Neutral Citation Number: [2015] EWHC 3691 (Admin)

Case No: CO/5494/2015

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
DIVISIONAL COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 17/12/2015

Before:
THE LORD CHIEF JUSTICE OF ENGLAND AND WALES
THE HON. MR JUSTICE OPENSHAW
THE HON. MRS JUSTICE CARR DBE

- -

Between:

B, N, O, Q, R, U, V (FORMER SOLDIERS)	**Claimants**
- and -	
THE CHIEF CONSTABLE OF THE POLICE SERVICE OF NORTHERN IRELAND	**Defendant**

- -
- -

Mr James Lewis Q.C. and Mr Ben Watson (instructed by **Devonshires**) for the **Claimants**
Mr Jonathan Hall Q.C. (instructed by the **Government Legal Department acting as agents for the Crown Solicitor for Northern Ireland**) for the **Defendant**

Hearing date: Thursday 26th November 2015

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Approved Judgment

Lord Thomas of Cwmgiedd CJ, Openshaw and Carr JJ:

Introduction and summary

1. On 30 January 1972 13 civilians were killed and 14 injured in Londonderry when members of the British armed forces opened fire with live rounds. The incident, commonly known as Bloody Sunday, has been the subject of numerous investigations, including the Inquiry chaired by Lord Saville which produced a report on 15th June 2010.

2. Since then the defendant, the Chief Constable of the Police Service of Northern Ireland ("the PSNI"), has conducted through the PSNI Legacy Investigation Branch a criminal investigation into those same events under the superintendence of Detective Chief Inspector Harrison ("DCI Harrison"). As we explain at paragraph 48, the Inspectorate of Constabulary has made clear its view that investigations into the actions of the British army should be conducted as ordinary criminal inquiries.

3. DCI Harrison's evidence to the court was that, as a result of the investigations carried out, there are reasonable grounds to suspect the claimants, all former British soldiers who served with the 1st Battalion of the Parachute Regiment, of having committed serious criminal offences, including murder and attempted murder. A decision was taken by the PSNI to interview them under caution.

4. The PSNI wished for that purpose to arrest each of the claimants in the jurisdiction of England and Wales where they all reside and transfer them to the separate jurisdiction of Northern Ireland for the interviews. It is common ground that under the applicable statutory provisions (s.137 of the Criminal Justice and Public Order Act 1994 ("the 1994 Act") and Article 26 of the Police and Criminal Evidence (Northern Ireland) Order 1989 as amended) (which we describe in more detail at paragraphs 11 and following), they can only be arrested for the purpose of interviewing them if the officer wishing to effect the arrest has reasonable grounds for believing that arrest is necessary to allow the prompt and effective investigation of the offences or the conduct of any of the claimants.

5. Each of the claimants accepts that under the statutory provisions the PSNI could arrest them in England and Wales in order to charge them. However, as each has offered an undertaking that he will co-operate and attend interview under caution at a police station in England and Wales and an interview can be carried out as the documentation is held electronically, each contends that the test of necessity is not met and such an arrest would therefore be unlawful.

6. After an application to Ouseley J, the PSNI has agreed to delay the exercise of its powers under s.137 of the 1994 Act until this court has considered the issue as to whether the PSNI can lawfully effect the arrests. This involves a two stage test: (1) the actual belief by the PSNI that an arrest was necessary and (2) judged objectively, the decision to arrest was made on reasonable grounds. Three reasons were put forward by DCI Harrison in his evidence as to why an arrest for this purpose was necessary (see paragraphs 0- 41 below).

7. As to the first stage of the test, we will proceed on the basis of an assumption in the PSNI's favour that these were reasons DCI Harrison subjectively believed were grounds justifying the arrests as necessary for the purposes of investigating the offences (see paragraph 0).

8. However, on the second stage of the test, we unhesitatingly conclude the reasons advanced did not provide reasonable grounds for the decision to arrest any of the claimants as being necessary to allow the prompt and effective investigation of the offence or the conduct of the claimants. Our reasons are set out at paragraphs 52 - 68 below. In summary, they are:

   (1) Each of the claimants has offered and will be required to give an undertaking to the court that they will attend for interview in a police station in England and Wales and be interviewed. Each has co-operated with all previous proceedings and investigations, namely at the time and in the immediate aftermath of Bloody Sunday with the Royal Military Police, in the associated inquest proceedings, Lord Widgery's inquiry in 1971 and the later Saville inquiry. Each of the claimants gave evidence before Lord Saville in what was a lengthy and detailed process, following an undertaking by the Attorney General of England and Wales dated 22 February 1999, the terms of which are set out more fully at paragraphs 31-32 below.

   (2) The documentation necessary for the interviews is held in electronic format. Such documentation can be put to the claimants at interview in England and Wales. The practice of the PSNI of putting to witnesses original documents of the type in issue in this case is outmoded and cannot form any justification for an arrest.

   (3) The present position of the claimants is that each will exercise their right to silence in the interviews. It is, in our view, almost impossible to foresee that any will depart from that position. The interviews are therefore likely to be short and straightforward.

   (4) The claimants have made clear that they will undertake to the court that they will attend for interview. They will attend and be interviewed under an obligation which will be enforced by this court; they cannot therefore at any stage decide to leave without being in breach of the undertaking.

   (5) There is no basis on which the possibility of imposing post-interview bail conditions could be a reason justifying the need for arrest now.

   (6) If interviewed in Northern Ireland they would not be able to return to their homes during the interview period, but would have to be detained for their own safety in conditions of close custody. Even if so detained, there would remain a risk to their safety.

9. We therefore have concluded that on the claimants each giving to the court the undertaking offered, the court will declare that the arrest of that claimant for the purpose of interview under caution would be unlawful. Further provision has been made for Soldier O because of his serious medical condition (see paragraphs 0- 45).

The relevant legislative framework and applicable legal principles

10. It is convenient first to set out the relevant legislative framework and the applicable legal principles.

(a) The relevant legislative framework in relation to arrest in England and Wales for cross border offences

11. S.137 of the 1994 Act provides materially as follows:

> "137. **Cross-border powers of arrest etc**.
>
> …
>
> (3) If the conditions applicable to this subsection are satisfied, any constable of a police force in Northern Ireland who has reasonable grounds for suspecting that an offence has been committed or attempted in Northern Ireland and that the suspected person is in England or Wales or in Scotland may arrest without a warrant the suspected person wherever he is in England or Wales or in Scotland…
>
> …
>
> (6) The conditions applicable to subsection (3) above are –
>
> (a) that the suspected offence is an arrestable offence; …
>
> (7) It shall be the duty of a constable who has arrested or, as the case may be detained, a person under this section…
>
> …
>
> (b) if he arrested him in England or Wales, to take the person arrested … to the nearest convenient designated police station in Northern Ireland or to a designated police station in Northern Ireland in which the offence is being investigated;…
>
> (9) In this section— 'arrestable offence' has the same meaning as in the Police and Criminal Evidence (Northern Ireland) Order 1989 ('the 1989 Order';'designated police station' has the same meaning as in the Police and Criminal Evidence Act 1984 or, in relation to Northern Ireland, as in the 1989 Order; and 'constable of a police force', in relation to Northern Ireland, means a member of the Royal Ulster Constabulary or the Royal Ulster Constabulary Reserve…"

12. As set out above, "*arrestable offence*" is defined in s.137(9) by reference to the Police and Criminal Evidence (Northern Ireland) Order 1989 ("the 1989 Order"), where the relevant substantive article is Article 26. On 1 March 2007 the Police and Criminal Evidence (Amendment) (Northern Ireland) Order (SI 2007/288) repealed Article 26, substituting it with a new power of arrest without warrant, subject to certain new conditions. Although in dispute at one stage, by the time that the hearing before us commenced it was rightly common ground that the reference in s.137(9) to "*arrestable offence*" is now to be construed as a reference to Article 26 as amended in the 1989 Order ("Article 26"), which is engaged accordingly.

13. Article 26 provides materially as follows:

> "**Arrest without warrant: constables**
>
> 26. (1) A constable may arrest without a warrant—
>
> …
>
> (2) If a constable has reasonable grounds for suspecting that an offence has been committed, he may arrest without a warrant anyone whom he has reasonable grounds to suspect of being guilty of it…
>
> (4) But the power of summary arrest conferred by paragraph …(3) is exercisable only if the constable has reasonable grounds for believing that for any of the reasons mentioned in paragraph (5) it is necessary to arrest the person in question.
>
> (5) The reasons are—
>
> …
>
> (e) to allow the prompt and effective investigation of the offence or of the conduct of the person in question; …"

14. Article 26 is for present purposes in identical terms to s.24 of the Police and Criminal Evidence Act 1984 ("PACE"). It contains an exhaustive list of the reasons for which it can be judged necessary to arrest a suspect (see the judgment of Hughes LJ in *Hayes v Chief Constable of Merseyside Police* [2012] 1 WLR 517 ("*Hayes*") (at paragraph 14)). Again in the context of section 24 of PACE the Court of Appeal said in *Shields v Chief Constable of Merseyside Police* [2010] EWCA Civ 1281 ("*Shields*") (at paragraph 13) that the summary power was intended:

> "to be uniform, self-contained, clear and to strike an appropriate balance between, on one side, the need for protection of the public and proper enforcement of the criminal law and, on the other side, protection of the individual against undue interference with his liberty. The scheme takes into

> account the principles of article 5, which therefore do not require separate consideration. *Wednesbury* principles are also accommodated within the scheme by the requirements that where suspicion that a person is about to commit, is committing or has committed an offence, is relied on as the basis for the person's summary arrest, there must be reasonable grounds for the suspicion, and by the express limits on the exercise of the power of summary arrest contained in s 24(4) to (6). A police officer who carried out an arrest in bad faith, or in circumstances where his decision was irrational in the *Wednesbury* sense, would not be able to satisfy those provisions."

15. Like PACE, the 1989 Order is accompanied by Codes of Practice (recently re-issued following amendment on 1st June 2015): see the Police and Criminal Evidence (Northern Ireland) Order 1989 (Codes of Practice) Order 2015 (the NI PACE Codes). Code G of the Northern Ireland PACE Codes effectively mirrors Code G issued under PACE.

16. Code G of the Northern Ireland PACE Code provides materially as follows:

> "1.2 The exercise of the power of arrest represents an obvious and significant interference with the Right to Liberty and Security under Article 5 of the European Convention on Human Rights set out in Part I of Schedule 1 to the Human Rights Act 1998.
>
> 1.3 The use of the power must be fully justified and officers exercising the power should consider if the necessary objectives can be met by other, less intrusive means. Absence of justification for exercising the power of arrest may lead to challenges should the case proceed to court. It could also lead to civil claims against police for unlawful arrest and false imprisonment. When the power of arrest is exercised it is essential that it is exercised in a non-discriminatory and proportionate manner which is compatible with the Right to Liberty under Article 5. See Note 1B […]
>
> **(b) Necessity criteria**…
>
> 2.4 The power of arrest is only exercisable if the constable has reasonable grounds for believing that it is necessary to arrest the person. The statutory criteria for what may constitute necessity are set out in paragraph 2.9. It remains an operational decision at the discretion of the arresting officer as to:
>
> - which one or more of the necessity criteria (if any) applies to the individual;

- if any of the criteria do apply, whether to arrest, report for summons, grant street bail, issue a fixed penalty notice or take any other action that is open to the officer.

In applying the criteria, the arresting officer has to be satisfied that at least one of the reasons supporting the need for arrest is satisfied.

….

2.9

…

(e) to allow the prompt and effective investigation of the offence or of the conduct of the person in question. See Note 2E.

This may arise when it is thought likely that unless the person is arrested and then either taken into custody to a police station or granted 'street bail' to attend the station later, see Note 2J, further action considered necessary to properly investigate their involvement in the offence would be frustrated, unreasonably delayed or otherwise hindered and therefore be impracticable. Examples of such actions include:[…]

NOTES

2E The meaning of 'prompt' should be considered on a case by case basis taking account of all the circumstances. It indicates that the progress of the investigation should not be delayed to the extent that it would adversely affect the effectiveness of the investigation. The arresting officer also has discretion to release the arrested person on 'street bail' as an alternative to taking the person directly to the station. See Note 2J.

2F An officer who believes that it is necessary to interview the person suspected of committing the offence must then consider whether their arrest is necessary in order to carry out the interview. The officer is not required to actively question the suspect to determine whether they will attend a police station voluntarily to be interviewed but they must consider whether the suspect's voluntary attendance is a practicable alternative for carrying out the interview. If it is, then arrest would not be necessary. Conversely, an officer who considers this option but is not satisfied that it is a practicable alternative, may have reasonable grounds for deciding that the arrest Is necessary at the outset 'on the street'. Without such considerations, the officer would not be able to establish that arrest was necessary in order to interview…"

(b) The statutory test for necessity under Article 26(4) of the 1989 Order

17. In considering whether or not the PSNI had reasonable grounds for believing that the arrest of the claimants is necessary to allow the prompt and effective investigation of their alleged offences or conduct the relevant test is now well-established.

18. In *Hayes* Hughes LJ confirmed (at paragraphs 40 and 42) that the correct test is a two-stage one:

(1) the constable must actually believe that arrest is necessary, and for a subsection Article 26(5) reason; and

(2) objectively assessed on the information known at the time, the decision was made on reasonable grounds.

Where the liberty of the subject is at stake, the decision of police officers is open to review by the court. Whilst the expertise, knowledge and operational judgment of the police officers is to be respected, what is required is careful scrutiny by the court. The second stage of the test therefore amply protects the liberty of the subject.

19. A demonstration of the second objective limb of the test in action can be found in *Lord Hanningfield v Chief Constable of Essex Police* [2013] EWHC 243 (at paragraph 29):

> "On the other hand, an objective assessment still has to be made, albeit having regard to the factors which actually informed any decision made at the relevant time. Having rehearsed and reconsidered those factors, I have come to the conclusion that the requirement of 'necessity' as laid down by Parliament has not, on any realistic interpretation of the word, been met. Summary arrest was never going to have any impact on 'the prompt and effective investigation' of the claimant's credit card expenses. It is not for a judge to second-guess the operational decisions of experienced police officers, but in the circumstances of this case I cannot accept that there was any rational basis for rejecting alternative procedures, such as those adopted successfully by the Metropolitan Police. There were simply no solid grounds to suppose that he would suddenly start to hide or destroy evidence, or that he would make inappropriate contacts. There was only the theoretical possibility that he might do so. I can, therefore, see no justification for bypassing all the usual statutory safeguards involved in obtaining a warrant."

20. The PSNI submitted that it is well established that the courts are loath to interfere with such operational decisions, see in particular *R v Commissioner of Police of the Metropolis, Ex parte Blackburn* [1968] 2 Q.B. 118, in which Lord Denning MR stated (at 136):

> "Although the chief officers of police are answerable to the law, there are many fields in which they have a discretion with which the law will not interfere. For instance, it is for the Commissioner of Police of the Metropolis, or the chief constable, as the case may be, to decide in any particular case whether inquiries should be pursued, or whether an arrest should be made, or a prosecution brought. It must be for him to decide on the disposition of his force and the concentration of his resources on any particular crime or area. No court can or should give him direction on such a matter."

21. We do not seek to direct the PSNI to take any particular course of action – what inquiries to pursue, whether or not to make an arrest or bring a prosecution. Rather we are required to rule on the lawfulness of proposed arrests by scrutiny of the reasons in accordance with the principles we have set out.

22. The PSNI went further in submitting that the true question for the court was not the two-stage test identified above, but rather a traditional "reasonableness" review by reference to the principles laid down in *Associated Provincial Picture Houses Ltd v Wednesbury Corporation* [1948] 1 KB 223. Thus, the decision to arrest would be lawful if we were to conclude that a reasonable police officer in DCI Harrison's position could have reached the decision that arrest of the claimants was necessary for a prompt and effective investigation of the claimants' alleged offences.

23. We find no support for this contention in the recent authorities. Their effect is that the appropriate test is the two-stage one identified in *Hayes.* That approach incorporates the *Wednesbury* principle of review via the concept of reasonable grounds, brought forward from the previous law and extended to the new general requirement of necessity (see *Hayes* at paragraph 15 and *Joshua Shields (by his litigation friend Rebecca Shields) v Chief Constable of Merseyside Police* [2010] EWCA Civ 1281 at paragraph 13). There is no separate or overarching review based on *Wednesbury* principles to be carried out. The objective second limb of the test encompasses the concept of *Wednesbury* reasonableness.

24. The PSNI referred to *Bank Mellat v Her Majesty's Treasury (No 2)* [2014] AC 700. But that decision (in relation to foreign policy and national security in respect of which the Treasury was to be granted a very wide margin of decision making) provides no material assistance as to the correct test to be applied to a review being carried out in the wholly different context to the liberty of the subject.

25. Thus, whilst, as we have said, the specialist view of the police officer is to be taken into account by the court, the test is not to see whether or not that view could reasonably have been held by someone in his or her position. Rather the test is the two stage one confirmed in *Hayes*, with the objective element there to safeguard the liberty of the individual.

26. We turn next to consider the meaning of the words or phrases "*necessary*" and "*prompt and effective*". We accept that the concept of necessity must be assessed in context (see *In re Alexander's application for Judicial Review* [2009] NIQB 20 (*"In Re Alexander")* (at paragraph 18)). The bar for necessity cannot be set so high as to frustrate the legislative intention to facilitate cross border arrests in appropriate circumstances, but

nonetheless it must be met; it plainly requires more than merely desirable or more convenient to the arresting authority.

27. As for "*prompt and effective*", we are satisfied that the phrase, as a matter of ordinary language, is to be read conjunctively, and not disjunctively as the PSNI submitted. "*[A]nd*" does not mean "or" in this context. Indeed, Article 26(5)(e) expressly distinguishes the two concepts internally.

28. Whether or not an investigation is "*prompt*" must be considered in context, taking account of all of the relevant circumstances. This is reflected in Note 2E to Code G of the Northern Ireland PACE Code set out above. "*Effective*" is not the same as efficient or, for example, cost-effective. It means tending to achieve its purpose.

The evidence relating to the need for arrest

(a) The Saville Inquiry

29. In the 43 years since Bloody Sunday there have been two major inquiries into the events of that day: Lord Widgery's inquiry in 1972 and the Saville inquiry, which was established under the Tribunals of Inquiry (Evidence) Act 1921.

30. The Saville inquiry was announced on 29 January 1998 and its report published on 15 June 2010. During the course of that 12½ year inquiry, the Court of Appeal quashed the ruling that the claimants should give evidence in Londonderry, on the basis that requiring them to do so would breach their human rights under Article 2 of the European Convention on Human Rights (see *R (A and others) v Lord Saville of Newdigate and others* [2002] 1 WLR 1249).

(b) The Attorney General's undertaking to the Saville Inquiry in 2000

31. At the outset of the Saville enquiry, the Attorney General of England and Wales wrote to Lord Saville on 22 February 1999 setting out the terms of his undertaking to witnesses appearing before the inquiry as follows (and as announced in Parliament on 17 March 2000) :

> "An undertaking in respect of any person who provides evidence to the Inquiry, that no evidence he or she may give before the Inquiry relating to the events of Sunday 30 January 1972, whether orally or by written statement, nor any written statement made preparatory to giving evidence, nor any documents produced by that person to the Inquiry, will be used to the prejudice of that person in any criminal proceedings (or for the purpose of investigating or deciding whether to bring such proceedings) except proceedings where he or she is charged with having given false evidence in the course of this Inquiry or with having conspired with, aided, abetted, counsel, procured, suborned or incited any other person to do so"

32. The Attorney General concluded his letter by stating that:

> "although the undertaking is cast in terms which preclude the use of evidence given by a witness as the basis for a criminal investigation into the conduct of that witness, this does not amount to any form of immunity. If the question of granting immunity to any individual were to arise, I would need to consider that on an individual case basis."

(c) The offer by the claimants in 2015 to be interviewed in England and Wales

33. Following the commencement of the PSNI's new investigation, and as it became clear that the PSNI intended to interview the claimants, the claimants' solicitors informed the PSNI on 25 June 2015 that all of the claimants would co-operate in attending an interview and asking for confirmation that they would be given reasonable notice of any interview.

34. DCI Harrison, the officer in charge of the investigation, responded to the effect that he would ensure that prompt notification would be given should the decision be to interview the claimants. Since then, the claimants have repeated their willingness to co-operate and attend interviews on many occasions. They have offered an undertaking to the court.

35. When the claimants' solicitors became aware of the PSNI's plans to conduct interviews in November 2015, and that no decision had been taken as to the location of the interviews, they wrote to the PSNI on 23 October 2015. In that letter they explained the basis on which they would object to any arrest of the claimants as part of the investigation being conducted in Northern Ireland. They summarised the extent of the claimants' co-operation to date.

36. The claimants' solicitors sought an undertaking from the PSNI, as referred to above, that at least one working day's notice is given before any arrest. In the absence of a response, a formal pre-action letter was sent on 29 October 2015. The PSNI stated on 30 October 2015 that it was not in a position to provide the undertakings sought, as that could amount to a violation of its obligations under Article 6 of the ECHR. Following further exchanges, the present proceedings were commenced.

(d) The evidence in DCI Harrison's first statement

37. DCI Harrison's evidence in his statement of 20 November 2015 was that in his professional operational judgment it was necessary for the PSNI to arrest the claimants and to conduct the interviews in Northern Ireland. He stated that he had considered alternative options to arrest and transfer to Northern Ireland but had concluded that it was necessary for the interviews to be conducted in Northern Ireland to allow a prompt and effective investigation for three reasons which we set out in full:

> "First, considerations of operational effectiveness lead me to conclude that the interviews should take place in the jurisdiction where the investigation is based. The interview strategy will require a minimum of five officers to be deployed

to the interviews of each of the claimants. The interview process will involve the use of a volume of material, including a significant volume of paper records. Unsurprisingly, some of the material is sensitive. As the interviews develop, it may be necessary for further material to be collated and deployed. All of the relevant material is currently stored and accessible in Northern Ireland where the investigation team is based. In my judgment, in order to further objective of a prompt and effective investigation, it is important that this critical evidence gathering stage takes place in circumstances which properly allow the investigators to access the investigation's resources and to respond to any developments. This requires the interview process to take place in Northern Ireland.

In contrast, significant practical difficulties would arise if the PSNI were required to conduct interviews in England, having been prohibited from gathering evidence in the way I believe to be appropriate and effective. Conducting the interviews in England would require a significant and costly shift of the investigation's manpower and other resources out of Northern Ireland for a lengthy, but uncertain, period of time. Transporting the relevant interview material and storing it in England, particularly when the material contains sensitive information will raise significant issues relating to security, manpower and cost. Furthermore the investigators conducting the interviews would be remote from the centre of the investigation's resources and would not have ready access to them, as may be required. The overall result is that the investigation resources would be deflected and the investigators will be faced with practical constraints and a loss of flexibility.
…

Second whilst I have had regard to the Claimant's stated willingness to cooperate, and their history of cooperation, the fact is that a voluntary procedure would not enable the investigators to control, direct or structure the interview process with the certainty and effectiveness that I believe is necessary, particularly when the interview strategy involves interviewing seven individuals. Given the seriousness of the matters and investigation, and the complex nature of those matters, in my judgment it is not appropriate for the police, in undertaking this critical step in the evidence gathering stage of the investigation, to be dependent on the co-operation of the Claimants, and to remain dependent on that co-operation. The interview process is likely to be lengthy, and circumstances may develop. In my judgment to be effective, it is necessary for the police to be able to conduct the interviews in accordance with their interview strategy and to be in a position to control and manage events to ensure that this takes place. I believe this objective can only be achieved if the interviews take place under conditions of arrest.

> Third, whilst the course and outcome of any interviews with the claimants cannot be prejudges, it is likely I would wish to consider the imposition of post-interview bail conditions. This would not be possible if the interviews take place on a voluntary basis. In addition, if a decision were made to charge a claimant, it would be necessary for an arrest to be made, and for the claimant in question to be transferred to Northern Ireland. In this regard it is right to observe that there are seven separate claimants. The course of the interviews, the question of continued cooperation, and matters concerning bail and charging may be different in each case. In summary the investigation is likely to develop, and the timing of and factors involved in any developments cannot at this stage be identified with precision. In these circumstances, I consider the promptness and effectiveness of the investigation would be hampered if it is prohibited from making an arrest."

38. He also stated that the PSNI had given "very careful consideration" to the security of the claimants following arrest and transfer. There were a number of practices and procedures in place specifically designed to protect those in police custody. A specific risk assessed operational plan would be implemented throughout the period of transfer, proposed detention and the period post-detention, ensuring the secure return of any claimant to England. They will be transported and accompanied by police officers in appropriate vehicles, held in purpose-built secure police accommodation, with no interface with the public.

39. He assured the Court that the decisions to interview any claimant under caution have not been based on any statement made by that claimant to the Saville inquiry (or any matter which is the subject matter of the Attorney General's undertaking). The decision had been based on other material available to the investigation.

(e) The evidence contained in DCI Harrison's second statement

40. It was well known that the Saville Inquiry had been conducted using very sophisticated digitalisation of the evidence and a then state of the art IT programme (at a cost of some £13m). A DVD of much of the material was published with the report (including, audio tapes, expert reports, recordings, photographs, planning and intelligence material, press cuttings, maps, regimental journals, radio logs, statements and transcripts). We asked how this related to the first reason given by DCI Harrison and permitted him to file a second witness statement (dated 26 November 2015) to explain in more detail his first reason set out above.

41. The second statement contained very significant important further information:

(1) The Saville inquiry DVD in the possession of the PSNI contained original statements and exhibits;

(2) Of the statements on that DVD around 400–500 were redacted to remove names, addresses and in some cases rank;

(3) The unredacted statements are not held electronically by the PSNI at present, but could be uploaded to a secure electronic format;

(4) There are 300-500 further witness statements, and they are held on the HOLMES electronic system;

(5) It would be possible to conduct interview with the redacted statements but the invariable practice of the PSNI is to use original unredacted statements in interview.

(f) The position of Soldier 0

42. On 12 November 2015, some eight days before DCI Harrison's first witness statement, Soldier O's solicitors wrote to DCI Harrison putting him on notice of Soldier O's medical condition and requirements. He has suffered a number of strokes. A major stutter stroke lasting four days in October 2010 has left him paralysed in the right hand side of his body. He has since then suffered three further strokes, the most recent some eighteen months ago. He is on significant medication which carries multiple side effects. He has to use a quadripod walking stick for short distances, and an electric wheelchair for longer ones. He requires access to close bathroom facilities and will need urgent and immediate breaks.

43. The PSNI's response by letter dated 25 November 2015 was to confirm that the intention was to convey Soldier O, following his arrest, to a police station in England or Wales where he would have access to a "*forensic medical officer*". The position of Soldier O was not covered in the statement of DCI Harrison.

44. The decision to arrest Soldier O without asking for provision of medical evidence could in our view not be considered proper, let alone reasonable. It was simply wrong to suggest that the issue of his health could be dealt with after arrest by providing then for consideration of his condition by a forensic examiner.

45. At the hearing we expressed our grave concern at this conduct. We gave the PSNI time over the luncheon adjournment time to consider the position of Soldier O. The PSNI told the court that it would not seek to arrest Soldier O before it had received a medical report from Soldier O's treating doctor(s). If that report indicated that Soldier O was unsuitable for arrest and the PSNI did not accept its contents, the PSNI would identify a mechanism to resolve the dispute.

The application of the legal principles to the facts

46. It is the application of the two stage test to the facts of this case that lies at the heart of the claim. Here on the facts :

(1) the PSNI must actually believe that an arrest is necessary to allow the prompt and effective investigation of the alleged offences; and

(2) judged objectively, that decision to arrest must have been made on reasonable grounds.

(a) The submission of the PSNI

47. The broad thrust of the PSNI's position, based on DCI Harrison's evidence, was that it had given careful consideration of the claimants' stated willingness to attend voluntarily at a police station in England as an alternative to arrest. It had concluded, having regard to all the factors that it considered to be relevant and important, it was nevertheless necessary for arrests to take place.

48. We were told that it was important to have regard to the report of the Inspection of the Historical Enquiries Team, then part of the PSNI, carried out by Her Majesty's Inspectorate of Constabulary, an independent inspectorate, in 2013. Criticism there made of the Historical Enquiries Team's practices led to the winding up of that team. The PSNI is anxious not to be seen to be treating this investigation differently to any other.

49. Thus it was submitted that given the factors set out, the decision was properly an operational one which should be left to the professional judgment of the PSNI which was best placed to make such a decision. The relief sought by the claimants would be unwieldy and would hinder the ability of the PSNI to exercise its statutory powers according to its operational judgment.

50. The PSNI further suggested that we are being invited by the claimants to provide special treatment to these claimants and submitted that we should not do so. We make it clear that we do no more than apply the correct legal test to the particular facts of this case. In other words, we do not approach this claim as a matter of principle any differently to any other.

(b) The subjective belief of DCI Harrison

51. We proceed on the basis of the assumption that DCI Harrison believed that arrest of the claimants to interview them in Northern Ireland was necessary to allow a prompt and effective investigation of their alleged offences, though his consideration of alternatives set out in his first statement was substantially impaired by the facts revealed in his second statement and his failure to consider other matters such as modern means of video interviewing. We were also concerned at his failure to deal in his first statement with the separate position of Soldier O. It is not, however, necessary for us to come to a conclusion on this issue; we can proceed on the assumption that the first limb of the test is satisfied.

(c) The reasonableness of the grounds for the decision

52. We proceed against this background to consider whether DCI Harrison's decision to arrest, judged objectively, was based on reasonable grounds, in a case where the claimants are prepared to undertake to the court that they will attend at a police station in England and Wales and be interviewed under caution and where the following further factors were present:

(1) A period of 43 years has elapsed since the relevant events took place;

(2) The claimants have fully co-operated in numerous and exhaustive investigations over those 43 years;

(3) That co-operation included the giving of evidence in writing and orally;

(4) All the documentation can be put to the claimants in electronic format, as we consider at paragraph 57 below;

(5) The present position of each of the claimants is that each will exercise his right to silence. It is almost impossible to foresee that any will depart from that position;

(6) The mandatory transfer of the claimants to Northern Ireland will, on the facts here, mean the deprivation of their liberty for at least several days, whilst being held securely and transported between various locations;

(7) Travel to and their stay in Northern Ireland will lead at least to some real attendant risk to their lives and personal security in Northern Ireland.

53. The PSNI submitted that promptness was to be considered in the sense that any further delay could be prejudicial to its investigation, because for example of the death or illness of witnesses or of the deceased's next of kin. But the fact remains that arrest of the claimants will not and cannot lead to a prompt investigation of their alleged offences, which are said to have been committed 43 years ago. DCI Harrison's evidence is notable for its failure to provide a timeline for or explain the period of time involved in his investigation. Judged objectively, it cannot be said that arrest of the claimants is necessary to allow the prompt investigation of the claimants' alleged offences.

54. On a conjunctive construction of the phrase "*prompt and effective*" in Article 26(5)(e), this finding is sufficient without more for any arrest as proposed to be unlawful.

55. As to effectiveness, we note that DCI Harrison does not suggest that interview of the claimants in England under caution would not be effective, in the sense of not achieving its purpose.

56. Rather, the first reason relied upon by DCI Harrison is that of "*operational effectiveness*". The matters set out in his second statement substantially qualify the reasoning in the first. Taken together, it is clear in our view that the matters set out by him do not demonstrate a necessity for arrest to allow an effective investigation. They demonstrate at best that it would be administratively more convenient or cheaper for the PSNI to interview the claimants in Northern Ireland than to have to travel to England to interview the claimants.

57. However, of central importance, there is no force any longer in DCI Harrison's concerns about documents, either as to transport, storage or access. They either are or can be stored electronically. There will be no difficulties in accessing necessary

material as investigations develop (which itself is in any event unlikely since the claimants are likely to exercise their right to silence). Concerns about sensitivity can also be met through the use of information technology, but in any event any material deployed in interview would have to be disclosed if the claimants are to be interviewed.

58. As for the use of original documentation, DCI Harrison identifies the PSNI's invariable practice of using them in interview. But he identifies no reason why on the facts of this case in relation to any particular claimant or document the use of originals is necessary for effective interview. It is a view that we regret to have to characterise as outmoded and providing no justification whatsoever for any need to arrest any of the claimants.

59. That a minimum of five police officers would be deployed to the interview of each of the claimants and therefore be required to travel here does not go to effectiveness. In any event it ignores the countervailing consideration that the claimants' lawyers would have to travel to Northern Ireland. Those lawyers would also be operating in far more strained circumstances in Northern Ireland than would the PSNI officers in England, given the need for the claimants to be detained with no interface with the public and the security considerations.

60. In short, objectively assessed, DCI Harrison's decision in so far as based on considerations of operational effectiveness, made the arrest of the claimants necessary to allow an effective investigation cannot be said to be a reasonable one.

61. DCI Harrison secondly reasons that arrest of the claimants is necessary to allow an effective investigation because a voluntary procedure would not enable the PSNI investigators to control, direct or structure the interview process with the certainty and effectiveness that he believes is necessary. In his judgment, it is not appropriate for the police to be dependent on the claimants' voluntary co-operation given the serious and complex nature of the matters under investigation.

62. It is right that it is not the case that a voluntary attendance is always as effective a form of investigation as interview after arrest. A suspect could interrupt the questioning the moment that it reached a topic that he or she found difficult (see the comments of Hughes LJ in *Hayes* at paragraph 42). But DCI Harrison's reasoning does not withstand objective scrutiny on the facts here. Although in one sense the claimants' attendance can be characterised as voluntary, it will not in fact be voluntary. Once the undertaking to the court is given, the claimants will be bound to attend and be interviewed. Any attempt to leave would be a breach of the undertaking. There is therefore no reason why procedures could not be structured or controlled as the PSNI would wish. In any event, there is nothing in the past conduct of any of the claimants to suggest that they would do anything other than co-operate.

63. This conclusion is consistent with the conclusions of the courts in the *Farrelly* case, in *In Re Alexander* (at paragraph 24) and *Richardson v The Chief Constable of West Midlands Police* [2011] EWHC 773 (QB) (at paragraphs 63, 69 and 70), though it is to be noted that the gravamen of the complaints there was that the constable did not consider any alternative to arrest. It also resonates with Note 2F of Code G of the of the Northern Ireland PACE Code as set out above. Objectively assessed, attendance pursuant to an undertaking to this court is a practicable alternative, in which case arrest is not necessary.

64. DCI Harrison's final and third given reason was that arrest is necessary to allow an effective investigation because it was likely that he would wish to consider the imposition of post-interview bail conditions. He did not identify any possible examples of the sort of conditions that he might wish to consider. In submission it was suggested that one condition might be that a claimant should not speak to any other suspect. In circumstances where the claimants are of good character who have fully co-operated and who will continue to co-operate, it is difficult to imagine a proper basis for imposition of any such bail condition. But in any event, the highest that DCI Harrison can put it is to say that he would probably wish to consider the imposition of a condition or conditions. That is not, objectively assessed, a reasonable basis for considering that arrest is necessary to allow an effective investigation. If arrest were deemed necessary under Article 26(5)(e) because of the possible desire to impose post-interview bail conditions, then the safeguards intended under Article 26(5) would be swept away: arrest could in nearly every case be said to be necessary for this reason.

65. For all these reasons, we conclude unhesitatingly that, judged objectively, DCI Harrison's decision that an arrest of the claimants was necessary to allow the prompt and effective investigation of the alleged offences was not one based on reasonable grounds. Furthermore, even if we had acceded to the submission of the PSNI set out at paragraph 22 above, that it was sufficient that a reasonable police officer in DCI Harrison's position could have reached the decision that arrest of the claimants was necessary for a prompt and effective investigation of the claimants' alleged offences, we would have found that no reasonable police officer in the light of all the matters we have set out could have reached such a decision.

66. As we have reached that conclusion, it is not necessary for us to consider the claimants' further arguments in relation to proportionality and their reliance on their right to protection of their lives under Article 2.

67. Nor in the light of the way the hearing has developed is it necessary for us to consider whether there has been a breach of the undertaking given by the Attorney General as set out at paragraph 31 above and whether any relief should be granted in respect of that undertaking. If the issue of a breach of the undertaking needs to be considered, whether here or in the courts of Northern Ireland, the involvement of the Attorney General would be required.

Conclusion

68. For all these reasons, we grant an order prohibiting the PSNI from arresting the claimants in order to interview them under caution in relation to the events of 30 January 1972 upon the claimants undertaking to the court that they will attend for an interview under caution (and remain for the duration of that interview) to be carried out by the PSNI at a police station in England or Wales (or other acceptable location to the Defendant in England or Wales) in relation to the events of 30 January 1972.