that purpose, Article 5(3) cannot apply. It is in this sense that Article 5(1)(c) and Article 5(3) are to be read together (per *Lawless* at [14]);

iii) That the Judge's approach was contrary to principle, given the fundamental principle that the exceptions in Article 5(1) are exhaustive and to be interpreted strictly. The Judge acknowledged this principle and yet adopted a contrary approach. His approach amounted to a "reading-in" to Article 5(1) of a basis for depriving a person of their liberty which is simply not to be found on the face of the provision. It was an approach also contrary to accepted principles concerning the detention of juveniles. Both the Convention on the Rights of the Child 1989 (at Article 37(b)) and the United Nations Standard Minimum Rules for the Administration of Juvenile Justice (1985) ("the Beijing Rules") (at Article 13.1) provide that the detention of a child is a measure of last resort;

iv) On the facts here, given that the primary reason for detention was the appellant's own protection, the decision to refuse him police bail was unlawful.

44. Mr Hermer challenges the Judge's suggestion that the authorities supported a "flexible" interpretation of Article 5 for present purposes. The authorities (such as *Lawless*, *Ostendorf v Germany* (Application No. 15598/08, 7 March 2013) ("*Ostendorf*"), *S v Denmark*, *Hicks* and *Austin 1*) are said to reveal a flexibility in only two limited sets of circumstances: i) in determining whether detention amounted to a deprivation of liberty at all and ii) in the context of the second limb of Article 5(1)(c) (i.e. detention for the purpose of preventing the commission of an offence). Each of the three limbs has to be treated separately and independently. There have to be cogent reasons for a flexible approach. The policy reasons behind a flexible approach in relation to the second limb of Article 5(1)(c) (i.e. preventive detention), where there is only a binary option, are that the police must be allowed properly to carry out their duties in maintaining public order. Those considerations do not arise in relation to the first limb of Article 5(1)(c) (i.e. reasonable suspicion of having committed a crime). A custody officer considering the detention of a child in his or her own interests is not faced with any binary option, but a much more nuanced situation.

45. It is submitted that there is no hint in the authorities that the flexibility appropriate in preventive detention cases is of any wider application; indeed, the authorities in fact illustrate a lack of flexibility in interpreting the requirement that detention must be "for the purpose of bringing a person before the competent legal authority". The Judge's

conclusion amounted to a "radical extension" of the jurisprudence and was inconsistent with long-established and fundamental principles of human autonomy, particularly acute considerations in the case of a child.

46. The appellant's alternative position in Ground 3 argues that in any event the Judge was wrong to find on the evidence before him i) that the facts of the appellant's case were "exceptional" requiring own protection detention and ii) that there were no reasonably available means other than detention to afford protection to the appellant. The burden of establishing the "pre-conditions" identified by the Judge at [50] to [52] of the Judgment lies with the respondent (see *S v Denmark* at [77]).

47. Police Sergeant Smith had no recollection of the appellant or his detention. Thus, the Judge found, the only reliable evidence of consideration of the reasons for detention were the contemporaneous records. Those records revealed no consideration at all as to either exceptionality or alternatives to detention. There was no proper basis on which the Judge could remedy these central shortcomings.

48. Further, on exceptionality, the appellant had been at liberty for five days since the incident without any indication of threat to safety; unlike the position in *IA*, this was not a case of any specific threat having been made. In relation to alternatives to detention, the Judge found that there had been no express consideration given. There was absolutely no basis on the facts for the Judge's observation that it was difficult to see how it would have been possible to devise and implement alternative measures in the very short overnight period in question.

49. Put shortly, the inferences drawn by the Judge were contrary to the evidence (which was at best neutral on both questions) and wrong in principle, given the heavy burden on the respondent to establish the lawfulness of the deprivation of liberty. It was wrong to give the benefit of the doubt to the detainer.

<u>The respondent's position in summary</u>

50. In her position as set out in writing, the respondent seeks essentially to uphold the Judge's decision for the reasons that he gave. The corollary of the appellant's position is that a denial of bail on the basis of concerns about a juvenile's safety could never be compatible with Article 5 if not expressly mentioned there. That is said to be not only counter-intuitive but "plain wrong".

51. It is submitted that any approach to interpretation should be influenced heavily by the principled need to avoid arbitrary detention. Equally, Article 5 is to be interpreted flexibly and not in a way as to make it impracticable for the police to fulfil their duties of maintaining order and protecting the public. It would be illogical to take into account an underlying purpose of the deprivation of liberty, such as protection of the public (which does not feature expressly in Article 5) when determining whether in a preventive detention case Article 5 is even engaged, but not to do so when determining compatibility once it is engaged. *IA* and *Buzadji* offer some "limited support" for the proposition that detention for own protection can be Article 5 compliant where the detention is short and where Article 5(3) provides a safeguard on the length of detention in any event.

52. As to the particular matters advanced for the appellant:

i) The attempt to create a distinction between an own protection criterion and bringing the detainee before the court is artificial (see *Hicks* at [36]). The Judge's reasoning that the end point of the detention where bail is refused is an appearance before a criminal court is entirely consistent with *Hicks, Austin 1* and *S v Denmark*. There the courts have given an "expansive interpretation", holding that the purpose requirement of bringing a detainee before the court bites for so long as the fear of the possible commission of an offence exists. The qualification is implicitly dependent on the cause for detention continuing long enough for the person to be brought before the court;

ii) The sense of *IA* is that the court was considering grounds beyond the second limb of Article 5(1)(c). In any event, it would be logically inconsistent for an own protection criterion to be capable of justifying the length of detention but not detention in the first place;

iii) The Judge was aware of the fundamental principle that the list of justifications in Article 5 is exhaustive and to be interpreted narrowly. He was right to conclude that the case law permitted a flexible reading so as to allow the police to fulfil their duties, with the requirement that a deprivation of liberty based on own protection would need to be exceptional and fact specific.

53. In response to Ground 3 the respondent's position is that, had the appellant wished to raise these matters, the appropriate and fair course would have been for him to require PS Smith to be called for cross-examination. In any event, the Judge was entitled to find that the circumstances were exceptional and to infer, as a matter of likely reality, that alternative protective measures were not reasonably available.

54. In his oral submissions, Mr Warnock advanced a different line of defence which focussed not on Article 5(1) but Article 5(3). This is not, he suggests, an Article 5(1)(c) case at all[3], and the appellant is "looking at it the wrong way". There is no dispute that the appellant was lawfully arrested and then lawfully placed in custody within Article 5(1)(c). The question is whether there were factors which justified the appellant's continued detention under Article 5(3). Mr Warnock emphasises the opening words of s. 38 which refer to the ordering of "release from police detention". The custody officer is reviewing whether or not detention should continue. Detention for own protection is a factor justifying continued detention, as is clear from *IA* (at [108]). Continued detention was justified within the terms of Article 5 read as a whole.

55. Developing this line of argument, Mr Warnock submits:

i) The lawful arrest and detention of a person on suspicion of having committed an offence falls within Article 5(1)(c) and meets its requirements including of detention for the purpose of bringing that person before a competent legal authority (see *S v Denmark* at [118]). The position is *a fortiori* when the arrested person is charged and given a court hearing date;

[3] Reference is made to *Buzadji* at [61] where, as it is suggested should be the case here, the court found it more appropriate to examine the complaint under Article 5(3) than under Article 5(1).

ii) There comes a point when the detention must be reviewed. Domestically, that point is reached upon charge under s. 38;

iii) The reasons for (continued) detention identified in s. 38 are in accordance with the jurisprudence of the Convention and as reviewed and summarised by the Grand Chamber in *Buzadji*;

iv) Detention for own protection has been held in *IA* as being a sufficient reason for detention to continue. The court in *Buzadji* endorsed that decision;

v) The Judge was therefore correct in his conclusion that the continued detention on the basis of own protection was in principle capable of being justified under Article 5(1)(c) and (3).

56. For the respondent it is said that the fact that the appellant was a child at the time makes no material difference, and it would be perverse if the same power did not exist for children. There is no dispute that the Convention must be interpreted in accordance with relevant Treaty obligations; the Judge had those obligations in mind. The domestic legislation gives effect to international obligations. The fact that a child who poses a risk only to him or herself must be referred to the local authority (under s.38(6)) does not mean that exercise of the power of detention for own protection can never be necessary. It is important to remember that, even when in the care of the local authority under s. 38(6), the child is still in police detention. In short, there is nothing in s. 38(6) to render s. 38(1) incompatible with Article 5.

The appellant's response to Mr Warnock's oral submissions

57. Mr Hermer fairly points out that Mr Warnock's approach (that this is in fact an Article 5(3), and not an Article 5(1) case) was not that adopted by the respondent below, nor had it been advanced in any written submissions on appeal. However, he took no procedural objection, confirming that he was in no difficulty responding to it. He described the respondent's position as "wholly misconceived": the default position in s. 38(1) is an entitlement to liberty. Thus the exercise being carried out when considering detention under s. 38 is not a review falling under Article 5(3) but a decision on detention under Article 5(1) which, in Mr Hermer's words, was "not a one hit wonder". It bound the custody officer when exercising his powers under s. 38. In any event, a decision by the custody officer could not engage Article 5(3) because, as is common ground, the custody officer was not a judicial officer within the meaning of Article 5(3) (see *Magee v The United Kingdom* (Applications nos. 26289/12 and 2 others) ("*Magee*") at [80] and onwards).

The domestic legislation: PACE, Part IV and s.38

58. PACE was introduced following the recommendations of the report of the Philips Royal Commission on Criminal Procedure published in 1981. Its purpose was to unify police powers under one code of practice and to balance carefully the rights of the individual against the powers of the police. It thus contains inbuilt safeguards designed to ensure that the rights and liberties of the individual are protected. Code A also now includes specific reference to the Children Act 2004 (and specifically s. 11 which requires chief police officers to ensure that in the discharge of their functions they have regard to the need to safeguard and promote the welfare of all persons under 18).

59. Despite its safeguards, PACE was controversial at the time of its introduction, as it was thought to give considerable extra powers to the police; and various reviews[4] have been conducted over the years since the introduction of the legislation. However, the basic structure of the PACE and its accompanying Codes of Practice have stood the test of time. In particular, PACE has been regarded as successful in standardising and professionalising police work.[5] PACE was modified significantly by the Serious Organised Crime and Police Act 2005 which replaced nearly all existing powers of arrest and introduced a new general power of arrest for all offences. In December 2007 the PACE Review Board, now renamed the Policing Powers Strategy Board, was established to provide independent oversight of the consultation processes.

60. The powers of the police to detain a person arrested for an offence are conferred and regulated by Part IV of PACE (ss. 34 to 51). An arrested person shall not be kept in police detention other than in accordance with Part IV (see s. 34(1)). By s. 34(2), the custody officer must order a person's immediate release if at any time the custody officer becomes aware that the grounds for the detention of that person have ceased to apply and the custody officer is unaware of any other grounds on which the continued detention of that person could be justified under Part IV.

61. S. 37 sets out the duties of the custody officer before charge. The custody officer must 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. S. 37(1) empowers the custody officer to detain that person for such period as is necessary to enable the officer to do so. If there is insufficient evidence, the person arrested must be released (see s. 37(2)); if the custody officer has reasonable grounds for believing that the person's detention without charge 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, the custody officer may authorise the person arrested to be kept in police detention (see s. 37(3)).

62. S. 38 sets out the duties of the custody officer after charge. Implicit is the assumption that the original arrest and detention were lawful. The section provides materially as follows:

> "**38 Duties of custody officer after charge**
>
> (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

[4] See for example *Report of the Joint Home Office/Cabinet Office Review of the Police and Criminal Evidence Act 1984*, 2002; Consultation Paper, '*Policing: Modernising Police Powers to Meet Community Needs',* August 2004*;* Consultation Paper, *'Modernising Police Powers',* March 2007; Government proposals in response to the Review of the Police and Criminal Evidence Act 1984.

[5] Joint Review, 2002, Executive Summary, para 5.

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;

…

(6) Where a custody officer authorises an arrested juvenile to be kept in police detention under subsection (1) above, the custody officer shall, unless he certifies-

(a) that, by reason of such circumstances as are specified in the certificate, it is impracticable for him to do so; or

(b) in the case of an arrested juvenile who has attained the age of 12 years, that no secure accommodation is available and that

> keeping him in other local authority accommodation would not be adequate to protect the public from serious harm from him,
>
> secure that the arrested juvenile is moved to local authority accommodation."

63. Thus, under s. 38(1)(a), where an adult who has been arrested (without a warrant endorsed for bail) is charged, the custody officer must release him or her unless one of the exhaustive conditions apply. The same rules apply to arrested juveniles, save that an arrested juvenile may also be denied release on the broader ground that it is reasonably believed to be in his/her own interests to do so.

64. S. 38(6) makes special provision for juveniles who are to be kept in police detention to be moved to local authority accommodation. A local authority in receipt of a police request under s. 38(6) to receive a juvenile is under a duty to receive and provide accommodation for the child, regardless of whether or not the juvenile is within its area at the time of the request (see s. 21(2) of the Children Act 1989). However, there is no absolute duty on the local authority to provide secure accommodation where such accommodation is requested, merely a duty to provide accommodation; the local authority has a discretionary power to provide secure accommodation which should be exercised in so far as it was practicable to do so to further the policy objective of preventing children from being detained in police cells (see *R(M) v Gateshead Metropolitan Borough Council* [2006] EWCA Civ 221; [2006] Q.B. 650 at [41] to [43]; *R(BG) v Chief Constable of West Midlands Constabulary and Birmingham City Council* [2014] EWHC 4374 (Admin) ("*BG*") at [32]-[35]).

65. Where a custody officer is not satisfied with the proposed arrangements of the local authority for the secure detention of a juvenile, the custody officer is entitled to refuse to transfer that juvenile into the care of the local authority. This is particularly so if the only accommodation available for the detention of the juvenile is insufficient to avoid the very consequences which led to the original decision to refuse bail (see *Chief Constable of Cambridgeshire, ex p Michel* [1990] 91 Cr App R 325 (DC) at 505D-G and 506D-G).

Article 5

66. Article 5 provides as follows:

> "**Right to liberty and security**
>
> 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[6] detention of a person effected for the purpose of[7] 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, drug addicts or vagrants;
>
> (f) the lawful arrest or detention of a person to prevent his effecting an unauthorised entry into the country of or of a person against whom action is being taken with a view to deportation or extradition.
>
> 2. Everyone who is arrested shall be informed promptly, in a language which he understands, of the reasons for his arrest and of any charge against him.
>
> 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.
>
> 4. Everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful.
>
> 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."

67. Article 5 thus protects the "right to liberty and security" of the person. It is not concerned with mere restrictions on liberty of movement, which are governed by Article 2 of Protocol No 4. The "paradigm case" of a deprivation of liberty is confinement in a cell (see for example *Austin 1* at [18], [20], [41] and [52] and *Austin 2* at [59]).

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[6] The French version of Article 5 refers to the lawful arrest and detention: "s'il a été arrêté en vue d'être conduit devant l'autorité judiciaire compétente, lorsqu'il y a des raisons plausibles de soupçonner qu'il a commis une infraction ou qu'il y a des motifs raisonnables de croire à la nécessité de l'empêcher de commettre une infraction ou de s'enfuir après l'accomplissement de celle-ci »

[7] The phrase "for the purpose of" is an English translation of the phrase "en vue de". The phrase "en vue de" also appears in Article 5(1)(b) but is translated as (the arguably less purposive) "in order to".

68. Fundamentally, Article 5 enshrines the right of the individual not to have his or her liberty interfered with arbitrarily by the state. The notion of "arbitrariness" in Article 5 extends beyond lack of conformity with national law; thus a deprivation of liberty may be lawful in terms of domestic law but nevertheless still arbitrary and contrary to the Convention. There is no single or "global" definition of what amounts to "arbitrariness" for the purposes of Article 5. Rather, key principles have been developed on a case-by-case basis; what may or not amount to arbitrariness is context-dependent and may vary depending on the type of detention involved (see *Saadi* at [67] and [68]; *S v Denmark* at [75]).

69. One such principle is that detention will be arbitrary where, despite complying with the letter of national law, there has been an element of bad faith or deception on the part of the authorities (see, for example, *Bozano v. France*, 18 December 1986, Series A no. 111; [1987] EHRR 297 at [59]; *Čonka v. Belgium*, no. 51564/99, ECHR 2002-I at [39] and [41]; *S v Denmark* at [76]). In *Saadi* (at [74] it was held that, to avoid being branded as arbitrary, detention under Article 5(1) must be carried out in good faith and its length should not exceed that reasonably required for the purpose pursued (see also *Austin 1* at [33]).

70. The condition that there be no arbitrariness further demands that both the order to detain and the execution of the detention must genuinely conform with the purpose of the restrictions permitted by the relevant sub-paragraph of Article 5(1) (see *Winterwerp v The Netherlands* no. 6301/73, (1979) 2 EHRR 387 ("*Winterwerp*") at [39]; *Bouamar v. Belgium* no. 9106/80, (1987) 11 EHRR 1 (*"Bouamar"*) at [50] and *O'Hara v. the United Kingdom* no. 37555/97, (2002) 34 EHRR 32 at [34]). There must in addition be some relationship between the ground of permitted deprivation of liberty relied on and the place and conditions of detention (see *Bouamar* at [50]; *Aerts v. Belgium* no. 25357/94, (2000) 29 EHRR 50 at [46] and *Enhorn v. Sweden* [2005] ECHR 56529/00 at [42]).

71. Beyond a consideration of arbitrariness, a number of general principles in relation to Article 5 as a whole can be stated uncontroversially as follows:

    i) Article 5 is of the highest importance "in a democratic society" within the meaning of the Convention and in the first rank of the fundamental rights that protect the physical security of an individual (see *Medvedyev v France* (2010) 51 EHRR 39 ("*Medvedyev*") at [76];

    ii) Three strands may be identified as running through the Strasbourg case law: a) 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; b) the repeated emphasis on the lawfulness of the detention, procedurally and substantively, requiring scrupulous adherence to the rule of law; and c) the importance of the promptness or speediness of the requisite judicial controls under Articles 5(3) and (4) (see *Medvedyev* at [117]; *S v Denmark* at [73]; *Magee* at [73]);

    iii) All persons are entitled to the protection of the right under Article 5, that is to say, not to be deprived, or continue to be deprived, of their liberty, save in accordance with the conditions specified in Article 5(1) (see *Medvedyev* at [77]);

iv) The list of exceptions to the right to liberty secured in Article 5(1) is an exhaustive one, and only a narrow interpretation of those exceptions is consistent with the aim of that provision (see *Medvedyev* at [78]; *Austin 2* at [60]; *Ostendorf* at [65]);

v) Where the "lawfulness" of detention is in issue, including the question whether "a procedure prescribed by law" has been followed, the Convention refers essentially to national law but also, where appropriate, to other applicable legal standards, including those which have their source in international law. In all cases it establishes the obligation to conform to the substantive and procedural rules of the laws concerned, but it also requires that any deprivation of liberty be compatible with the purpose of Article 5, namely, to protect the individual from arbitrariness (see *Medvedyev* at [79]);

vi) Where deprivation of liberty is concerned, it is particularly important that the general principle of legal certainty be satisfied. The conditions for deprivation of liberty under domestic and/or international law must be clearly defined and the law itself must be foreseeable in its application, so that it meets the standard of "lawfulness" set by the Convention, a standard which requires that all law be sufficiently precise to avoid all risk of arbitrariness and to allow the citizen—if need be, with appropriate advice—to foresee, to a degree that is reasonable in the circumstances of the case, the consequences which a given action may entail (see *Medvedyev* at [80]).

The Strasbourg and domestic case law
The preventive detention authorities

72. Recent Strasbourg and domestic jurisprudence has examined the compatibility of cases of detention in order to prevent the commission of offences in the future under the second limb of Article 5(1)(c) with the additional requirement that detention must be "effected for the purpose of bringing them before the competent legal authority" ("the purpose requirement"). Where there may be no intention at all to bring the detainee before a competent legal authority, it may at first blush be difficult to see how detention in such circumstances can satisfy the purpose requirement.

73. Two separate lines of authority emerged within the Strasbourg jurisprudence. The first held that Article 5(1)(c) only permits deprivation of liberty in connection with criminal proceedings and governed by pre-trial detention, and not custody for preventive purposes without the person concerning being suspected of having *already* committed a criminal offence (see for example the majority opinion in *Ostendorf*). This approach rested on the purpose requirement, namely that the person's detention was to be effected "for the purpose of bringing him before the competent legal authority", and the requirement in Article 5(3) that the person was to "be brought promptly before a judge" and was "entitled to a trial within a reasonable time". Reliance was also placed on previous case law to this effect, traced back to *Ciulla v Italy* no. 11152/84, (1991) 13 EHRR 16 as affirmed in *Jėčius v. Lithuania* no. 34578/97, (2002) 35 EHRR 16 and *Epple* and *Schwabe and M.G* nos. 8080/08 and 8577/08, 59 EHRR 28. A statement to similar effect can be found in *Hassan* at [97]).

74. The alternative strand concluded that preventive detention, even if effected outside the context of criminal proceedings, can be permissible under Article 5(1)(c) (see for example *Lawless* and *Guzzardi v Italy* (1981) 3 EHRR 333).

75. *Lawless* deserves particular mention. It concerned the internment without trial of members of the IRA by the Irish Government. The applicant was detained for five months, without being brought before a judge, under legislation which gave to ministers special powers of detention without trial, whenever the government published a proclamation that the powers were necessary to secure the preservation of peace and order. The government argued that such detention was permitted by the second limb of Article 5(1)(c), which was not qualified by the words "for the purpose of bringing him before the competent legal authority" and therefore was also not within Article 5(3). The European Court of Human Rights (ECtHR) rejected that argument, stating that the expression qualifies every category of case of arrest or detention referred to in Article 5(1)(c) including therefore limb 2. The ECtHR reasoned that paragraph Article 5(1)(c) can be construed only if read in conjunction with Article 5(1)(3), stating at [14]:

> *"*…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. Paragraph 3 stipulates categorically that 'everyone arrested or detained in accordance with the provisions of paragraph 1(c) of this Article shall be brought promptly before a judge .. .' and 'shall be entitled to trial within a reasonable time'; it plainly entails the obligation to bring everyone arrested or detained in any of the circumstances contemplated by the provisions of paragraph 1(c) before a judge for the purpose of examining the question of deprivation of liberty or for the purpose of deciding on the merits. Such is the plain and natural meaning of the wording of both paragraph 1(c) and paragraph 3 of Article 5."

76. The ECtHR also held that the government's interpretation would permit the arrest and detention of a person suspected of an intent to commit an offence for an unlimited period on the strength merely of an executive decision, and that this, with its implications of arbitrary power, would lead to conclusions repugnant to the fundamental principles of the Convention.

77. In *Ostendorf* the tension between these two opposing positions came starkly to the fore. The applicant was known to the police as a suspected football hooligan and gang leader. The police arrested him under public security legislation which permitted the police to take a person into custody if necessary to prevent the imminent commission of a criminal or regulatory offence of considerable importance to the general public. He was taken to a police station and released one hour after the game finished, when it was considered that the risk of violence had passed. He complained that his arrest and detention violated his rights under article 5. The court was divided as to whether or not his detention under Article 5(1) was lawful.

78. At [88] the majority opinion stated:

> "The Court is aware of the importance, in the German legal system, of preventive police custody in order to avert dangers to the life and limb of potential victims or significant material damage, in particular, in situations involving the policing of large groups of people during mass events, as set out by the Government (see paragraph 54 above). It reiterates that Article 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 Article 5, which is to protect the individual from arbitrariness…"

79. The majority considered that the applicant's detention could be justified under Article 5(1)(b) but not Article 5(1)(c), which it concluded only permits deprivation of liberty in connection with criminal proceedings. The applicant's detention was purely preventive. Further, the majority held that the purpose of bringing the person before a court must be for the purpose of trial, and not just for the purpose of determining the legality of his preventive detention.

80. By contrast, the minority considered that the applicant's detention could be justified under Article 5(1)(c), but not under Article 5(1)(b). It reasoned that the case law to the effect that preventive detention under Article 5(1)(c) was permissible only in the context of criminal proceedings, for the purpose of bringing a person before the competent legal authority on suspicion of his having committed an offence, derogated from *Lawless* and went too far. The minority considered that later case law had unduly restricted the purpose of bringing the detainee before the court to "deciding on the merits" of the criminal charge and had done away with the possible purpose of "examining the question of deprivation of liberty". It favoured a return to the *Lawless* line of authority.

81. In terms of pragmatic implementation, consistent with [88] of the majority judgment in *Ostendorf* and at around the same time, the Strasbourg court in *Austin 2* highlighted the importance of ensuring that the police have a degree of discretion to enable them to carry out their duties practically. In *Austin 2* the application of Article 5(1) in the context of the "kettling" by the police on public order grounds was considered for the first time. The court concluded by a majority that there had been no violation of Article 5.

82. In particular for present purposes, the Strasbourg court emphasised (at [53]) that the Convention "is a living instrument which must be interpreted in the light of present-day conditions and of the ideas prevailing in democratic states today", although that was not a charter for creating new rights outside the Convention, whittling down an existing right or creating new exceptions or justifications not expressly recognised in the Convention. The court went on to state (at [55]) that, in assessing whether a domestic authority had complied with a positive obligation to take preventive operational measures, account must be taken of the difficulties in policing modern societies, the unpredictability of human conduct and the operational choices which must be made in terms of priorities and resources. At [56] it continued:

> "As the Court has previously stated, the police must be afforded a degree of discretion in taking operational decisions. Such decisions are almost always complicated and the police, who

> have access to information and intelligence not available to the general public, will usually be in the best position to make them…Police forces in the contracting states face new challenges, perhaps unforeseen when the Convention was drafted, and have developed new policing techniques to deal with them, including containment or "kettling". Article 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 art.5, which is to protect the individual from arbitrariness."

83. In *Hicks,* some four years after the majority and minority judgments in *Ostendorf,* the Supreme Court signalled its clear preference for the minority approach to Article 5(1)(c). In *Hicks* the claimants were arrested in central London on the morning of a royal wedding on the ground that their arrests were necessary to prevent anticipated breaches of the peace. They were detained for between two and a half and five and a half hours and subsequently released without charge and without having been brought before the Magistrates' Court. At [29] and [30] Lord Toulson highlighted the complementary twin requirements of the need to protect the individual from arbitrary detention underlying Article 5 and the need not to interpret Article 5 in such a way as would make it impracticable for the police to perform their duty to maintain public order and protect the lives and property of others:

> "In balancing these twin considerations, it is necessary to keep a grasp of reality and the practical implications…"

84. At [31] Lord Toulson stated:

> "In this case there was nothing arbitrary about the decisions to arrest, detain and release the appellants. They were taken in good faith and were proportionate to the situation. If the police cannot lawfully arrest and detain a person for a relatively short time (too short for it to be practical to take the person before a court) in circumstances where this is reasonably considered to be necessary for the purpose of preventing imminent violence, the practical consequence would be to hamper severely their ability to carry out the difficult task of maintaining public order and safety at mass public events…"

85. Referring to the fact that the Strasbourg case law as to how such preventive power could be accommodated within Article 5 was "not clear and settled", Lord Toulson held that the view of the minority in *Ostendorf* was correct:

    i) The approach of the majority collapsed the second limb under Article 5(1)(c) into the first and was inconsistent with *Lawless;*

    ii) It would be perverse if it were the law that, in order to be lawfully able to detain the person so as to prevent their imminently committing an offence, the police

must harbour a purpose of continuing the detention, after the risk had passed, until such time as the person could be brought before a court with a view to being bound over to keep the peace in future. This would lengthen the period of detention and place an unnecessary burden on court time and police resources;

iii) In order to make coherent sense and achieve the fundamental purpose of Article 5, the qualification on the power of arrest or detention under Article 5(1)(c), contained in the words "for the purpose of bringing him before the competent legal authority", is implicitly dependent on the case for detention continuing long enough for the person to be brought before the court. In the case of an early release from detention for preventive purposes, it is enough for guaranteeing the rights inherent in Article 5 if the lawfulness of the detention can subsequently be challenged and decided by a court.

86. In the subsequent case of *S v Denmark* the Grand Chamber settled the debate in the Strasbourg jurisprudence. Like the Supreme Court, it firmly endorsed the minority approach in *Ostendorf. S v Denmark* also concerned the detention of football hooligans prior to a match. The Grand Chamber confirmed, pursuant to *Lawless,* that the purpose requirement applies to all categories of cases referred to in Article 5(1)(c). However, (at [118]) it acknowledged:

> "…that this requirement is to be interpreted and applied with a certain flexibility when the intention which once existed of "bringing the applicant before the competent legal authority" does not materialise for some reason. The fact that an arrested person was neither charged nor brought before a judge does not necessarily mean that the purpose of his or her detention was not in accordance with art.5(1)(c)…"

87. The Grand Chamber went on to conclude (at [126]) that when a person is released from preventive detention after a short period of time, either because the risk has passed or, for example, because a prescribed short time-limit has expired, the purpose requirement of bringing the detainee before the competent legal authority should not as such constitute an obstacle to short-term preventive detention falling under the second limb of Article 5(1)(c).

88. At [125] the Grand Chamber stated:

> "…in respect of short-term preventive detention the requirement "for the purpose of bringing [the detainee] before the competent legal authority" implicitly depends on the cause of detention continuing long enough for the person to be brought before a court. In this regard, the Court considers that the question whether the purpose requirement has been complied with should depend on an objective assessment of the authorities' conduct, in particular whether the detainee, as required by art.5(3) is brought promptly before a judge to have the lawfulness of his or her detention reviewed or is released before such time. Furthermore, in the event of failure to comply with the latter requirement, the person concerned should have an enforceable right to compensation in accordance with para.5 of art.5."

89. The Grand Chamber emphasised that the Convention should be interpreted and applied flexibly in recognition of the need to deal specially with such serious challenges as were at issue. At the same time:

> "127…it should be stressed that any flexibility in this area is limited by important safeguards embodied in art.5(1), notably the requirements that the deprivation of liberty be lawful, in keeping with the purpose of protecting the individual from arbitrariness, that the offence be concrete and specific as regards, in particular, the place and time of its commission and its victims and that the authorities must furnish some facts or information which would satisfy an objective observer that the person concerned would in all likelihood have been involved in the concrete and specific offence had its commission not been prevented by the detention. Such flexibility is further circumscribed by the requirement that the arrest and detention be "reasonably considered necessary". Moreover, in assessing the scope of that requirement, regard may be had to the extent to which the measures affect interests protected by other rights guaranteed by the Convention."

90. Having considered the "additional safeguards" under Articles 5(3) and (5), the Grand Chamber concluded at [137] as follows:

> "…The Grand Chamber finds that it is necessary to clarify and adapt its case-law under sub-para.(c) of art.5(1), and in particular to accept that the second limb of that provision can been as a distinct ground for deprivation of liberty, independently of the first limb. Although the "purpose" requirement under art.5(1)(c) applies also to deprivation under the second limb of this provision, this requirement 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. Furthermore, in the event of failure to comply with the latter requirement, the person concerned should have an enforceable right to compensation in accordance with art.5(5). In other words, subject to the availability under national law of the safeguards enshrined in art.5(3) and (5), the purpose requirement ought not to constitute an obstacle to short-term detention in circumstances such as those at issue in the present case."

91. In summary therefore, a number of relevant principles can be derived (at least in the context of preventive detention cases):

i) Article 5(1)(c) is to be read in conjunction with Article 5(3), with which it forms a whole (see *Lawless* at [14]; *Medvedyev* at [123]; *Ostendorf* at [68]; *Buzadji* at [86]);
ii) Article 5(1)(c) authorises detention of a person on three separate limbs: (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. Detention on any of these limbs must be "effected for the purpose of bringing him before the competent legal authority" (see *Lawless* at [14]; *S, v and A v Denmark* at [105], [106], [118] and [137]);

iii) When interpreting the scope of its exceptions, Article 5 must not be interpreted in such a way as would make it impracticable for the police to perform their duty to maintain public order and protect the lives and property of others, provided that the police comply with the fundamental principle underlying Article 5, namely, to protect the individual from arbitrary detention (see *Hicks* at [29] and *S v Denmark* at [116] and [123]);

iv) The purpose requirement must be interpreted and applied with a certain flexibility. In cases of preventive detention it requires 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 (see *Hicks* at [38] and *S v Denmark* at [125] and [[137]);

v) 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) (see *Lawless* at [14]; *S v Denmark* at, [129] and [137]; *Magee* at [75]).

Article 5(3) authorities

92. In relation to Article 5(3), the following principles can be derived from the authorities:

i) The purpose of Article 5(3) is to ensure that arrested persons are physically brought before a judicial officer promptly. Such automatic expedited judicial scrutiny provides an important measure of protection against arbitrary behaviour, incommunicado detention and ill-treatment (see *Medvedyev* at [118]; *Magee* at [74]);

ii) Article 5(3), as part of this framework of guarantees, is structurally concerned with two separate matters: the early stages following an arrest, when an individual is taken into the power of the authorities, and the period pending any trial before a criminal court, during which the suspect may be detained or released with or without conditions. These two limbs confer distinct rights and are not on their face logically or temporally linked (see *Medvedyev* at [119]; *Magee* at [75]);

iii) Taking the initial stage under the first limb, there must be protection through judicial control, of an individual arrested or detained on suspicion of having committed a criminal offence. Such control serves to provide effective safeguards against the risk of ill-treatment, which is at its greatest in the early stages of detention, and against the abuse of powers bestowed on law enforcement officers or other authorities for what should be narrowly restricted purposes and exercisable strictly in accordance with prescribed procedures. The judicial control must satisfy the requirements of promptness, automatic nature of review and be carried out by a judicial officer (see *Medvedyev* at [120]-[124]; *Magee* at [76]);

iv) Since Article 5(1)(c) forms a whole with Article 5(3) "competent legal authority" in paragraph 1(c) is a synonym, of abbreviated form, for "judge or other officer authorised by law to exercise judicial power" in (3) (see *Magee* at [80]).

93. Two authorities addressing Article 5(3) considerations, namely *IA* and *Buzadji,* have been the subject of particular focus on this appeal.

94. In *IA* the Strasbourg Court considered the legality of the detention on remand by the French authorities of a man detained on suspicion of the murder of his wife. The applicant complained of the excessive length of his detention on remand and alleged a breach of Article 5(3). The period of detention on remand which fell to be taken into account lasted just over 5 years and 3 months. One of the grounds cited intermittently in the orders by the French authorities for the continued remand of the applicant was "the need to protect the applicant".

95. In considering whether the pre-trial detention of an accused person had exceeded a reasonable time[8], the Court held at [102] that:

> "The persistence of reasonable suspicion that the person arrested has committed an offence – a point which was 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…" (emphasis added)

96. The Strasbourg Court then considered the various grounds relied upon by the French authorities to justify the length of the continued detention of the applicant. On the own protection ground, the Court stated at [108]:

> "The Court accepts that in some cases the safety of a person under investigation requires 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."

97. In *Buzadji* the Grand Chamber (at [88]) cited this passage with approval. The need to protect the detainee was deemed a "relevant and sufficient" reason for continued detention (in addition to the existence of reasonable suspicion).

The protection of children

98. Children occupy a unique place in the criminal justice system and require additional protections. Children brought into police custody are in a particularly vulnerable

[8] In the context of preventive detention, the Court in *S v Denmark* at [134] found that, "generally speaking, release "at a time before prompt judicial control" should be a matter of hours rather than days".

position, not only by virtue of their age, but also because of the circumstances which brought them into contact with the police (*Concordat on Children in Custody*, p 3).

99. The Interveners, which support the appellant's position on appeal, helpfully drew the court's attention to international material which makes it clear that at the heart of any decision-making involving children must be the best interests of the child[9]; and that pre-trial detention of minors is a measure of last resort, and where strictly necessary only (see the United Nations Convention on the Rights of a Child ("the UNCRC"): Articles 3, (best interests), 9 (separation of children from parents), 37 (children in detention) and 40 (children in the criminal justice system); the Beijing Rules: 10.2, 10.3, 13.1 and 13.2; the Guidelines of the Committee of Ministers of the Council of Europe on Child-Friendly Justice at [73] and [74] of the explanatory memorandum).

100. The UNCRC principles are also analysed and developed in General Comments of the United Nations Committee on the Rights of the Child. The General Comments have been described as "the most authoritative guidance now available" (see *R (SG and Others) v Secretary of State for Work and Pensions* [2015] UKSC 16; [2015] 1 WLR 1449 ("*SG*") at [105] echoing Lady Hale's description a decade earlier in *R (Williamson) v Secretary of State for Education and Employment* [2005] 2 AC 256 at [84] and [86]).

101. General Comment No 14 underlines the rigour required when undertaking a "best interests" analysis for a child. There must be formal processes, with strict procedural safeguards, designed to assess and determine the child's best interests for decisions affecting the child, including mechanisms for evaluating the results:

> "….the justification of a decision must show that the right has been explicitly taken into account. In this regard, States parties shall explain how the right has been respected in the decision, that, what has been considered to be in the child's best interests; what criteria it is based on; and how the child's interests have been weighed against other considerations, be they broad issues of policy or individual cases."

102. The consideration of the best interests of the child becomes all the more acute in the context of children in the justice system, as General Comment No 24 identifies. Pre-trial detention should be primarily for ensuring appearance at the court proceedings and if the child poses an immediate danger to others. If the child is considered a danger (to him or herself or others), child protection measures should be applied. Pre-trial detention should be subject to regular review and its duration should be limited (see [87]). A child deprived of liberty is not to be placed in a centre or prison for adults, as there is "abundant evidence" that this compromises their health and basic safety and their future ability to remain free of crime and to reintegrate (see [92]).

103. It is uncontroversial that the Convention must be interpreted in line with these international obligations, which are binding in domestic law. This has been confirmed in both Strasbourg and domestic authority (see *Güveç v Turkey no. 70337/01*, 20 January 2009 at [108]-[109]; *Nart v Turkey* no. 20817/04, 6 May 2008 ("*Nart*") at [31]; *ZH (Tanzania) v Secretary of State for the Home Department*) [2011] UKSC 4, [2011] 2 AC 166 at [21]; *SG* at [83]-[84]).

[9] "Child" and not "juvenile" or "minor" is the term favoured by the Interveners.

104. English domestic law already recognises that police cells are not a suitable place for children. As set out above, s. 38 and s. 21 of the Children Act 1989 are a complementary set of provisions which together mandate the police to request local authorities to provide accommodation for children in most circumstances when bail is refused. PACE requires the transfer of children who have been charged and denied bail to more appropriate local authority accommodation, with a related duty under s. 21 of the Children Act 1989 for local authorities to accept these transfers. S. 11 of the Children Act 2004 requires both police and local authorities to have regard to the welfare and protection of children. Its purpose is to incorporate within domestic law the spirit of the United Kingdom's international obligations toward children stated in Article 3.1 of the UNCRC (see *Castle v Commissioner of Police of the Metropolis* [2011] EWHC 2317 (Admin) at [51]; *BG* at [32]-[36], [50]).

105. Together, s. 38 and s. 21 of the Children Act 1989 make clear that there are *"very limited circumstances to justify the detention of children at police stations"* (see the Letter from the Secretary of State for the Home Department and the Secretary of State for Education to local authorities in England, January 2015). Most recently, in October 2017, the Government published guidance for police forces and local authorities regarding their respective statutory obligations (*Concordat on Children in Custody*).

106. The Interveners also drew attention to other safeguards for children who are in need of protection or welfare support. S. 25 of the Children Act 1989 imposes restrictions on the use of secure accommodation used to restrict the liberty of children being looked after by local authorities. The criteria which must be satisfied in order to authorise such restrictions of liberty have been described as *"stringent criteria"* (see *In re M (A Child)* [2018] EWCA Civ 2707 at [7]). There are detailed criteria, time limits, and safeguards and requirements imposed, alongside those set out in the Children (Secure Accommodation) Regulations 1991/1505. Section 25 has also been held to be Article 5 compliant in the context of detention for the purpose of educational supervision under Article 5(1)(d) (see *Re K (Secure Accommodation Order: Right to Liberty)* [2001] Fam 377).

The Turkish Cases

107. A series of cases emanating from Turkey demonstrate the importance of ensuring the presence adequate safeguards in the context of the detention of children. It suffices to refer to two of them.

108. In *Nart* the ECtHR expressed its misgivings about the practice of detaining children in pre-trial detention. The court found a violation of Article 5(3) of the Convention in circumstances where a Turkish national, who was 17 years old at the time, was held in detention on remand in prison for 48 days. The court took into account the wealth of important international texts and highlighted "that the pre-trial detention of minors should be used only as a measure of last resort; it should be as short as possible and, where detention is strictly necessary, minors should be kept apart from adults" (see [31]). The court reached its conclusion on the basis, amongst other things, that the authorities had failed to take the applicant's age into consideration and the fact that the applicant was kept in a prison together with adults (see [33]).

109. Similarly, in *Güveç* the ECtHR considered the length of the 15-year-old applicant's detention on remand – amounting to 4 years, 7 months and 15 days – to be excessive

and in violation of Article 5(3). The Court observed that the Government had not argued that alternative methods had been considered first and that his detention had been used only as a measure of last resort, in compliance with their obligations under both domestic law and a number of international conventions. In addition, there were no documents displaying concern about the length of the applicant's detention. Indeed, the lack of any such concern by the national authorities in Turkey as regards the detention of minors was evident in the reports of the international organisations (see [108]).

110. Having considered the background and the relevant legal landscape we turn now to the Grounds of Appeal.

Ground 1

111. The overarching question in this appeal is whether the detention of a person for their own protection, pursuant to ss. 38(1)(a)(vi) and 38(1)(b)(i) of PACE, is compatible with Article 5 of the Convention.

112. There are three preliminary points to make. First, though the young age of the appellant is relevant to the assessment of the facts and circumstances of this case, it does not affect the fundamental question of principle that arises. Secondly, there is a difference in the wording of ss. 38(1)(a)(vi) and b(ii) (necessary for own protection/ought to be detained in own interests). Nothing turns on that difference in wording in this case however and none of those making submissions before us suggested that it did. Though the "own interests" provision may have a somewhat wider ambit than "own protection", if for example, the appellant was liable to be stabbed if released on bail, his continued detention would be in own interests as well as for own protection. Thirdly, it should be expressly noted that is conceded in this case that the appellant was lawfully detained on the basis that there was a substantial risk of him committing further offences if released on bail (the lawfulness of his detention on this basis was originally challenged in the Particulars of Claim, but that claim is no longer pursued).

Can the detention of an individual pursuant to ss. 38(1)(a)(vi) and b(i), ever be lawful under Article 5?

113. A key point of departure between the parties' submissions concerns the 'purpose' of a person's detention. The appellant characterises 'own protection' as an invalid 'purpose' for the detention of an individual on the basis that it is not referred to in Article 5(1). In support of this, he relies, firstly, on the notion that the exceptions to the general principle that no individual shall be deprived of their liberty contained in Article 5 are exhaustive (see *Buzadji* at [84]). Secondly, he rejects the submission that the Strasbourg Court has endorsed a flexible approach to Article 5(1)(c) as a whole. Cases such as *S v Denmark*, *Ostendorf*, *Hicks* and *Austin I* are relevant only to the second limb of Article 5(1)(c). In such cases, he says, there are strong policy justifications for allowing a more flexible approach which are not relevant to the first limb. He further submits that *IA* and *Buzadji* offer no support for an expansive approach to Article 5(1)(c) as they concern the separate issue of whether the length of pre-trial detention for a person's own protection is reasonable, rather than whether 'own protection' can provide a basis for detention.

114. By contrast, the respondent views 'own protection' as a legitimate justification for the continued detention of an individual who is being detained for the purpose of bringing

him before a competent legal authority. She submits that the Judge was justified in balancing the need to interpret the exceptions contained in Article 5 narrowly, with the need to allow a flexible reading, in favour of the latter. As far as the 'purpose' of the detention is concerned, the respondent contends that the distinction advanced by the appellant – between 'own protection' and the bringing the individual before a court – is artificial (*Hicks*, [36]). It is self-evident that an individual arrested on reasonable suspicion of having committed an offence will be detained for the purpose of bringing them before a competent legal authority, so long as that reasonable suspicion persists.

115. As far as the present case is concerned, we do not accept the appellant's characterisation of the "own purpose" criterion as a standalone basis for his continued detention. For the avoidance of doubt, "own protection" cannot justify the detention of an individual in circumstances where none of the limbs of Article 5(1)(c) are made out. This accords with the established principle that the list of exceptions contained in Article 5 is exhaustive and is to be interpreted narrowly (see *S v Denmark* at [73] and *Secretary of State for the Home Department v JJ and others* [2007] UKHL 45; [2008] 1 AC 385 at [5] and [35]). Yet this is not the central issue between the parties. The appellant wrongly seeks to place the present case in this category by ignoring the existence of a legitimate underlying basis for his detention, i.e. a reasonable suspicion of his having committed an offence.

116. To bring the present analysis into focus, the true question is whether an individual can be kept in police custody for reasons of their own protection, provided that the police have a reasonable suspicion that they have committed an offence. The broader question of whether a person can be kept beyond the initial period was considered by the Strasbourg Court in *Buzadji*. Whilst Article 5(1)(c) contains the grounds on which pre-trial detention may be permissible in the first place, Article 5(3), with which it forms a whole, lays down certain procedural guarantees. The following well-established passage from [87] of the judgment in *Buzadji* can be traced back to earlier decisions such as *IA, B v Austria* (1991) 13 EHRR 20 and *Letellier v France* (1992) 14 EHRR 83:

> "The persistence of reasonable suspicion that the person arrested has committed an offence – a point which was 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."

117. It is not suggested that the "lapse of time" argument is engaged on the facts of this case. The case for the appellant is that his own interests could not provide any justification for any lawful detention, however short.

118. Article 5(1) says that no one shall be deprived of his liberty save in the following cases (which are specified) and in accordance with a procedure prescribed by law. Article 5(1)(c) is the relevant specified case, i.e. detention for purpose of bringing him before the competent legal authority on reasonable suspicion of having committed an offence; another limb of Article 5(1) is when detention is necessary for the purposes of

preventing him from committing an offence. Both limbs apply here. The effect of Article 5(3) is to require that the detained person must be brought before the court promptly. No one suggests that this did not happen in this case. The appellant was, on any view, produced promptly because he was produced before the Youth Court, the morning following his arrest and detention. That court then refused bail presumably because it was satisfied that one of the exceptions to the right to bail applied, albeit the court log is now no longer available.

119. In our view, it is clear that reading Articles 5(1)(c) and Article 5(3) together, a person can be detained for a period between their initial arrest and their production before the court, provided detention is in accordance with a procedure prescribed by law (and therefore not arbitrary), and provided the detainee is brought before the court promptly. This is confirmed by Article 5(4) which provides a remedy for the detainee if the lawfulness of his detention is not decided speedily by a court. The relevant procedure prescribed by law in the present case is that laid down in s. 38 of PACE, which specifies the duties of the relevant custody officer ("Duties of Custody Officer after Charge"): see para 62 above. The particular provisions engaged here are s. 38(1)(a)(vi) for an adult; and section 38(1)(b)(i) and/or (ii) for a juvenile. On the evidence, we consider it was lawful, both as a matter of domestic law, and under Article 5 of the Convention, to continue to detain the appellant pursuant to those provisions.

120. The fallacy of the appellant's argument is the attempt to treat the appellant's interests as wholly divorced from the need to bring him before the court. To spell it out, the reasons for the appellant's detention were two-fold: the substantial risk that he may commit further offences and because it was in his own interests (see para 23 above). The matter was succinctly encapsulated by Police Sergeant Smith in his first witness statement: "it was feared that if he was released he may sustain further injuries or inflict violence upon his original intended victim."

121. We do not accept that any of this process was incompatible with Article 5 so as to constitute arbitrary detention. There is nothing arbitrary about continuing to detain a suspect in the circumstances summarised by Police Sergeant Smith, i.e. continuing to detain someone who is otherwise lawfully detained for the purpose of production before the court, if releasing him puts his life at serious risk, something which would of course defeat the purpose of bringing him before the court. All this is in our view, entirely consistent with the approach of the ECtHR in *IA* at [108] approved in *Buzadji* at [88]*:* see paras 95 to 97 above.

122. The passages from the cases cited above provide the basis for the principles, correctly identified by the Judge. Such detention will only be permissible: for a short period of time (*IA* at [108]); 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 (*IA* at [108]); and only if there are no reasonably available means other than detention to afford protection (*S v Denmark* at [77]). These safeguards reflect the fundamental importance of the need to protect individuals from arbitrary deprivation of their liberty.

123. For these reasons we conclude that the continued detention of an individual for their own protection, where there exists a reasonable suspicion of his having committed an offence, is not inherently contrary to Article 5 of the Convention. It follows that s.

38(1)(a)(vi) of PACE, which concerns the continued detention of an arrested adult for reasons of his own protection, is not incompatible with Article 5.

124. We should focus now on the position of juveniles. We have already identified and discussed the various instruments and legal provisions to which we were referred: see paras 99 to 106 above. In *Nart* at [31] the ECtHR said that "the pre-trial detention of minors should be used only as a last resort" confirming thereby that the pre-trial detention of minors is not inherently contrary to the Convention.

125. The Court in *Nart* as set out above, stipulated three limitations: first, as already indicated, pre-trial detention should be a measure of last resort; second, such detention should be as short as possible; third, where detention is strictly necessary, children should be kept apart from adults. In the context of considering the safeguarding of juveniles, and in the light of what the Judge said at [50] to [53] we should make the following points. It seems clear to us, from what was said both in *Nart* and in *IA*, that (self-evidently) detention of juveniles for own protection pre-trial should be the exception, and not the rule and the facts and circumstances relating to each individual decision to do so, must be rigorously considered to ensure the limitations stipulated in *Nart* are respected. It is in those circumstances, and it is in that sense that we can endorse what was said by the Judge below

> "Under what circumstances will "own protection" detention be permissible under Article 5(1)(c)?"
>
> 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] 2AC 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."

126. It follows from the above, that ss. 38(1)(a)(vi) and 38(1)(b)(i) of PACE are not incompatible with Article 5 of the Convention. Accordingly Grounds 1 and 2 of the appeal must be rejected.

Ground 3

127. This brings us to Ground 3 of the appeal, namely, did the Judge err in concluding that on the evidence before him, the appellant's detention was justified?

128. This requires a consideration of the following questions:

i) Was there a reasonable suspicion that the appellant had committed an offence which persisted through his detention?

ii) Did the review of the basis of the appellant's detention, at which it was determined that he could be further detained for reasons of his own protection, happen promptly after his arrest?

iii) Did the 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, exceptionally, justify the detention?

iv) Were there any reasonably available alternative means to afford protection (i.e. was detention used only as a last resort)?

v) Was the appellant's detention for a short period of time (i.e. as short as possible)?

vi) Was the appellant kept separate from adults?

129. We consider the Judge was both entitled and right to answer these questions in the affirmative.

130. The appellant was arrested on the morning of his detention (22 February 2012) on suspicion of violent disorder contrary to s. 2(1) and (5) of the Public Order Act 1986 and possession of an offensive weapon contrary to s. 1(1) of the Prevention of Crime Act 1953, following an incident in Woolwich five days earlier. He was charged with both offences that evening at 7.45pm. It is no part of the appellant's case to challenge the lawfulness of his detention to that point. The proceedings were eventually discontinued on 13 April 2012. Although the appellant originally claimed in these proceedings that he was wrongfully identified as a perpetrator of a crime and wrongfully arrested, and prosecuted, this now forms no part of his case. It follows, as we have already said, that it is no longer challenged that the police reasonably suspected him of having committed the offences throughout the period of his detention.

131. The period of time relevant to this question starts with the moment at which the person is deprived of their liberty: see *Buzadji*, [97]. In the present case, this was the moment the appellant was arrested. The review of his initial period of detention happened at 7.53pm on 22 February 2012, at which point he was refused bail for reasons, amongst others, of his own protection. We are satisfied that the review happened promptly, and the appellant does not now suggest otherwise. Thereafter, the appellant was placed in a cell on his own, monitored throughout the night, for most of which he was asleep, and kept separate from adults.

132. As to the specific circumstances, at [58] of the judgment below, as the Judge said:

> "..[A]lthough 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 [appellant]on a consideration of the specific circumstances and context of the offence and not merely on generic considerations. The offences with which the [appellant]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 [appellant] 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[appellant] 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 [appellant's] solicitors wrote to an officer at Plumstead Police Station pointing out that the [appellant] was at risk of attack, given his involvement in the proceedings in which two gang members were convicted."

133. With regard to protective measures short of detention, we consider the Judge was right for the reasons he gave at [59]:

> "..[A]lthough 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 [appellant'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…"

134. In our view, on this particular issue, the Judge should also have taken into account Police Sergeant Smith's second witness statement (a point raised by the respondent, in its Respondent's Notice). The Judge said that he placed no weight on that statement because of Police Sergeant Smith's lack of recollection of the appellant's case. Police Sergeant Smith did however recollect and was clearly able to give evidence about the lack of secure accommodation for juveniles, that is, he was entitled to give evidence based on his general experience as a custody officer that there was no secure accommodation available for juveniles in the local area at the material time. Moreover, he had made an unequivocal statement that there was no viable alternative (see para 23 above). If this was to be challenged by specific matters within the appellant's own knowledge, as to which the appellant bore the evidential burden, Police Sergeant Smith should have been required to attend for cross-examination. But this the appellant did not require him to do. In our view this was not fair to the respondent or to Police

Sergeant Smith, whose conduct was, after all, alleged to have justified exemplary damages, in a claim brought and litigated many years after the event, and which had only lately been reduced to a very small part of the claim as originally formulated.

135. As to the length of the detention, the appellant was detained overnight and brought before the court at the earliest opportunity the following morning. Once the decision had been taken that he should be detained, the period of detention could not have realistically been shorter than it was. The Judge dealt with this at [57] and said detention was for a short period overnight until the appellant had been brought to Court. He was clearly correct in his overall conclusion that the necessary criteria were fulfilled.

136. Our overall conclusion therefore is that giving the fullest weight to the special considerations that apply to the pre-trial detention of a juvenile, we would also reject Ground 3.

Conclusion

137. It follows that for the reasons given above, we would dismiss the appeal.