Neutral Citation Number: [2013] EWHC 243 (QB)

Case No: HQ12X00705

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 15 February 2013

Before :

THE HONOURABLE MR JUSTICE EADY

- -

Between :

LORD HANNINGFIELD OF CHELMSFORD **Claimant**

- and -

THE CHIEF CONSTABLE OF ESSEX POLICE **Defendant**

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- -

Rupert Bowers (instructed by **Keystone Law**) for the **Claimant**
Andrew Warnock QC (instructed by **Essex Police Legal Department**) for the **Defendant**

Hearing dates: 7 & 8 February 2013

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Approved Judgment

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

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THE HONOURABLE MR JUSTICE EADY

Mr Justice Eady :

The early morning raid

1. Lord Hanningfield claims damages from the Chief Constable of Essex for his allegedly unlawful arrest by five police officers at his home early on 14 September 2011 and in respect of what is said to have been an unlawful search of those premises on that occasion. Complaint is also made of his further detention at the police station later the same day, as authorised by the custody officer. The officers were at that time investigating allegations of fraud by abuse of position relating to expenses claimed when Lord Hanningfield had been leader of the Essex County Council. Those allegations were ultimately not pursued.

2. On 1 July 2011 Lord Hanningfield had been sentenced to nine months imprisonment, following his conviction by a jury at the Chelmsford Crown Court, in respect of offences of false accounting over expenses claimed in connection with his duties in the House of Lords. In the event, he was released on 9 September, subject to tagging and curfew arrangements. The events complained of in these proceedings thus took place within a matter of days following his return home.

3. The five officers arrived at 6.45 a.m. in two unmarked police vehicles, aroused him from sleep, arrested him and searched his bungalow without having troubled a Justice of the Peace for the grant of a search warrant. It is accepted that he was not informed that they lacked a search warrant. Their case is that Lord Hanningfield invited them into his home. I think it unlikely that he actually invited the officers in. It is true that he did not resist – he was simply overborne by the circumstances. He had an appointment booked for 9 a.m. with his GP to review his various conditions and medication, but he was told that this had to be cancelled. (On arrival at the police station, he was presented to a doctor who duly pronounced him fit to be interviewed.)

4. This was part of a carefully planned strategy and did not suddenly come about for reasons of urgency. A policy decision was taken (and recorded in writing on 6 September 2011 for future reference) by the Senior Investigating Officer ("SIO") who was DCI Davies. It would have the effect of by-passing any need for a search warrant. No one has suggested that this was done otherwise than in good faith: the only question is whether it was lawful.

5. Although it does not affect the legal position, an explanation of the factual background was put forward to account for the strategy adopted. The original intention had been to have Lord Hanningfield taken out of prison by permission of the Home Secretary for interview, but this was frustrated by delay on the part of two Council witnesses. I was told that they procrastinated for many weeks over signing and returning their statements. They had also cancelled meetings. They only overcame their apparent reluctance to confirm the contents of the drafts on 8 September.

6. Much of the argument at the recent trial turned upon the construction of various provisions contained within the Police and Criminal Evidence Act 1984 ("PACE"). It had been determined by the SIO that the statutory regime most appropriate to the circumstances was that set out in s.32. Reliance was to be placed on the powers of search there provided which are ancillary to, and dependent upon, a lawful arrest

having taken place (elsewhere than at a police station). Accordingly, if the arrest itself is unlawful, this undermines the legality of the search as well.

The argument on the construction of s.32 of PACE

7. Mr Bowers, on behalf of the Claimant, argues that s.32 is designed for the exigencies of an unplanned arrest, away from a police station, when police officers need to make use of what he calls "here and now" powers of arrest and search. It is simply not designed as an alternative to ss.8 and 15-18, which fall within Part II of PACE ("Powers of Entry, Search and Seizure") and provide obvious safeguards for citizens whose property is about to be searched. The provisions relied upon here, contained in s.32(2), are to be found in Part III, which is headed simply "Arrest".

8. One of Mr Bowers' main submissions, primarily concerned with the search of Lord Hanningfield's home, turned upon the interpretation of s.32 ("Search upon arrest"). I shall refer to this as "the construction argument". So far as relevant for present purposes the provisions are in these terms:

> "(1) A constable may search an arrested person, in any case where the person to be searched has been arrested at a place other than a police station, if the constable has reasonable grounds for believing that the arrested person may present a danger to himself or others.
>
> (2) Subject to subsections (3) to (5) below, a constable shall also have a power in any such case –
>
> (a) to search the arrested person for anything –
>
> (i) which he might use to assist him to escape from lawful custody; or
>
> (ii) which might be evidence relating to an offence; and
>
> (b) if the offence for which he has been arrested is an indictable offence, to enter and search any premises in which he was when arrested or immediately before he was arrested for evidence relating to the offence.
>
> (3) The power to search conferred by subsection (2) above is only a power to search to the extent that is reasonably required for the purpose of discovering any such thing or any such evidence.
>
> …
>
> (6) A constable may not search premises in the exercise of the power conferred by subsection (2)(b) above unless he has reasonable grounds for believing that there is

> evidence for which a search is permitted under that paragraph on the premises.
>
> … "

9. It is obviously not provided by s.32(1) that a person may only be arrested away from a police station if it is believed that he presents a danger to himself or others. That condition is imposed in relation to a search of the person arrested. Indeed, as I have indicated, the section itself is headed "Search upon arrest". The section does nothing to define the power of arrest. Those provisions are to be found earlier under Part III, in s.24, governing "arrest without warrant".

10. The statute goes on to provide in s.32(2) that other powers may "also" be exercised "in any such case". The principal issue that has arisen on construction is whether the words "any such case" are to be defined by reference only to those cases in which there are grounds for believing that the person concerned presents a danger. In purely grammatical terms, there is no reason why this should be so, since the words "in any case" in s.32(1), to which s.32(2) refers back, occur within the parenthesis that is concerned solely to specify a "case where the person to be searched has been arrested at a place other than a police station".

11. Furthermore, when addressing the public policy considerations underlying the various search powers provided for in s.32(2), it is difficult to see why a power to search the person or the premises should *only* be triggered if he is thought to present a danger. Those powers are additional to that provided for in s.32(1) and are not made conditional upon the person presenting a danger. Nor is there any logical reason why they should be. One could well understand, where such a physical danger is (or is believed to be) presented, that a need for personal search may be required in case the suspect has, for example, a weapon. On the other hand, where the search is for evidence relating to an offence already committed, or to a potential means of escape, the need for it would not necessarily have any connection with physical danger. An officer might, for example, wish to search for burglary tools or the keys to a vehicle. There is no reason why a search for items such as these should only take place if the suspect is perceived to present a physical danger.

12. I would, therefore, determine the construction argument in the Defendant's favour. The search of Lord Hanningfield's bungalow, purportedly carried out under s.32(2)(b), cannot be characterised as unlawful merely because Lord Hanningfield was not perceived to be dangerous.

Was the arrest necessary?

13. A search warrant was not required, submits the Defendant, because the only condition specified in s.32(2)(b) was, on the occasion in question, fulfilled. That is to say, Lord Hanningfield had been lawfully arrested for an indictable offence away from a police station. The next question to be determined, therefore, is whether the arrest itself was indeed lawful.

14. That must be resolved by reference, not to s.32(1), but to other general principles governing arrest. In particular, it is necessary to have regard to s.24 of PACE governing "arrest without warrant". The power of summary arrest may only be

exercised if the relevant officer (in this case, Det Sgt Thomson) had reasonable grounds for believing that it was "necessary" to do so: s.24(4). That must be judged, in turn, against the reasons specified in s.24(5):

> "(a) to enable the name of the person in question to be ascertained (in the case where the constable does not know, and cannot readily ascertain, the person's name, or has reasonable grounds for doubting whether a name given by the person as his name is his real name);
>
> (b) correspondingly as regards the person's address;
>
> (c) to prevent the person in question –
>
> (i) causing physical injury to himself or any other person;
>
> (ii) suffering physical injury;
>
> (iii) causing loss of or damage to property;
>
> (iv) committing an offence against public decency (subject to subsection (6)); or
>
> (v) causing an unlawful obstruction of the highway;
>
> (d) to protect a child or other vulnerable person from the person in question;
>
> (e) to allow the prompt and effective investigation of the offence or of the conduct of the person in question;
>
> (f) to prevent any prosecution for the offence from being hindered by the disappearance of the person in question."

The only "reason" potentially relevant here, and indeed the one relied upon by the Defendant, is that listed at (e) above.

15. I must ask myself accordingly whether the officer in question had reasonable grounds for believing that it was necessary, on 14 September 2011, to arrest Lord Hanningfield in order to allow the prompt and effective investigation of the offence(s) or of the conduct of Lord Hanningfield himself.

16. Some emphasis was placed, on behalf of the Defendant, upon the two witness statements produced by the apparently reluctant employees of the Essex County Council and signed on 8 September. They seem for one reason or another to have been somewhat hostile to Lord Hanningfield. They refer to his having sometimes had a short temper and to an inclination to "bully" some members of staff. It is not for me, of course, to come to a conclusion one way or the other as to whether those allegations are true. I am concerned with whether they provided reasonable grounds

for Mr Thomson to believe that it was necessary, on the date in question, to arrest Lord Hanningfield (as opposed, for example, to posing questions to him in the course of a voluntary interview).

17. It is appropriate to recall, in this context, that Lord Hanningfield was about to pass his 72nd birthday and that he was suffering from depression and high blood pressure. He was relieved to have been allowed home a few days earlier and was thinking about trying to piece his life together. The prospect of his attempting to "bully" any of the police officers visiting his home that morning does seem somewhat remote. On the other hand, I believe that the suggestion put forward was that, when challenged with his council expenses claims as leader, he might fly into a temper and become uncooperative.

18. It was further mooted that, unless he was arrested, Lord Hanningfield might seek to destroy or conceal evidence relating to his expenses. It seems that the officers were under the (mistaken) impression, for example, that he was still in possession of a Council computer. Moreover, there was apparent concern that he might seek to make contact with "co-suspects" – this despite the fact that he had known of the ongoing enquiries within the Essex County Council at least since 25 May 2011 and of the police interest in him since 21 June (when he had been offered the opportunity to have five offences relating to Council expenses taken into consideration by the sentencing judge at Chelmsford). He would have been expecting them to contact him from then onwards.

19. Mr Bowers raises the query why, if he had not taken any of these undesirable steps prior to 14 September of that year, it had suddenly become necessary to prevent such behaviour by summary arrest at that point. I naturally accept, in general terms, that the fact that one or more suspects have already had an opportunity to collude does not necessarily mean that they should be given a further opportunity to do so, especially where collusion has already occurred: see e.g. *R (Rawlinson & Hunter Trustees) v Central Criminal Court* [2012] EWHC 2254 (Admin) at [241]. But each case must turn on its own facts. (I should record, incidentally, that whoever these "co-suspects" were, none was ever arrested or charged.) After the interview had taken place at the police station, it is to be noted that no bail conditions were imposed which would restrict Lord Hanningfield's movements or his contact with other people. It would thus appear that any earlier apprehension that he would behave in any of these ways had by then dissipated for some reason. Why, therefore, was it necessary to arrest him at 6.45 a.m. on 14 September and only at that point?

20. My attention was drawn to the latest guidance on the statutory power of arrest contained in Code G at Note 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 interrogate 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."

21. Mr Bowers argues that the Defendant has simply failed to discharge the burden in this respect. He places reliance upon what he calls his client's "track record" in relation to the earlier enquiries by the Metropolitan Police into his House of Lords expenses. I gather that he had been cooperative throughout and given a voluntary interview in the course of that enquiry. He had never broken off interviews or lost his temper with them. Because the Essex Police were aware of this, it is suggested that they should have adopted that same approach in relation to their own investigations as a "practicable alternative" to arrest.

22. This process of addressing alternatives is not a matter of box-ticking. The record must show that genuine consideration was given to practicable options. Since there had been no need to arrest him over the House of Lords expenses, it is submitted that there was no reason to suppose that this precedent could not safely be followed. If this point was addressed at the time, it does not seem to have found a mention in the contemporaneous documents. In the witness box, however, Mr Thomson put forward the explanation that Lord Hanningfield had, in the meantime, been found guilty; this *might* have caused him to regret his strategy of cooperation and to adopt a more truculent stance second time round. This is rather speculative and I did not find it a compelling scenario.

23. The officers also advanced the rather curious argument that he was not to be trusted because he had not only pleaded not guilty in respect of the House of Lords charges but had even appealed the conviction.

24. There is no dispute between the parties as to the appropriate test to apply in this context. Reference was made to the convenient summary of the law by Hughes LJ in *Hayes v Chief Constable of Merseyside Police* [2012] 1 WLR 517 at [42], where he indicated that the Court of Appeal preferred the "two stage test" proposed by counsel for the defendant. This had been summarised, earlier, at [21] in these terms:

> "(i) that the constable actually believed that arrest was necessary, and for a [s.24(5)] reason; and
>
> (ii) that objectively that belief was reasonable."

It was also recognised, in that case at [22], that in answering the appropriate questions, the court will always be concerned with the facts as known to the officer making the arrest. That serves to highlight the distinction between the test to be applied here and that applicable in a public law context. The officer will need to take into account relevant facts – but only in so far as they are known to him.

25. I have no reason to doubt that the officer concerned, Mr Thomson, believed by the time it took place that the arrest was necessary for the purpose described (i.e. to allow the prompt and effective investigation of the offence). The question for me to determine is whether or not that belief can be characterised as objectively reasonable

in the light of what he then knew. I should not, therefore, take into account other facts – nor arguments thought up *ex post facto*.

26. To the casual observer, these issues may seem rather technical, but it is necessary always to remember the importance of the safeguards provided by the legislature as to powers of arrest and search. The burden clearly rests on the Defendant to establish that it was *necessary* to arrest Lord Hanningfield to effect a search of his home without obtaining a search warrant.

27. The officers were very familiar with the statutory provisions and the Code (although Mr Bowers submits that they did not understand the overall structure or the interplay between the different powers). It was in the light of that knowledge that the SIO decided that the s.32 route would be the most appropriate for the case in hand. One can see that it was in some ways convenient for the officers to take this course, without having to obtain a warrant, but that is clearly not a sufficient justification.

28. I bear in mind that I should not adopt a public law approach and must allow room for the individual judgment of the officer(s) concerned according to the exigencies of the occasion. As Hughes LJ explained in *Hayes* at [40]:

> "To require of a policeman that he pass through particular thought processes each time he considers an arrest, and in all circumstances no matter what urgency or danger may attend the decision, and to subject that decision to the test of whether he has considered every material matter and excluded every immaterial matter, is to impose an unrealistic and unattainable burden."

Here, of course, there was neither urgency or danger, but the principle is the same.

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 Lord Hanningfield'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 by-passing all the usual statutory safeguards involved in obtaining a warrant.

The detention authorised at the police station

30. The final question for me to address is that of whether the continued detention of Lord Hanningfield, following his arrival at Braintree Police Station on the morning of 14 September, was lawful or otherwise. Reference was made here to paragraph 16 of the particulars of claim:

> "The decision to detain the Claimant at the police station is a separate decision to that to arrest him and the detention that follows as a consequence. The decision to detain is taken by the Custody Officer under section 37 PACE. Similarly the Custody Officer must have been satisfied that the Claimant's continued detention was necessary pursuant to section 37(2). The reasons for continued detention are recorded as being 'to obtain evidence by questioning' on the ground that the 'interview [was] required to establish facts'. For the same reasons as outlined above it was not necessary to forcibly detain the Claimant to interview him. There was every reason to believe that he would co-operate with such a procedure and no reason to believe that he would not."

Mr Warnock QC, on behalf of the Defendant, accepted that this question would largely turn upon the lawfulness of the earlier arrest.

31. The power of detention to be exercised by the custody officer, Sgt Seymour, arises under s.37(1)-(3) of PACE:

> "Duties of custody officer before charge
>
> (1) Where –
>
> (a) a person is arrested for an offence –
>
> (i) without a warrant; or
>
> (ii) under a warrant not endorsed for bail, …
>
> (b) …
>
> the custody officer at each police station where he is detained after his arrest shall determine whether he has before him sufficient evidence to charge that person with the offence for which he was arrested and may detain him at the police station for such period as is necessary to enable him to do so.
>
> (2) If the custody officer determines that he does not have such evidence before him, the person arrested shall be released either on bail or without bail, unless the custody officer has reasonable grounds for believing that his detention without being charged is necessary to secure or preserve evidence relating to an offence for which he is under arrest or to obtain such evidence by questioning him.
>
> (3) If the custody officer has reasonable grounds for so believing, he may authorise the person arrested to be kept in police detention."

32. Again, the lawfulness of the custody officer's acts must be judged in the light of his knowledge at the material time. He may or may not know the same facts as his colleague(s) who carried out the earlier arrest. Here, it is said that Sgt Seymour was not aware of Lord Hanningfield's so called "track record" during the Metropolitan Police enquiries. Sgt Seymour, who gave evidence, fairly acknowledged that it would have been his duty, had he been given the information, to make further enquiries. He also accepted that his procedures had subsequently been tightened up a good deal, so as to ensure that his independent role could be properly carried out – not least by keeping some record of his reasons for any decision to detain. It seems that he was simply given by PC Egleton (whose statement was admitted) information based on a note typed by Mr Thomson. Mr Egleton could not remember how much of its contents he passed on.

33. It is acknowledged by Mr Warnock that, if the original arrest had been unlawful, the subsequent detention could not be regarded in itself as lawful simply because the custody officer did not have the same information laid before him. Reference was made to the words of Slade J in *Richardson v Chief Constable of the West Midlands* [2011] 2 Cr App R 1 at [57], where she rejected the submission that the custody officer's reasons for detention could "cure" any defect in the original arrest. Counsel were agreed that this accurately reflects the present state of the law.

The overall outcome

34. In the light of my rulings on the issues raised, it becomes necessary to fix an award of compensation, in accordance with the conventional scale, to cover the arrest, search and period of detention. I do not apprehend that there will be any problems in agreeing the amount.