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Case No: TLQ/13/0019

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 11/09/2013

Before:

MR JUSTICE JAY

- -

Between :

JOSEPH WRIGHT	**Claimant**
- and -	
COMMISSIONER OF POLICE FOR THE METROPOLIS	**Defendant**

- -
- -

Hugh Southey QC (instructed by **Irvine Thanvi Natas Solicitors**) for the **Claimant**
George Thomas (instructed by **Weightmans LLP**) for the **Defendant**

Hearing dates: 24th & 25th July 2013

- -

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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MR JUSTICE JAY

Mr Justice Jay:

Introduction

1. Mr Joseph Wright ("the Claimant") claims damages at common law (for false imprisonment, assault and battery) and under section 8 of the Human Rights Act 1998 (for breaches of his rights under Articles 5, 10 and 11 of the Convention) in relation to his containment in a police pen between shortly after 09:27 and 10:42 on 30th March 2011. The Claimant, and approximately 40 others, was demonstrating outside Chatham House against the President of the State of Israel, Mr Shimon Peres. The demonstration was organised by the Palestinian Solidarity Campaign. This case raises an important issue of principle for the Claimant and the Commissioner of Police for the Metropolis ("the Defendant") notwithstanding that the amount of money at stake is small.

2. I should say at the outset that this claim is decidedly *not* about the merits and conduct of the State of Israel, Mr Peres, the Palestinian cause generally or the Palestinian Solidarity Campaign in particular. To the fair to the parties and to all the witnesses, no one sought to maintain that it was. This case is about the extent of police powers in these sorts of circumstances, and to that extent it is adventitious that the target of the demonstration was Mr Peres. However, it is argued by the Defendant that the background is relevant inasmuch as it frames the context, most pertinently the strength of feeling in some quarters against Israel and its Head of State. Plainly, I must bear those matters in mind, although I prefer to do so in the context of the United Kingdom rather than what has happened in the Middle East over the years.

3. Further, I have to bear in mind that this is a claim brought by one named Claimant who attended this demonstration; this is not multi-party litigation, still less a Group Action. The focus will be on the particular, but in order to see the whole picture one also needs to discern the contours of the general.

4. It is convenient to divide this judgment into Chapters. Chapter 1 will comprise a narration of what happened on the day. Chapter 2 will explain the governing legal principles. Chapter 3 will set out the issues which arise. Chapter 4 will examine the evidence of the Claimant and his witnesses, and will supply what might be described as the Claimant's perspective. Chapter 5 will view the matter from the Police perspective. And Chapter 6 will set out my findings of fact (to the extent that they have not previously been covered), my analysis of the issues, and my conclusions.

The Events of 30th March 2011

5. At 10:23 on 29th March 2011 the Palestinian Solidarity Campaign sent an email to the relevant Defendant email address explaining its intention to hold what it described as a picket outside Chatham House in St James' Square the following day **[58]**. The email further explained that '*this is to be a static and peaceful event, with banners,*

placards, targeting the presence of Shimon Peres'. For reasons which are unclear, there was no reply to this email, albeit there was no evidence that it had not been received.

6. However, it is quite clear that the Defendant preparing for all foreseeable eventualities in the context of this event, which was a seminar recognising 60 years of British-Israeli diplomatic relations. Aside from Mr Peres, the attendees were to include the Israeli Ambassador and the Foreign Secretary. Mr Peres was to give the keynote speech at some point between 09:15 and 10:00, after which he would depart **[114]**.

7. The 'Service Operation Order' starting at **[98]** shows that the overall threat to the event was 'low' although the threat to the Principal (i.e. Mr Peres) was assessed as 'moderate' (note the slightly different wording at **[99]** and **[220]**). Although at the time the Order was prepared the Defendant had no specific intimation that the Palestinian Solidarity Campaign would be in attendance, this was clearly in prospect **[220]**:

> "*If protests are arranged during the Presidential visit there* [sic] *are more likely to be either at Chatham House for the conference on 60 years of Anglo-Israeli diplomacy or … . Neither the PSC not the StWC has been significantly active against events attended by prominent Israelis in recent months nor have they indicated a willingness to protest at this event. Activists from both groups are able to respond quickly to call-outs and should they decide to protest can mobilise a group of vociferous but generally law-abiding demonstrators. Further Israeli action in Gaza will increase the likelihood of these groups conducting anti-Israeli protests that may find the presence of Shimon Peres a target of opportunity.* "

8. The police security operation was codenamed 'Operation Fieldgate', with the Gold Commander being Chief Superintendent Johnson, the Silver Superintendent Bird and the Bronze Chief Inspector Stephen Osborn. CI Osborn and other officers from Westminster were at the scene from about 07:45 (registration for the conference was due to start at 08:15). Metal barriers had been ordered so that a protest pen could be set up before the arrival of any protesters, but owing to traffic congestion engendered by a motorcycle protest in Trafalgar Square these were delayed. Thus, when the protesters did start to arrive at approximately 08:30 they were not confined to one particular area. However, the video evidence shows that, in the main, they kept to the pavement and to the empty parking bays (parking suspension notices had been installed) opposite the main entrance to Chatham House but not directly adjacent to it. Although I was not given the exact dimensions of the location, I deduce that the main group of demonstrators were a pavement's width and the majority of a road's width away from the front entrance.

9. The video shows a reasonably orderly and good natured demonstration, although the chants were pointed and *ad hominem*. By way of example, *'Shimon Peres you can't*

hide, we charge you with Genocide'. Subsequently, there were calls for Mr Peres and others to be arrested. I should emphasise that the Claimant and others were fully entitled to use language of this nature in the exercise of their rights of free speech and free association.

10. CI Osborne was concerned that, in the absence of barriers, there was an insufficient police presence at the scene: at approximately 09:00 he therefore asked Superintendent Bird for additional officers to be sent, and these arrived at about 09:15. Shortly before then the barriers arrived and these were installed more or less where the protesters were already (although slightly to the left of the main group, orientation being defined by the video camera viewing the front door of Chatham House). In essence, the 'pen' comprised the railings in the centre of the Square and three mobile barriers set at right angles to each adjacent barrier.

11. The video footage for 09:17 shows that the majority of the protesters were prepared to enter the pen (one side had been left open to enable that to happen) without cajolement. However, a relatively small number were not. The transcript of the video soundtrack shows that demonstrators were being firmly encouraged to enter the pen *'because that's what the barriers are for'*. On occasion, this was expressed as advice; on others, the language used was more prescriptive (e.g. *'you can't protest here that's where you have to protest'*), and on at least one occasion it was indicated that if the protester did not enter the pen she would be arrested. Paragraph 9 of CI Osborn's witness statement at **[260]** explains that he was very concerned about *'the degeneration of the situation'* and if the barriered area was not used in line with its purpose then this protester would have to be arrested to prevent a breach of the peace. The transcript also shows that one female demonstrator (possibly the same one mentioned by CI Osborn) pointed out that *'we aren't breaching any peace'*, at which point the police officer stated that the pen was also there for their own safety.

12. Meanwhile, the Claimant had not entered the pen. He had worked out that Mr Peres might not be entering through the front door at all; there is a side entrance in Duke of York Street. I set out relevant parts of the transcript for 09:27:

> *"O: do you mind going into the pen?*
>
> *C: who are you* [the officer was in plain clothes] … *err, for what reason?*
>
> *O: because we want to make sure that there's you know, safety for everybody. We've got a lot of traffic here, it's the middle of the morning.*
>
> *C: I'll be on the pavement.*
>
> *O: but do you mind going in there, though?*
>
> *C: I would rather not because I have a feeling he's coming this way so I want to make sure he can see there's a protest, do you know what I mean. So, I don't want to cause any disruption*

> *O: fellers, can you go into the pen, please, that is what it's there for, OK. You are not going to cause any disruption but you can go into the pen.*
>
> *C: but for what reason?*
>
> *O: for the reason what I don't want any breach of the peace, we've got a lot of traffic here and, as you know, we've a lot of important people wanting to come around the place. So if you can go in there*
>
> …
>
> *C: Shimon Peres is coming this way* [shouting]
>
> …
>
> *O: In the pen, please mate, thank you very much. And this is to prevent you causing a potential breach of the peace, OK. In the pen. Go into the pen … he's not because that's where you are supposed to be. Can you stop it, that you very much … where to demonstrate, thank you very much*
>
> …
>
> *Protester: are we being kettled?*
>
> *O: not you are not"*

13. There were a number of police officers caught on the video at this point, at least two of whom were in plain clothes. It follows that the preceding paragraph is not intended to refer to just one officer. It is likely that the audiotape recorded the voice of Inspector Rooke who was instrumental in causing the Claimant to enter the pen. I will need to examine his evidence subsequently. At all events, it is sufficient to record at this stage that the Claimant did enter the pen after having been pushed in that direction by the Inspector.

14. At this stage the protesters were not being absolutely contained or 'kettled'; the position was that the containment was voluntary, although we have seen that it was coupled with a warning – at least in some cases – that in the event of non-compliance there would be an arrest for a breach of the peace. Subject to that, the voluntary nature of these arrangements was borne out by the fact that protesters were allowed to leave to go to work or college, but it is clear from the video that at least one, probably two, used this as an opportunity to continue the demonstration from a different location. The Claimant was not amongst this little splinter group, the exact numerical constituent of which is unclear.

15. President Peres had been due to arrive at about 09:20 but his advent was delayed by the situation on the ground. CI Osborn was concerned to create a 'sterile' area for Mr

Peres, namely an area where there would be no risk of human intrusion. Shortly after 09:27 CI Osborn decided to make the containment absolute. I will need to examine his reasons for doing that but in temporal terms these were allied to the imminent arrival of the 'Principal'. Following a discussion between the two of them, CI Osborn communicated his decision to Inspector Rooke and the latter passed it down the command chain – *'Breach of the peace containment. Absolute.'* Protesters, including the Claimant, were not allowed to depart; they were being penned in for the duration.

16. The Defendant has drawn my attention to parts of the transcript of the audiotape for 09:52. I shall set some of these out:

> "*O: we are here to remain impartial, to prevent a breach of the peace … the reason the breach of the peace containment has gone in is that several people have already said they are leaving, they haven't left, and tried to go inside the Embassy* [sic], *across the road to the Embassy and also hurled abuse at the staff inside the embassy, OK? We are here to prevent a breach of the peace and unfortunately – the minority have caused it for the rest of you*
>
> …
>
> *C: … and we're not particularly rowdy, we're just stood here, so like what other factor do you ….*
>
> *Rooke: you are one factor, by trying to pull people down that road – you were one factor … Now we are preventing it, yeah, OK? You and whoever was down there pulling people down that road, you were the factor that caused it. That it where the breach of the peace … was coming from, and we are preventing that*"

17. And then at 10:20:

> "*Our senior officer has authorised a breach of the peace containment, because certain individuals from this protest have abused the trust by saying they were leaving … certain people from this protest have said that they were leaving. As they were leaving they tried to get round the side of the building, they've also hurled abuse at members of staff there. Because of that the breach of the people containment has been authorised and is in place. "*

18. The absolute containment was in place until 10:42 which was within two minutes of President Peres' departure. The protesters, including the Claimant, were informed that they were free to leave.

The Governing Legal Principles

19. A breach of the peace arises where there is an actual assault, or where public alarm and excitement are caused by a person's wrongful act. As the authors of Halsbury's Laws have explained, '*mere annoyance and disturbance or insult to a person or abusive language, or great heat and fury without personal violence, are not generally sufficient'* (cited in *R v Howell* (1982) 1 Q.B. 416 at 427A. At 427E-F Watkins LJ said this:

> "*we are emboldened to say that there is a breach of the peace whenever harm is actually done or is likely to be done to a person or in his presence to his property or a person is in fear of being so harmed through an assault, an affray, a riot, unlawful assembly or other disturbance. It is for this breach of the peace when done in his presence or the reasonable apprehension of it taking place that a constable, or anyone else, may arrest an officer without warrant. "*

20. The leading recent authority on the scope of police powers to prevent a breach of the peace is *R(Laporte) v Chief Constable of Gloucestershire Constabulary* (2007) 2 A.C. 105, where the House of Lords made it clear that prophylactic action was only permissible where there was a reasonable apprehension of imminent breach. In that case protesters were travelling up to Gloucestershire from London in a coach, and the imminence criterion was held not to be satisfied.

21. In the words of Lord Bingham of Cornhill (at paragraph 55):

> "*I would acknowledge the danger of hindsight, and I would accept that the judgment of the officer on the spot, in the exigency of the moment, demands respect. But making all allowances, I cannot accept the chief constable's argument. It was entirely reasonable to suppose that some or all of those on board the coaches might wish to cause damage and injury to the base at RAF Fairford, and to enter the base with a view to causing further damage and injury. It was not reasonable to suppose that even these passengers simply wanted a violent confrontation with the police, which they could have had in the lay-by. Nor was it reasonable to anticipate an outburst of disorder on arrival of these passengers in the assembly area or during the procession to the base, during which time the police would be in close attendance and well able to identify and arrest those who showed a violent propensity or breached the conditions to which the assembly and procession were subject. The focus of any disorder was expected to be in the bell-moth area outside the base, and the police could arrest trouble-makers then and there …*"

22. The basic point in *Laporte* was that any apprehension of a breach of the peace could not be said to be imminent; it was some time off. Lord Rodger dealt with the concept of imminence in these terms (see paragraph 69):

> "*This does not mean that the officer must be able to say that the breach is going to happen in the next few seconds or next few minutes. That would be an impossible standard to meet, since a police officer will rarely be able to predict just when violence will break out. The protagonists may take longer than expected to resort to violence or it may flare up remarkably quickly. Or else, as in O'Kelly v Harvey the breach of the peace may be likely to occur when others arrive on the scene and there is no way of knowing exactly when that will happen. There is no need for the police officer to wait until the opposing group hove into sight before taking action. That would be to turn every intervention into an exercise in crisis management. As Cooke P observed in Minto v Police, 'it would be going too far to say as a matter of law that the powers of the police at common law can be exercised only when an instantaneous breach of the peace is apprehended' …*"

23. And Lord Mance addressed the point in these terms (at paragraph 141):

> "*In my opinion, that proposition and the statements on which it relies are to be rejected. So too the suggestion that imminence is a flexible concept, different degrees of which may justify different forms of preventive action. I regard the reasonable apprehension of an imminent breach of the peace as an important threshold requirement, which must exist before any form of preventive action is permissible. … That is not to suggest that imminence falls to be judged in absolute and purely temporal terms, according to some measure of minutes. What is imminent has to be judged in the context under consideration, and the absence of any further opportunity to take preventive action may have relevance.*"

24. Moses LJ brought the various strands of the law together in the recent case of *Mengesha v Commissioner of Police for the Metropolis* (2013) EWHC 1695 (Admin), at paragraph 10 of his judgment:

> "*Containment is only permitted where a breach of the peace is taking place or is reasonably thought to be imminent. It is a method of last resort where other possible steps to prevent a breach of the peace would be ineffective … and it must be proportionate … It is clear, therefore, that containment is not permissible for some purpose other then to prevent a breach of the peace which is taking place or reasonably thought to be imminent.*"

25. But what if the conduct of the primary actors does not itself breach the peace but appears likely to provoke others to do so? Lord Brown touched on this issue in *Laporte* at paragraph 120, and the main authority hereabouts is his own decision in

Nicol and Selvanayagam v DPP (1996) 160 JP Reps 155. The issue in such circumstances is whether the primary actor is acting unreasonably (at 162D-E). Brown LJ, as he was then, also said this:

> "*Putting it another way, the court would surely not find a s115 complaint proved if any violence likely to have been provoked on the part of others would be not merely unlawful but wholly unreasonable - as, of course, it would be if the defendant's conduct was not merely lawful but such as in no material way interfered with the other's rights. A fortiori, if the defendant was properly exercising his own basic rights, whether of assembly, demonstration or free speech.*"

26. Finally, I should mention the decision of the European Court of Human Rights in *Austin v UK* (2012) 55 EHRR 14, which is the leading decision on what constitutes a violation of Article 5 of the Convention in this type of case. However, Mr Southey QC for the Claimant accepted that the issues at common law and under Article 5 were the same.

The Issues

27. The principal issue is whether the Defendant can satisfy the tripartite test encapsulated by Moses LJ in *Mengesha*, namely of reasonable apprehension of an imminent breach of the peace; the necessity of the measure; and its proportionality. This entails a close examination of the Defendant's evidence. To that extent the Claimant's evidence is less important, save to the extent that it throws light on the purposes, intentions and motivations of the Defendant's officers.

28. However, there is one issue of important issue of fact that I need to resolve, and other subsidiary issues. The important issue is whether the Claimant had any intention to attempt to cross St James' Square and enter Duke of York Street, being the location of Mr Peres' anticipated arrival. The main subsidiary issues are whether the Claimant was beckoning his fellow protestors over to where he was standing at 09:27; and if so, or perhaps in any event, any of the Claimant's witnesses harboured an intention to cross the square. If I were to determine those issues against the Claimant, it would not be overly difficult to decide the first limb of the tripartite test in favour of the Defendant. But there is a degree of asymmetry here because the converse does not follow.

29. There are less important issues concerning assault and Articles 10 and 11 which I will also need to address.

The Claimant's Perspective

30. The Claimant's evidence was that his demonstration was peaceful and reasonable. He genuinely believes that Mr Peres is guilty of genocide and of war crimes, and ought in due course to be arrested and stand trial for those matters. At the material time, and so long as Mr Peres remains Head of State, he has diplomatic immunity. It follows that a citizen's arrest must be out of the question. The Claimant accepted that in 2010 he attended a workshop devoted to the issue of 'direct action', which in principle covers illegal protesting activity (albeit its proponents would argue that it is morally justified). The Claimant did not accept that this was his intention on this occasion. Indeed, he accepted in terms that it would have been unreasonable to have attempted to approach Mr Peres' car, because that might have fomented a confrontation. Slightly earlier in his evidence the Claimant told me: *'If it had proved reasonable in the circumstances I would have tried to get closer, but it did not seem reasonable'.* Plainly, this is a point which very much cuts both ways.

31. The Claimant was cross-examined closely about what his intentions were when he shouted out *'he's here'* at 09:27. He agrees that he was pointing. He stated that he was not intending that people should come over at that time, although he possibly accepted that this was a natural understanding (i.e. interpretation) of his actions. In my judgment, it was obvious to the Claimant that acting in this way would encourage fellow protesters to come over, and that was his intention. Indeed, at one stage the Claimant did say that *'I do not know what they might have done having been called over'.*

32. The Claimant stated that he could not speak for his fellow protesters, some of whom were Palestinians. He claimed that they were slightly older and more sedate. The Claimant accepted that it was possible that one or more of his fellow protesters would try to approach the car, but believed that this was unlikely in the circumstances.

33. On balance, but only just, I am not persuaded that it was the Claimant's intention to attempt to approach the presidential vehicle: at least, in the sense that he would not have initiated the approach. But what he might have done had others moved forward is less clear. Even the Claimant cannot be clear about this since, by definition, we are debating what would or might have happened in the heat of the moment. Furthermore, I am in no position to judge what others might have done in such circumstances, not least because I did not hear evidence from other than a handful of those present. In one sense, their actions would in part have been conditioned by their perception of the likelihood or otherwise of any such action being successful. There was a relatively heavy police presence and any progression into Duke of York street would have had to have been speedy and unheralded to have had any reasonable chance of success. But, putting the matter in this way does not really help the Claimant, particularly if I observe that a lighter police presence – or a police presence splintered by a number of smaller demonstrating groups - would have enhanced the probability of an advance.

34. The Claimant accepted Inspector Rooke's account as to how he was impelled in the direction of the pen. He also accepted seeing someone climbing over the railings at the back of the pen. But his point was that there was a degree of circularity in the police position: if there was no reasonable apprehension of an imminent breach of the peace, how could the police create one by insisting that protesters entered the pen? The protesters, on this hypothesis, were merely standing on their rights, and to do that cannot by definition be unreasonable.

35. The evidence from the Claimant's witnesses was on broadly similar lines, and I make the same finding in relation to each of them: I do not believe that any would have initiated an approach towards the presidential vehicle. Sarah Colborne told me that the Palestinian Solidarity Campaign has supporters who 'do' direct action, including unlawful action. She emphasised that there are Israeli statesmen, present and past, who attract more hostile animus than does Mr Peres. She recognised that people were feeling upset and frustrated, but did not accept that they would be likely to act in the heat of the moment. They wanted to demonstrate peaceably, and then get back to work.

36. In my judgment, Ms Colborn was a more impressive witness than the Claimant. I accept her evidence, save that I do not consider she is able to say how all 40 demonstrators present would have acted in the heat of the moment if they were not in the pen. One needs to address whether one demonstrator would have allowed the emotion of the situation to take himself or herself closer to the location of the presidential vehicle; and, if that had occurred, how others might have responded.

37. I was not particularly assisted by the evidence of Mr Abraham Hayeem, not because I disbelieved him but because he seemed more concerned to debate the politics. He stressed that the anger was addressed as much at the conduct of HMG in its complicity with the State of Israel as at Mr Peres himself.

38. Ms Eleanor Kilroy was an impressive witness who, I believe, would have been highly unlikely to have done anything rash or intemperate on the day. She confirmed that she was told that she would be arrested if she did not enter the pen: this was before CI Osborn's absolute containment decision. She did not object to the size of the pen but to the police's exercise of power.

39. The evidence of Mr Michael Deas did not take matters any further.

The Police Perspective

40. CI Osborn told me that it was always the intention to install a pen. This is borne out by the suspension of the parking bays in the vicinity and the fact that barriers were requested at the location; the problem was that their arrival was delayed by the separate protest in Westminster. As CI Osborn put it, *'it was customary to invite the protesters to use it'*. However, in the first instance the use of the pen was voluntary in

the sense that the protesters were to be encouraged, not compelled; and, moreover, would be able to leave if they wished. Furthermore, CI Osborn conceded that at that stage he did not believe that there was an imminent threat of a breach of the peace. That said, CI Osborn accepted that when one female protester refused to enter the pen he warned her that she would be arrested in order to prevent a breach of the peace. This stemmed, as I have already pointed out, from what he characterised as *'the degeneration of the situation'*. I have seen from the video that other protesters were given the same warning. When he was cross-examined about this, CI Osborn said that it would not be safe to have groups of protesters in various locations and, as he put it, *'if they weren't going to cause harm, why not use the pen?'*.

41. Unsurprisingly, CI Osborn's cross examination centred on the events immediately leading up to the absolute containment decision reached shortly after 09:27. This appears to have been immediately before President Peres' arrival, which had already been delayed, although it is not possible to pinpoint the exact timing of the decision even to the nearest minute. My difficulty is in correlating the evidence I heard about the absolute containment decision with the events depicted on the videotape and the known timings.

42. The evidence was that Israeli security personnel on the ground, some of whom were armed with the permission of the Home Secretary, were concerned that the protest represented a real security threat. CI Osborn explained, and I am prepared to accept, that the Israelis tend to countenance a lower level of protest than their counterparts in this jurisdiction. By 09:27 the President was already 7 minutes late, and I do not draw the inference that the whole of the delay was attributable to security concerns.

43. CI Osborn said that there came a point when he *did* believe that a threat of a breach of the peace arose, and this coincided with the imminent arrival of the President. Paragraph 12 of his witness statement is directly germane here, but for present purposes I will focus on the oral evidence. The basis for this belief was a combination of: the refusal of individuals to enter the pen, and the greater risk occasioned by pockets of demonstrators; the conduct of the Claimant in beckoning people over; the fact that demonstrators had been permitted to leave and then continued their demonstration; advice on the ground given by the security co-ordinator, Mike Askew; the discomfort of the Israeli security personnel; his previous experience of demonstrations of this nature; and the passionate nature of young people. CI did not mention safety concerns which, as I have said, featured quite heavily on the audiotape.

44. I should interpose that the Claimant's conduct was not mentioned as a factor in CI Osborn's witness statement. Nonetheless, I conclude that the correct explanation for this is oversight, not rationalisation after the event, because I accept Inspector Rooke's evidence that the Claimant's conduct featured in the discussion the two officers had shortly after 09:27.

45. Key to an understanding of CI Osborn's evidence were two related concerns. First, that one or more individuals would try and get as close as possible to the presidential car and/or party. Although from the police perspective the intention may well only have been to throw an egg or a flour bomb, it was a cold day and people were wearing heavy clothes. A hand in the pocket might be interpreted as something more threatening which would demand an instantaneous response. We were therefore talking about split-second decisions and an overriding imperative to ensure that no one got too close. Furthermore, a factor here was that the Israeli security personnel might well have responded with a greater degree of robustness than British police officers.

46. Once the containment was made absolute it seems clear that those in the pen became aware of that fact, as well as the essential reasons for it, by about 09:52. CI Osborn was asked to justify the continued containment: it is clear that a number of demonstrators, including the Claimant, were saying that they wanted to leave the scene. Although this might generally have been so, I find on the balance of probabilities that the Claimant wanted to stay; there remained a point to be proved, and until Mr Peres left the Claimant would remain *in situ*. True it is that the Claimant would far have preferred to have been located elsewhere in the vicinity, but if the choice was between remaining in the pen and returning to complete an essay I am satisfied that the Claimant's heart was more in the former than in the latter.

47. Paragraph 14 of CI Osborn's witness statement explains why the containment remained in place until Mr Peres' departure from the area at shortly before 10:42. In short, Mr Peres was assessed to be at risk whilst he was in Chatham House because someone might seek to 'storm' the building. Furthermore, Mr Peres was ill that day and might wish to leave unexpectedly. In any event, Heads of State tend to leave when they want, and CI Osborn would have little or no prior notice of his departure. If the demonstration had been allowed to continue unconstrained, it would have been difficult to re-secure it at short notice.

48. Finally, CI Osborn was asked to explain why he did not deploy one or both of the following alternative strategies, namely (i) the deployment of s.14 of the Public Order Act 1986, and/or (ii) deploying a line of policemen at the mouth of Duke of York Street. As for (i), CI Osborn told me that he did not consider that there was a risk of sufficient seriousness so as to meet the s.14(1)(a) set of criteria. As for (ii), CI Osborn explained that he did not have enough 'cops' (as he put it) to close the mouth of the street. In any event, had there been a serious incident President Peres' car would have needed a clear exit route at exactly that point.

49. I also heard evidence from Inspector Rooke. Like CI Osborn, he was a frank and generally impressive witness. I did not gather the impression that either police officer was trying to withhold relevant information from me or trying to 'spin' the evidence any particular way. Nor did Mr Southey suggest in cross examination that either was seeking to do so.

50. Inspector Rooke arrived at the scene at approximately 09:15. He could see that CI Osborn was speaking to the group and trying to ensure that they entered the pen so as to prevent a breach of the peace (see paragraph 6 of his witness statement). He believes that at about 09:27 he started speaking to CI Osborn about the situation on the ground. About thirty seconds into that conversation, he witnessed the Claimant beckoning his fellow protesters over. Inspector Rooke told me that he believes that it was that action which tipped the scales and led to the absolute containment decision. It all happened very quickly but in Inspector Rooke's view CI Osborn had fears about the security surrounding the President and the possibility that one or more protesters would try to approach him. In the witness' own words:

> "*He appeared to be beckoning. It was my belief that he was trying to bring the other protesters closer. My immediate thought was that he wanted to approach Shimon Peres. It was a cold day and people were wearing jackets. I feared paint bombs, or that they would try to surround the car. The opportunity to move that way was not viable for him; he did not attempt to. He did not fight back. He stood his ground. My fear was that he wanted to move forward. If the officers had not been there, he might have advanced. After CI Osborn made the decision, I communicated it …*"

51. As Inspector Rooke's witness statement makes clear, the Claimant was manoeuvred into the pen with minimal force. The police officer effectively pushed him on the chest with his chest, deploying only light contact.

Findings, analysis and conclusions

52. It is clear that the police officers honestly believed that a breach of the peace was about to occur; the key question is: did the officers have reasonable grounds for that belief?

53. In his sustained and fluent oral submissions Mr Southey sought to persuade me to give a negative answer to that question. The Palestinian Solidarity Campaign is a responsible organisation with its members, and those associated with it, seeking to exercise their lawful right to protest. It is clear, submits Mr Southey, that even at 09:17 the demonstrators had really no option but to enter the pen; there was no voluntariness about the matter. Furthermore, the reasons given for the absolute containment decision were either irrelevant (viz. the reluctance of Israeli security personnel for Mr Peres to arrive before the area was effectively sealed off; the passionate nature of youth), or inadequate (viz. the general reluctance to enter the pen) or *ex post facto* (viz. the Claimant's conduct). The Claimant was fully entitled to conduct his lawful protest in full view of Mr Peres. Indeed, if anyone was acting unreasonably, the metaphorical finger should be pointed not at the Claimant at all, but those purportedly involved in maintaining the security of Mr Peres. For these purposes, one should consider the Claimant's actual behaviour, not what he might have done: see *Nicol and Selvanayagam*. Finally, Mr Southey submitted that the

common law power could not properly be used where the statutory power under s.14 could not apply. The right course would have been to arrest individuals as and when they constituted a risk rather than to impose a blanket control over movement and freedom of action. Mr Southey emphasised the chilling effect this sort of practice would be likely to have on the free exercise of protest rights.

54. In his equally able submissions Mr Thomas for the Defendant urged me to find that there were reasonable grounds for concluding that a breach of the peace was imminent even before the Claimant was seen to shout and to beckon his colleagues over. But his primary submission was that, once the Claimant shouted etc, the police officers could reasonably conclude that one or more persons might seek to approach the presidential vehicle the arrival of which was imminent. It was irrelevant that the breach of the peace might well be constituted by the reaction of the British police or Israeli security personnel. The fact remains that running forward would have given rise to the risk and been unreasonable: the Claimant certainly accepted the latter, and the former was so obvious that it went without saying.

55. I confess that for much of the trial I was attracted by the Claimant's case, but my mind changed during the course of the re-examination of CI Osborn. That change of mind was reinforced by Mr Thomas' oral argument to which I pay tribute.

56. I do not, however, accept Mr Thomas' submission that reasonable grounds for apprehending a breach of the peace were present before the Claimant was heard to shout and seen to beckon, and the related point (which he came close to making) that the imminence of Mr Peres' arrival, and nothing else, constituted the reasonable grounds. At that stage CI Osborn told me that he did not have reasonable grounds so to apprehend. It is true that by 09:17 Mr Peres was already late, and in one sense his arrival was therefore imminent, but it seems to me that I should not seek to go behind the witness' own evidence on this matter. CI Osborn was at pains to explain that his reasonable grounds coincided with the imminent arrival of Mr Peres some ten minutes later. But I draw from CI Osborne's evidence, and contrary to the submission made about it by Mr Thomas, that the bare fact of Mr Peres' imminent arrival did not, without more, create the sufficient degree of risk. CI Osborn relied on other factors which I have set out previously.

57. If one were to stop the notional clock at 09:17, there would be a real danger of falling into the trap of circularity of reasoning which both the Claimant and Mr Southey forcibly mentioned. If, *ex hypothesi*, there are no reasonable grounds, how can the police create those grounds by informing protesters that unless they comply they will be arrested? Although the Defendant's position was that a reasonable protester would want to enter the pen, I can see the force of the argument that this assumes too much and places a form of burden of persuasion or justification on the Claimant. In truth, the onus is on the police to justify containment and the protester is quite entitled to say: *'I am not causing a breach of the peace: let me stand on my rights'*.

58. Accordingly, had the Claimant been one of those who were warned at 09:17 that unless he entered the pen he would be arrested, he would then have had the makings of a claim. It is unnecessary for me to decide whether such a hypothetical claim would have succeeded.

59. It is therefore necessary to bring the notional clock forward to shortly after 09:27. I have already pointed out that the exact timings are unclear. What is clear that everything happened very quickly and that a rapid decision fell to be made. Plainly, there was a discussion between CI Osborn and Inspector Rooke which is likely to have been some sort of briefing by the former to the latter. By this stage Mr Peres' arrival was in my judgment imminent. About thirty seconds into the briefing the Claimant shouted out and was seen to beckon. The issue for me to decide is whether CI Osborn had reasonable grounds to apprehend that a breach of the police would or might occur.

60. Not without a measure of hesitation, I conclude on the balance of probabilities that CI Osborn did have reasonable grounds. I cannot ignore the possibility that CI Osborn was unduly influenced by a combination of factors including reasons of police convenience, a desire to keep everyone safe in a relatively busy street, a wish to avoid adverse publicity, and a related wish to mollify the Israelis. But these matters did not feature heavily in the cross examination, and (regardless of that omission) I have concluded that – save for the point on public safety - it would not be right to making findings on a probabilistic basis to that effect. Furthermore, CI Osborn was undoubtedly entitled to have in mind an issue such as the level of police resources.

61. The principal ground for the containment was a belief that one or more persons, whoever they might be, would seek to advance at speed in the direction of Mr Peres' car. CI Osborn interpreted the Claimant's conduct as liable to provoke action of this nature, regardless of whether that was in fact the Claimant's intention. CI Osborn no doubt also believed that the Claimant himself might form the vanguard of such action: self-evidently, he could not know what was passing through the Claimant's mind. He had to respond in rapid real time to the situation as it was developing before him. Although the exact sequence of events does not clearly emerge from the evidence of CI Osborn, I consider that the missing links are filled by Inspector Rooke. He made it clear that his superior's decision to impose an absolute containment came after the Claimant beckoning and was prompted by it.

62. Had it not been for the Claimant's own actions, I am far from convinced that the other matters prayed in aid by CI Osborn would have been sufficient. The refusal to go into the pen could well be regarded as protesters standing on their rights. On the other hand, protesters who claimed that they wanted to leave the scene, were let out of the pen, and then rekindled their protest elsewhere placed themselves in a different category: they were not simply standing on their rights; they had misled the police and could therefore be regarded as untrustworthy. I also see some merit in the point that the police wanted to avoid having to deal with pockets of demonstrators and the impact that would have on resources.

63. As for Mr Southey's other submissions relating to the decision-making process, he urges me to ignore the point made by CI Osborn that young people can be passionate. In my judgment, I should not. Although not a particularly strong point in itself, it is plainly relevant in an adjunctive way to the principal issue relating to level of risk to which I have already adverted. Mr Southey's submission about the Israeli security services is less easily disposed of. The fact that they were expressing concerns about the situation on the ground before the Claimant shouted out suggests to me (a) that they might have been over-sensitive, and (b) the Defendant may have been overly influenced by that fact. I have already stated that there was a conversation between CI Osborn and Mark Askew during which these concerns were shared. That said, once the Claimant shouted out that, in my judgment, became the primary spur for action, and what would or might have happened without that occurrence raises a hypothetical issue which I really do not have to resolve.

64. Mr Southey submitted that if the Defendant's decision was found to be tainted by unlawful considerations then I should find for the Claimant on liability but reflect the fact that there remained a lawful basis for the decision in any award of damages. I am satisfied that would not be the right approach. If the decision could be justified by lawful grounds then the presence of additional unlawful grounds is irrelevant. I have found that the decision was justified by a number of lawful grounds, and in those circumstances the desire to uphold public safety can effectively be blue-pencilled out.

65. Finally on this first issue, Mr Southey submitted that I should judge the Claimant's conduct by an overarching standard of reasonableness rather than in the light of what a third party might do on some hypothetical basis. Accordingly, if I were satisfied that the Claimant was acting reasonably, or not acting unreasonably, in shouting out etc, and if I were of the view that the Claimant would not have sought to run forward, then I should find for him in the light of *Nicol and Selvanayagam*. The correct analysis would be that the Claimant was merely standing on his rights, and the Israeli security personnel, had they intervened, would have been acting unreasonably.

66. I reject that submission. On the facts of *Nicol and Selvanayagam*, the defendants would not have done anything more than continue to throw sticks into the stream, thereby frightening off the fish. But they were held to have acted unreasonably because it was highly foreseeable that the reaction of the anglers would have been such so as to cause a breach of the peace. In the instant case Mr Thomas submits that the Claimant was acting unreasonably by shouting out etc. I make no finding on that issue. However, I have found that his actions were such as to cause the police reasonably to apprehend that someone would rush forwards in the direction of Mr Peres' car. *That* would have been unreasonable action liable to cause a breach of the peace, whether it be directly (viz. action perpetrated by the person running forward, for example throwing a flour bomb at Mr Peres or his car) or indirectly (viz. preventive action by the police or the Israelis). On either analysis the first limb of the tripartite test is satisfied.

67. I turn to consider the second and third limbs of the test in the context of CI Osborn's decision made shortly after 09:27. I should make it clear that the justification for the continuation of the containment falls to be addressed subsequently.

68. Mr Southey strongly submitted that section 14 of the Public Order Act 1986 was the only reasonable and proportionate response to this situation, and the fact that s.14(1)(a) is not satisfied scarcely avails the Defendant. But the fact remains that the Defendant could not deploy s.14 for the very reason that its preconditions were not satisfied, in which circumstances the real question becomes this: does the fact that s.14 could not be deployed here mean that the common law containment power could not be lawfully used either? Put in those terms, the question posed only has one answer: it does not. The common law power could lawfully be used provided that the tripartite test was satisfied, and if s.14 was not an option (on these facts) then it fell out of consideration. Furthermore, although CI Osborn fairly accepted that s.14 could be used dynamically, as he put it, I consider that it would have been difficult to do this in this sort of fast moving situation, particularly given the need under s.14(3) to provide notification.

69. I also reject Mr Southey's submission that the police should have arrested individuals as and when the need arose. Arguably, this would have been a less than proportionate strategy. Mr Southey did not rely on paragraph 55 of Lord Bingham's opinion in *Laporte* (as he might have done), where – on one reading at least – his Lordship observed that the lawful and proportionate approach would have been to arrest individuals as and when the need arose. Arguably, Lord Bingham's approach is slightly different from that of Lord Rodger, Lord Brown and Lord Mance. However, I do not read that paragraph as covering the sort of situation currently in play, in particular one in which officers seek to deploy action short of arrest, namely containment. Indeed, as the House of Lords explained in *Laporte*, the common law entitled and bound all police officers and citizens alike to seek to prevent, by arrest or action short of arrest, any breach of the peace occurring in their presence, or which they reasonably believed was about to occur. Containment was action short of arrest and was not in my view a disproportionate response.

70. Overall, I conclude that CI Osborn had reasonable grounds, and that containment was both necessary and proportionate.

71. I turn to consider the decision to perpetuate the containment until after Mr Peres had left. CI Osborn did not know exactly when the President would leave but he must have been aware in general terms of his programme. The key point here is that a lengthy period of containment was not anticipated, and so it was to prove. I accept CI Osborn's evidence on this issue as set out under paragraph 47 above. Accordingly, I conclude that he had reasonable grounds to continue the containment until 10:42, and that this action was both necessary and proportionate.

72. This leaves the Claimant's subsidiary claims for assault, and for breaches of Articles 10 and 11 of the Convention.

73. There is no issue of fact between the Claimant and Inspector Rooke as to precisely what occurred when the former was ushered into the pen. There was a degree of physical confrontation, but it was minimal. To my mind, the question should be posed in these terms: was Inspector Rooke deploying reasonable force to prevent a breach of the peace which he reasonably apprehended as imminent? In my opinion, he was, and so the claim for assault must fail.

74. As for the remaining Convention claims, it was unclear to me how strongly Mr Southey was continuing to press these in the event that I disfavoured his primary case, but I shall examine these in the light of my earlier findings. Articles 10 and 11 are qualified rights and yield in the face of sufficiently strong public interests, which interests (in effect) I have found to exist. The interference with the relevant Convention rights was in any event close to minimal: the Claimant was still free to demonstrate and to associate, albeit not quite where he wished to. An additional consideration, although the Claimant would no doubt have wished me to discount it, is that I have to place in the balance the equivalent Article 10 and 11 rights of those attending the seminar, including Mr Peres himself. Given my findings on necessity and proportionality in relation to the main issue, the remaining Convention claims fall away, and I say nothing more about them.

75. Had I found for the Claimant on the main issue, I would have awarded damages in the sum of £500.

76. This claim is therefore dismissed, with judgment for the Defendant.