Neutral Citation Number: [2022] EWHC 3162 (KB)

Case No: QA-2021-000052

IN THE HIGH COURT OF JUSTICE
KING'S BENCH DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 12/12/2022

Before :

MRS JUSTICE ELLENBOGEN

- -

Between :

Paul Charles Andrews	**Appellant**
- and -	
The Chief Constable of Suffolk Constabulary	**Respondent**

- -
- -

Una Morris and Michael Etienne (instructed by **Hatch Brenner LLP**) for the **Appellant**
Adam Clemens (instructed by **Weightmans LLP**) for the **Respondent**

Hearing dates: 19 November 2021

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Approved Judgment

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MRS JUSTICE ELLENBOGEN

Mrs Justice Ellenbogen DBE :

Introduction

1. With the permission of Steyn J, the Appellant appeals from the judgment of the County Court at Norwich (HHJ Pugh - 'the Judgment'), by which his claims for false imprisonment; contravention of the Human Rights Act 1998 ('the HRA') and of Article 5 of the European Convention for the Protection of Human Rights and Fundamental Freedoms ('the ECHR'); assault and battery; and trespass to premises (his vehicle) were dismissed. The last two of those claims flowed from the Appellant's allegedly unlawful

detention and it was not disputed by the Respondent that, in the event that detention was held to be unlawful, each such claim would be established.

2. The proceedings had arisen from an incident on 10 June 2017 which had occurred in a Morrisons supermarket car park, in Lowestoft, following which the Appellant had been arrested, on 15 June 2017, for attempted child abduction. Thereafter, the Appellant had been detained until 16 August 2017, initially in police custody and then on remand at HMP Norwich, by order of Norwich Magistrates' Court. The criminal proceedings against the Appellant concluded on that day, when the Crown Prosecution Service ('the CPS') offered no evidence, at a hearing before Ipswich Crown Court.

3. As recorded at paragraphs 2, 3, 5 and 6 of the transcript of the Judgment:

> *'2. What happened on the 10th June 2017 is broadly agreed, although there are some minor areas of divergence. At around 8pm Mr Andrews went to Morrisons, entered the store and made some purchases. He had driven there in his car which had his three dogs in it. As he left the store he spoke to the father of two young girls who were standing between that exit and where the car was parked close by. There was a brief discussion between them about the dogs. Mr Andrews went to the car. Shortly after he did so, the mother of the two young girls came out of the store and the father, with one of the girls, entered the store, leaving the second girl, aged 9, outside the store with the mother. Mr Andrews drove the car around the car park and then stopped the car directly in front of the remaining young girl. There was loud music emanating from the vehicle. He called loudly to the young girl "I've got my music loud and clear just for you." He got out of the car and began to dance and shimmer*[1] *towards the young girl with his arms wide open asking her if she wanted to dance. The young girl smiled and began to move towards Mr Andrews. As she did so her mother walked over to the girl and put her arm around her daughter and said "No she's fine, thank you". It is suggested by the mother that as she put her arm around her daughter Mr Andrews repeated his invitation to the young girl to dance. However this is denied by Mr Andrews. After the mother had told Mr Andrews that her daughter was fine Mr Andrews then said "I'm just trying to have a bit of fun". The mother says that this was said angrily. Mr Andrews accepts he said those words but denies that he did so in an angry manner. Mr Andrews then drove off.*
>
> *3. The incident was reported to the police, who attended the scene. On the 15th June 2017 PC Pullen and PC Robinson saw Mr Andrews in his car and PC Pullen arrested him on suspicion of attempted child abduction.*
>
> *…*
>
> *5. The basis of his claim is that the arresting officer, PC Pullen, did not have reasonable grounds for suspecting that the claimant had attempted to abduct a child and that accordingly his detention was*

[1] It seems probable that this word ought to have been transcribed as 'shimmy'.

unlawful as it was contrary to sections 24 and 28 of the Police and Criminal Evidence Act 1984 (PACE) and in breach of Article 5. If the arrest was unlawful then he asserts that any physical touching was an unlawful assault and that a search of his vehicle pursuant to section 18 of PACE would be unjustified. He also asserts that all decisions or reviews by police officers relating to his continued detention were unlawful.

6. The defendant accepts that the onus of proving that the arrest was lawful and that there has been no breach of Article 5 rests on him.'

4. At paragraphs 7 to 12 of the Judgment, HHJ Pugh stated:

7. PC Pullen's evidence is that on the morning of the 15th June 2017 he had been part of a verbal briefing which included DS Beales informing the team of the incident at Morrisons on the 10th June 2017 and that the claimant was involved in that incident. PC Pullen stated that he had access to the investigation log, that he noted that Mr Andrews had been seen to dance towards a young girl with his arms open. He said that he formed the view from the information that he had been told and read that Mr Andrews appeared to be attempting to coerce a young girl away from her mother. He considered that the conduct was more than merely preparatory. He also confirmed that he had been informed at the briefing of Mr Andrews' previous convictions which included an offence involving a young child being locked in a cupboard.

8. The investigation log, otherwise known as the Athena log, gives details of the incident as set out at paragraph 2 of this judgment. It included the reported opinion of a woman standing a few feet away who spoke to the girl and the mother after the incident stating that "the man was going to take [the girl] away". PC Pullen also stated in oral evidence that he had taken into account that the girl, who had appeared to be with her father, had then looked as if she was on her own and that the claimant had returned to speak to her when she looked unattended, pulling up in front of the store next to the girl, rather than in a parking bay.

9. In cross-examination it was put to PC Pullen that there had been no such briefing i.e. that PC Pullen was lying when he said there had been one. Ms Morris justified putting such an allegation on the basis that there was no contemporaneous record of any such briefing and that he had not mentioned the briefing in his pocket notebook, nor when preparing his MG11 statement for the purposes of a criminal prosecution and nor had any other officers who were present at the briefing been called to give evidence. PC Pullen's response, that there was no such record because it was a verbal briefing and that it would not be usual to mention morning briefings in MG11 statements is one that I accept. He was also taken to entries within the investigation log from an Inspector Hinitt which stated that the offence was not made out as it did not cross the merely preparatory threshold. In answer PC Pullen said that he had not noted that comment but that by the time he was involved the officer in charge was DS Beales who did not express

any similar reservation concerning whether the offence had been committed.

10. PC Pullen said that based on the information he had been given and read that he suspected that an offence of attempted child abduction had been committed. Whilst this was challenged, I accept PC Pullen's evidence on this.

11. PC Pullen's evidence regarding the arrest is similar to the account given by Mr Andrews. That Mr Andrews was parked in his car on the phone. That he permitted Mr Andrews to finish his call and then arrested him, informing him what he was being arrested for and explaining the allegation to him including the date, time and location of the incident and the nature of the allegation. There is a dispute as to whether PC Pullen cautioned Mr Andrews (although it is not asserted that even if there had been no caution, this would, by itself, mean that the arrest was unlawful). I accept PC Pullen's evidence that he did caution Mr Andrews and that Mr Andrews then replied "No, that's not right".

12. PC Pullen said that he considered it was necessary to arrest Mr Andrews to allow for the prompt and effective investigation and to protect vulnerable children. PC Pullen explained that he was concerned that Mr Andrews may commit further child abductions and he also considered that a search of Mr Andrews' vehicle was necessary. There is a dispute as to whether PC Pullen told Mr Andrews of the need for the arrest. I accept that he did so, but it is not, in any event, submitted that a failure to do so would make the arrest unlawful.'

5. The judge held the Appellant's arrest by PC Pullen to have been lawful, in accordance with section 24 of the Police and Criminal Evidence Act 1984 ('PACE'), set out (so far as material) below:

*'**Arrest without warrant: constables***

(1) ...

(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.

(3) ...

(4) But the power of summary arrest conferred by subsection (1), (2) or (3) is exercisable only if the constable has reasonable grounds for believing that for any of the reasons mentioned in subsection (5) it is necessary to arrest the person in question.

(5) The reasons are—
...

(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;

...

(6) ...'

6. The judge set out his reasons for that conclusion at paragraphs 18 to 36 of the Judgment:

'18. The first question is whether PC Pullen suspected that an offence of attempted child abduction had been committed. This is a subjective test.

19. The offence of child abduction involves the taking or detention of a child so as to remove him from the lawful control of, in this case, a parent. An attempt to commit an offence involves the doing of an act which is more than merely preparatory to the commission of the offence.

20. I accept PC Pullen's evidence that he did so. I accept that he had considered the information received in the morning briefing and had also considered the information in the Athena log and what was known about Mr Andrews.

21. The second question is whether there were reasonable grounds for that suspicion. This is an objective test.

22. Ms Morris submits that because it was still light, in a supermarket car park with members of the public about, which could be covered by cctv and because he was wearing a distinctive t-shirt with a car full of dogs, playing loud music and that no one suggests that Mr Andrews said to the girl "come with me" or anything to that effect, it cannot be said that there are reasonable grounds to suspect him of the offence and specifically that there were no reasonable grounds to suspect that his conduct was more than merely preparatory to the offence of child abduction.

23. In Parker v The Chief Constable of Essex [2018] EWCA Civ 2799 Sir Brian Leveson reiterated that the threshold for suspicion is a low one. He said:

> *"The bar for reasonable cause to suspect set out in s24(2) of the 1984 Act is a low one. It is lower than a prima facie case and far less than the evidence required to convict ... further, prima facie proof consists of admissible evidence, while suspicion may take account of matters that could not be put in evidence ... suspicion may be based on assertions that turn out to be wrong ... the factors in the mind of the arresting officer fall to be considered cumulatively".*

24. *I find that there were reasonable grounds for PC Pullen's suspicion: he had received a briefing when the incident had been discussed; he had read the Athena log which referred to Mr Andrews dancing towards a young girl with his arms open inviting her to dance; the log referred to a witness who considered that Mr Andrews was trying to coerce the young girl away from her mother; the mother had to intervene as the child was moving towards Mr Andrews; he had been informed during the briefing of Mr Andrews' previous convictions which included an offence involving children; he had noted that Mr Andrews had returned to the area the girl was in having initially driven away.*

25. *The next questions are whether PC Pullen suspected Mr Andrews of committing the offence (subjective) and whether PC Pullen had reasonable grounds for that suspicion.*

26. *Given that the log records that the check on the vehicle matched that of the vehicle owned by Mr Andrews I accept PC Pullen's evidence that he suspected that it was Mr Andrews who had committed the offence. For the reasons given at paragraph 24, I find that there were reasonable grounds for that suspicion.*

27. *For an arrest to be lawful it must also comply with s28(3) of PACE which provides:*

    ..no arrest is lawful unless the person arrested is informed of the ground for the arrest at the time of, or as soon as is practicable after the arrest.'

28. *Mr Andrews accepts that he was informed that he was under arrest on suspicion of attempted child abduction and that he was told that the offence was said to involve a young girl and that it was said to have been committed at Morrisons at 8pm on Saturday, which was the 10th June 2017.*

29. *Notwithstanding this, Ms Morris submits that s28(3) is not met.*

30. *In Taylor v Chief Constable of Thames Valley Police [2004] 1 WLR 3155 the Court of Appeal in a case involving an offence of violent disorder held that the requirements of s28(3) are met if the arrested person is told what he is being arrested for and given the time and place of the alleged offence. At paragraph 38 of the judgment of the court Clarke LJ stated that there was no need to specify the precise way in which the offence was said to have been committed.*

31. *I am satisfied that Mr Andrews was informed of the ground for the arrest at the time of the arrest.*

32. *Finally, the person making the arrest must have reasonable grounds for believing that the arrest is necessary: s24(4) and s24(5) PACE.*

33. *I accept PC Pullen's evidence that he considered it would be necessary for an arrest to allow a prompt and effective investigation and to protect vulnerable children. PC Pullen gave evidence that he considered that searches would need to be carried out, particularly of the vehicle and that Mr Andrews would need to be interviewed and that*

he considered a voluntary interview as not appropriate. He was also aware of Mr Andrews' previous convictions. I am satisfied that he had reasonable grounds for believing that the arrest was necessary.

34. *I find that the arrest of Mr Andrews was lawful.*

35. *Article 5(1)(c) provides that no one shall be deprived of his liberty save in the following cases:*

    the lawful arrest or detention of a person effected for the purpose of bringing him before the competent legal authority on reasonable suspicion of having committed an offence or when it is reasonably considered necessary to prevent his committing an offence or fleeing after having done so

36. *It follows from my finding that the arrest of Mr Andrews was lawful that I do not find that there has been a breach of his Article 5 rights in respect of his arrest.'*

7. HHJ Pugh went on to consider whether the authorisation of the Appellant's detention by the Custody Officer, PS Bloomfield, and the three subsequent reviews of that detention, had been lawful, holding as follows ([37] to [46]):

'<u>Was the authorisation of Mr Andrews' detention by PS Bloomfield lawful?</u>

37. *When Mr Andrews was conveyed to the Great Yarmouth Custody Suite on the 15th June 2017 he was brought before PS Bloomfield who authorised his detention. The grounds for detention are set out in the Custody Record as "I am authorising your detention as being necessary for the following purposes, To Secure Or Preserve Evidence, To Obtain Evidence by Questioning".*

38. *S37 of PACE provides that a custody officer may authorise a person arrested to be kept in police detention if that officer has:*
    … reasonable grounds for believing that the person's detention without being charged is necessary to secure or preserve evidence relating to an offence for which the person is under arrest or to obtain such evidence by questioning the person …

39. *PS Bloomfield's evidence was that he would have considered the fact that the alleged victim was a child, that Mr Andrews did not have a fixed abode, that it was necessary to conduct a search and that it was necessary to conduct an interview with Mr Andrews.*

40. *I am satisfied that PS Bloomfield had reasonable grounds for authorising Mr Andrew's detention.*

41. *In evidence Mr Andrews also stated that he had no criticism to make of PS Bloomfield.*

<u>The reviews of detention</u>

42. *There were three reviews of detention prior to Mr Andrews being remanded in custody by the Norwich Magistrates' Court.*

43. *In evidence Mr Andrews said that he had no criticism of those reviews.*

44. *Notwithstanding there was no criticism of the reviews by Mr Andrews, Ms Morris in cross-examination suggested to the reviewing officers that they had a duty to consider afresh at every review whether the original decision to detain Mr Andrews was appropriate and that this should involve a review of the basis for detention.*

45. *However, as submitted by Mr Clemens on behalf of the defendant, the obligation of a reviewing officer is as set out at section 34(2) of PACE:*

    Subject to subsection (3) below, if at any time a custody officer—

    (a) becomes aware, in relation to any person in police detention, that the grounds for the detention of that person have ceased to apply; and

    (b) is not aware of any other grounds on which the continued detention of that person could be justified under the provision of this part of this Act,

    it shall be the duty of the custody officer, subject to subsection (4) below, to order his immediate release from custody.

46. *There is no evidence that the grounds for the detention had ceased to apply at any of the reviews. Accordingly I am satisfied that each review was carried out in accordance with section 34 of PACE.'*

8. The judge then turned to consider whether the denial of bail, post-charge, and the search of the Appellant's vehicle, had been lawful, holding that each had. As this appeal is not concerned with either such matter, I need not set out his findings. Finally, the judge considered whether there had been a breach of Article 5 ECHR, concluding as follows:

'<u>Has there been a breach of Article 5?</u>

57. *I have addressed the issue of whether there was a breach of Article 5(1)(c) in relation to the arrest at paragraphs 35 and 36.*

58. *In relation to the detention of Mr Andrews Article 5(1)(c) provides that the detention must be:*

    for the purpose of bringing him before the competent legal authority on reasonable suspicion of having committed an offence or when it is reasonably considered necessary to prevent his committing an offence or fleeing after having done so

59. *The claim relating to a breach of Article 5 extends beyond the period when the claimant was in police detention. He claims that his remand in custody by the Magistrates' Court was also in breach of Article 5,*

relying on Zenati v Commissioner of Police of the Metropolis and another [2015] EWCA Civ 80. He frames his case in two ways. First, that there was a failure by the police to send to the Crown Prosecution Service (CPS) in a timely manner the recorded ABE discs of the interview with the child; and second, that if there were never any reasonable grounds for suspecting the claimant of having committed the offence, then, notwithstanding that the decision to charge and the objection to bail made in court was made by the CPS, the police remain liable for the breach of Article 5.

60. *As to the second of those grounds Ms Morris was unable to point to any authority to support that proposition (although Mr Clemens allowed for the possibility where, for example, there had been misfeasance on the part of a police officer which was calculated to lead to the suspect being remanded in custody by a court). But given my findings that there were reasonable grounds to detain Mr Andrews and to deny him bail, this limb of Ms Morris' argument falls away. Should it have been necessary I would, in any event, have found that once the CPS had considered the evidence and decided to authorise a charge, whether on the full test or, as here, the threshold test, the finding that there was, in the words of Article 5, "reasonable suspicion of having committed an offence" was one that was made by the CPS and accordingly, if there was no basis for that finding, it would not be the defendant that would be liable.*

61. *As to the alleged failure by the police to send to the CPS the ABE discs of the child in a timely manner, the evidence before me is that contained in the Athena system. DC Shrubshall, the officer in the case, gave evidence that this system will record the actions and tasks carried out. She gave evidence, relying on those entries, that the ABE discs of the child, which was carried out on the 22nd June 2017 were sent to the CPS on the 28th June 2017. The entries show that following the ABE on the 22nd June there was a request sent to the Image Technicians to provide three copies of the discs and that this had been done by 13:30 on the 28th June 2017 with the discs being sent by post to the CPS at 14:45 on that day.*

62. *Mr Clemens accepted that Zenati is authority for the proposition that if there is new material which undermines the prosecution case it should be brought to the attention of the CPS in a timely manner so as to enable the CPS to bring the matter back to court. But he submits first, the ABE interview of the child did not undermine the prosecution case; and second, that in any event it was sent to the CPS in a timely manner.*

63. *Ms Morris submits that the ABE went no further than support for the evidence that had already been obtained and that, by itself, undermined the prosecution case. And secondly, that the police should not have waited for the ABE discs to be copied but should have contacted the CPS to let them know of this soon after the ABE had been conducted.*

64. *I reject both of those submissions. The ABE of the child supported the evidence that had been obtained from the mother and other witnesses. It was on the evidence of the mother and those other witnesses that the CPS had made the charging decision and the decision to oppose bail when the case first came to the Magistrates' Court on the 16th June*

2017. As the ABE of the 22nd June 2017 was consistent with that evidence it cannot be said to have undermined the prosecution case. There was no requirement for the police to have contacted the CPS to inform them of this as a matter of urgency. I also find that the provision of the ABE discs to the CPS was in a timely manner.

65. It follows that I do not find that there was any breach of Article 5 by the defendant.

66. The claim against the defendant on all grounds is dismissed.'

The grounds of appeal

9. There are three grounds of appeal. It is said that the judge erred in law in:

9.1. concluding that the Respondent had proven that there had been objectively reasonable grounds on which to have suspected the Appellant of attempted child abduction;

9.2. concluding that the Appellant's detention had been based on reasonable grounds, within the meaning of section 37 of PACE; and

9.3. rejecting the Appellant's claim under Article 5 of the ECHR.

The parties' submissions

10. On behalf of the Appellant, Ms Morris observes that his claim in false imprisonment relates to his time in police custody only and that, concurrently and thereafter, his claim under the HRA, for breach of Article 5 ECHR becomes relevant. By all three grounds of appeal, she submits, the Appellant accepts the facts as found by the lower court and that it had identified the correct legal principles. It had been in the court's application of those principles to the facts that it had erred, she submits.

Ground 1

11. At the time of the Appellant's arrest, it is said, PC Pullen[2] had lacked objectively reasonable grounds to have suspected him of an offence of attempted child abduction, from which the conclusions invited on appeal inevitably follow. A proper assessment of whether or not there are reasonable grounds to suspect a person of an offence cannot be carried out in the abstract, but must be undertaken by reference to the specific offence in contemplation and in light of all relevant facts and circumstances. On the facts of this case, the question, put another way, was whether PC Pullen could have had reasonable

[2] who had been promoted to the rank of Sergeant by the date of trial

grounds to have suspected that the Appellant had done an act which had been more than merely preparatory to a child abduction. Ms Morris submits that the answer is that he could not. Whereas the judge had correctly identified the legal tests applicable to the assessment of the lawfulness of an arrest (in particular at [17], at which section 24 of PACE had been cited, [21] and [23]) and had purported to recognise the need for an act which had been more than merely preparatory [19], he had erred in the application of those tests. He had failed to identify exactly which aspect(s) of the Appellant's conduct had been more than merely preparatory to an offence of child abduction. Ms Morris submits that, taken at its highest, the evidence upon which the judge had relied had indicated no more than that which might have been in the Appellant's mind, i.e. the mere possibility that he had been thinking about attempting an abduction (albeit that it had been the Appellant's case that he had had no malign intent). The criminal law did not criminalise or penalise an individual for his or her thoughts alone and, an act which, viewed at its highest, was merely preparatory would not suffice to constitute an offence under section 1(1) of the Criminal Attempts Act 1981 ('the 1981 Act'), which provides:

> *'**1.— Attempting to commit an offence.***
>
> *(1) If, with intent to commit an offence to which this section applies, a person does an act which is more than merely preparatory to the commission of the offence, he is guilty of attempting to commit the offence.'*

12. Ms Morris relies upon *R v Rowley* [1991] 1 WLR 1020, CA and *R v Geddes* (1996) 160 JP 697, CA (to both of which the lower court had been referred) and upon *R v MS* [2021] EWCA Crim 600 and *Perry v The Government of the United States of America* [2021] EWHC 1956 (Admin), decided subsequently, as indicating a clear line between acts considered to have been merely preparatory and those which had gone beyond that stage. Applying those principles to the facts of the instant case, at best the Appellant could be said to have been getting ready, or putting himself in a position, to abduct the child in question. Even if PC Pullen had suspected a continuum of events in the course of which the Appellant's aim had been frustrated, there remained a need for the judge to have been satisfied that the acts in question had been more than merely preparatory.

13. In Ms Morris' submission, in the absence of any conduct, taken on its own or cumulatively, which could have given rise to reasonable grounds to suspect the Appellant of an act which had been more than merely preparatory to a child abduction, any perception of that which might have been in the Appellant's mind, or in the mind of any witness, had been irrelevant to the central question. Equally, the child's own act in

moving towards the Appellant could not have constituted conduct by him. Without more, the Appellant's conduct had not amounted to an attempted child abduction and, thus, it could not have been reasonable to have suspected him of the same. Gaining a child's trust would have been a preparatory act. There had been no allegation that he had made any discernible move to snatch the child away, or detain her, or that he had told her to go with him. That is important, submits Ms Morris, because it had not been in dispute that the child had been in the presence of a parent. The implication that, on a Summer evening, in a busy supermarket car park, whilst wearing a bright green T-shirt bearing a distinctive slogan, the Appellant had been attempting to abduct a child who had been within sight and reach of her parent merely by dancing towards her was inherently improbable and could not (at its highest), on any reasonable view, have progressed beyond a merely preparatory act. An unparticularised allegation of a perceived attempt at coercion of the child could not change that. A person's criminal history could, at its highest, speak to that which might have been in his mind, which would not have fallen for consideration had the correct approach been taken to the assessment of the nature of the conduct in question. The rest had been speculative assumption. That was not to submit that an insufficiency of evidence to justify charging an individual automatically equated with an absence of reasonable suspicion grounding his or her arrest, or that the judge ought not to have viewed matters cumulatively. Here, taken at its highest, the evidence could not have grounded such a suspicion and the judge had failed properly to have identified the information or evidence which had crossed the required threshold, of which there had not been any. Accordingly, the Appellant ought to have succeeded in all causes of action.

14. For the Respondent, Mr Clemens submits that the lower court had been entitled to conclude that the arresting officer's subjective suspicion – itself a low threshold – that the Appellant had committed an offence of attempted child abduction had been objectively made out. In arguing to the contrary, and in the absence of any suggestion that the judge had misapplied the law, he submits, the Appellant has made an impermissible attack on his interpretation of the facts as found and has relied, selectively, on 'jury points', excluding counter-factual evidence. Secondly, he submits, the Appellant has conflated and confused that which is necessary for an arrest to be lawful, on the one hand, with that which might be necessary to prove commission of an offence, on the other. In doing so, he has mis-framed the proper question; the objective component of the test is not concerned with the viability of an offence of attempt at trial, but with a much earlier and low-threshold question of reasonable grounds for suspicion.

15. Mr Clemens notes that there is no challenge to the judge's findings at [2] and [24] of the Judgment, or to his entitlement to have made them, or to the subjective element of the relevant test. The Appellant has acknowledged that the judge had identified, correctly, the test which he had been obliged to apply. As he had recited [23], the bar for reasonable cause to suspect, set out in *Parker v Chief Constable of Essex Police* [2019] 1 WLR, CA [115], is low. *Parker* [116] had also cautioned against the over-compartmentalisation of the evidence to be taken into account. In Mr Clemens' submission, the Appellant's approach to the evidence is selective and isolated certain points, excluding other relevant information (including the Appellant's previous conviction in relation to a child) which had been available to PC Pullen. The judge had articulated that which he had found the Appellant to have done, or which had not been in dispute [2]. He had accepted PC Pullen's evidence, having discussed the significance of DI Hinitt's entries in the log ([9] and [10]). Having addressed the points made by the Appellant [22], he had found there to have been objective, reasonable grounds [24]. The judge had not been obliged to itemise every individual factor which had led him to conclude that the Appellant's acts had gone beyond the merely preparatory; he had been entitled to consider the cumulative effect of the evidence which he had received and the question which he had been obliged to address had been whether there had been reasonable grounds objectively to have suspected the commission of the relevant offence; it had not been for him to find as a fact that one or more of the Appellant's acts had been more than merely preparatory in nature. The Appellant's challenge to the judge's interpretation of the facts as found, necessarily entailing a qualitative assessment, was impermissible.

16. In any event, Mr Clemens submits, the Appellant's submissions ignore the facts as found, to the effect that he had circled Morrisons, *'...had returned to the area the girl was in having initially driven away'* [24], had parked near the young girl, got out of the car, engaged with her by moving towards her (and she having begun to move towards him) and that her mother had been obliged to walk over and put an arm around her daughter, which the judge had interpreted as a protective intervention. Contrary to the Appellant's submission, this had not been the criminalisation of thoughts alone, or an attempt to gauge, or come to a definitive view regarding, the Appellant's intention; the issue had been whether the low threshold for reasonable suspicion had had a reasonably objective basis. In considering whether a criminal offence might be made out, the focus is on the acts of the perpetrator, but the consequences of those acts inform the proper analysis of those acts. The Appellant was wrong to contend that the reaction of the intended victim and of others ought to be ignored. Those reactions were highly material, in serving to indicate that the Appellant's acts had necessitated protective intervention by the girl's

mother and, thus, had gone beyond an attempt to gain the girl's trust. There was a judgement call to be made, on the facts of each case, as to where, in the course of a continuum of events, the necessary choate act arose. A police officer is entitled to take account of a witness' reactions and of an individual's prior conviction in forming a reasonable suspicion as to the commission of an offence. Neither a police officer nor a judge is obliged to consider the acts done in isolation. In Mr Clemens' submission, the Appellant's reliance upon *Rowley* and *Geddes*, and upon the cases decided subsequent to the Judgment, is misplaced and indicative of the way in which the issue had been mis-framed on appeal. *Rowley* and *Geddes* had been criminal cases, examining whether the available evidence had sufficed to make good a charge of/indictment for an offence of attempt, and had not been concerned with the lawfulness of an arrest. Each was clearly distinguishable from the facts of this case. Mr Rowley had not engaged or interacted, verbally or physically, with any boy who might have found a note which he had left in a public lavatory, which had been held to have constituted merely an attempt to engineer a preliminary meeting. He had not come close to any act of gross indecency. Mr Geddes had not moved from planning into the area of execution or implementation because he had not reached the stage of engagement or interaction with an intended victim. The later cases had related to the removal of children from the jurisdiction and were not particularly instructive, for current purposes. By contrast, submits Mr Clemens, the offence of child abduction entails removing a child from the lawful control of a person having such control. In this case, by his actions, the Appellant had enticed a young girl away from her mother and towards himself. Ultimately, each case falls to be determined on its facts.

Ground 2

17. Ms Morris submits that the judge's conclusion that the authorisation of the Appellant's detention had been based on reasonable grounds and, thus, lawful, was flawed. Starting with PS Bloomfield, whilst the judge had identified the matters which had been taken into account in deciding whether to authorise detention and for which purposes, he had failed (adequately) to consider reasonableness by reference to the information then available regarding the Appellant's conduct. That question had called for some consideration of the offence for which the Appellant had been arrested and not simply of the reasons for which detention might be convenient. From the absence of reasonable suspicion in connection with the Appellant's arrest, it followed, automatically, that there had been an absence of reasonable grounds for his detention, rendering the latter unlawful, submits Ms Morris. Even if there had been reasonable grounds for the Appellant's arrest, it did not follow that his detention had been authorised on reasonable grounds, which appeared to

have been the approach adopted by the judge. Whilst section 37(3) of PACE enables a custody officer to rely on the information presented to him or her by the arresting officer, on the very limited information which had been available to PS Bloomfield (namely that which had been recorded in the custody record), it could not have been reasonable to have suspected the Appellant of the offence in question, such that his detention could not have been authorised on reasonable grounds based on that information. The judge had erred in failing to have considered the information known to PS Bloomfield, according to his own evidence, and, thereafter, in failing to have applied the test of objective reasonableness in the context of that information. The latter ought to have been connected to the former. Absent those errors, the judge ought to have concluded that there had been an absence of reasonable grounds for authorising the Appellant's detention, since the information available to PS Bloomfield about the Appellant's conduct on 10 June 2017 could not have constituted, in law, the offence for which he had been under arrest, submits Ms Morris. Those same errors had been applied to the dealings which each subsequent custody officer had had with the Appellant, on 15 and 16 June 2017, none of whom (with the exception of Inspector Miller) had given evidence to the effect that s/he had had any information about the Appellant's alleged conduct on 10 June 2017 beyond that which had been recorded in the custody record by PS Bloomfield. Upon each review of the Appellant's detention, the relevant officer had been required to satisfy himself or herself of the grounds for detention. Although section 34(2) of PACE identifies circumstances in which detention has been authorised on reasonable grounds at the outset, it cannot be the case that, if reasonable grounds never existed, the detained person ought not similarly to be entitled to immediate release. If grounds for the Appellant's detention had been lacking from the outset, each review officer had been under a duty to release the Appellant. On a proper construction of section 37 of PACE, Ms Morris submits, the judge ought to have concluded that the Appellant's detention had been unlawful, from the beginning and throughout, and that none of the custody officers had had reasonable grounds for continuing that detention in connection with the offence for which the Appellant had been under arrest.

18. Mr Clemens submits that, were the Appellant to succeed on Ground 1, it would be unnecessary to determine Ground 2, by reason of the Respondent's consistent concession that, if the Appellant's arrest had been unlawful, the totality of his detention *in police custody* would have been unlawful, such that his claims of false imprisonment and dependent claims of battery and trespass ought, in that event, to succeed. It is not accepted that success on Ground 1 automatically leads to success on Ground 3.

19. Mr Clemens submits that the Appellant has not asserted any discrete error of law, but has hinted that, simply because he had found there to have been reasonable grounds to arrest, the judge automatically had found that the authorisation of detention had been similarly lawful. That was an unsustainable contention; the judge had set out the different legal test for which section 37 of PACE provides [38]. In Mr Clemens' submission, Ground 2 essentially attacks findings of fact. The test imposed by section 24 of PACE requires that the constable must have reasonable grounds for suspecting that an offence has been committed. Once at the police station, whilst the custody officer must be satisfied that the detainee is properly before him, s/he has to answer two different questions, under section 37: (1) whether there is sufficient evidence to charge; and (2) if not, and if the detainee is not released, whether there are reasonable grounds for believing that detention without charge is necessary to secure or preserve evidence relating to the offence for which the person is under arrest, or to obtain such evidence by questioning. On any view, submits Mr Clemens, it had been essential to search the Appellant's car and to interview him to obtain his side of the story. In the event, he had given a no comment interview.

20. The Appellant's real criticism, submits Mr Clemens, which had emerged for the first time in cross-examination of PS Bloomfield, appeared to be that there was a legal obligation on the part of a custody (or review) officer to go back to square one; to satisfy himself or herself of the legality of the arrest, and that PS Bloomfield had not done that, the same criticism having been made of the review officers, albeit that no ground of appeal had been advanced in relation either to them, or to the post-charge decision under section 38 of PACE, to refuse bail. Mr Clemens submits there to be no such obligation. The extent of the duty, he says, is set out in sections 34 and 37 of PACE and is forward-looking. Under section 34(2), it is only if a custody officer 'becomes aware' that the grounds for detention have ceased to apply that s/he comes under a duty to order the individual's release and the officer is entitled to assume that the arresting officer has acted appropriately. The wording of section 37(3) is consistent with that interpretation. If perverse consequences can flow from that, so be it.

21. Mr Clemens submits that the judge had addressed, specifically, the section 34 point [45] and there could be no suggestion that the Appellant had been under arrest for an offence 'not known to law'. Self-evidently, a custody officer's concerns at the section 37 authorisation of detention stage primarily revolve around whether there is sufficient evidence to charge and, if not, whether detention is necessary to secure or preserve evidence. There had been no effective challenge to paragraphs 4 to 7 of PS Bloomfield's witness statement and, on appeal, no discrete challenge to the judge's acceptance of his

evidence that, based upon the information which he had been told or gleaned, he had believed detention to be necessary. Reliance by the Appellant on subsequent custody reviews was misplaced and beside the point.

Ground 3

22. Ms Morris submits that, in the lower court, the primary basis of the Appellant's claim under Article 5 of the ECHR had been his contention that, if the Respondent's officers had not (and could not have) had reasonable grounds to suspect him of attempted child abduction, his arrest and detention had run contrary to Article 5 ECHR. In Ms Morris' submission, the Appellant's claim under Article 5 of the ECHR had been dismissed by reason of the judge's finding that his arrest and detention had been lawful throughout. That conclusion was challenged on the basis advanced by Ground 1.

23. Ms Morris further submits that the judge erred in his conclusion, in the alternative, that, once the CPS had considered the evidence and decided to authorise a charge, the Respondent could not be liable in the event that the CPS' determination that the test had been satisfied had lacked a proper basis. Predicated upon the overarching submission that there had been no reasonable grounds on which to have suspected the Appellant of attempted child abduction, Ms Morris submits that, if one asks the simple question whether the Respondent had breached Article 5 by arresting the Appellant and putting him before a court, the answer must be yes. It cannot be the case that the police can be liable only in circumstances in which they fail to notify the court with due speed that a reasonable suspicion, present at the outset, has since fallen away, and not in cases, such as this one, in which reasonable suspicion never existed. Such a situation would be perverse, inasmuch as an individual who has been lawfully arrested would be in a better position than one who had never been under lawful arrest. Whilst, in certain cases, it might be that the police and the CPS were both liable for a breach of Article 5 of the ECHR, the liability of one of those criminal investigatory bodies does not inevitably exclude liability on the part of the other. On the facts of this case, Ms Morris submits, it had been the Respondent's officers who had set the wheels in motion, by having arrested and then detained the Appellant in the absence of reasonable suspicion, during which time and despite which they had sought a charging decision from the CPS. Thereafter, it had been the Respondent's officers, pursuant to section 46 of PACE, who had put the Appellant before the court, otherwise than on reasonable suspicion of having committed an offence. In so doing, on its literal construction, they had contravened Article 5 of the ECHR, because the proviso in Article 5(1)(c) had not applied, leading to a need for consideration of whether damages would afford just satisfaction and, if so, in what sum. The principle

to be derived from *Zenati* was that the police may be liable for a breach of Article 5 even where an individual is in the physical custody of another and has been administratively detained by the court under a warrant of remand. Whilst, in those cases, a reasonable suspicion that an offence had been committed had existed at the outset, that had not been a pre-requisite, nor was there a requirement for any bad faith. The question in each case was whether, on the facts, a breach has been established.

24. In Ms Morris' submission, the Respondent contends for a position whereby the police can arrest someone without having reasonable grounds and such a person will have no remedy for detention by the police in the absence of bad faith. That was contrary to the purpose of Article 5 of the ECHR, being protection against the arbitrary deprivation of liberty. In *Zenati*, Article 5 had filled the lacuna left by the tort of false imprisonment, which does not apply to detention beyond police custody.

25. Mr Clemens submits that, it is now clear that the Appellant does not pursue any argument based on *Zenati*, but his case lacked precision. At issue is whether the police can be liable, under Article 5 of the ECHR, for a period of remand resulting from a court's denial of bail. It was not clear whether the Appellant was arguing for an Article 5 breach where the subjective element of reasonable suspicion had been made out, but the objective element had not. Below, the Respondent had simply been put to proof of the legality of the detention in toto, without any specific challenge having been identified. If the Appellant were to fail on Ground 1, he necessarily would fail on Ground 3, as the judge had correctly reasoned ([35] and [36]), but the converse did not follow. Even if the Appellant were to succeed on Ground 1, on the basis that PC Pullen had held a genuine, subjective, suspicion that the relevant offence had been committed, but that such suspicion had not been objectively justified, Ground 3 ought to fail. The judge had been entitled to come to view which he had reached [60], in the alternative, were his finding on the lawfulness of the arrest to have been wrong.

26. Mr Clemens submits that, if the Appellant's argument is that the Article 5 claim should succeed if the subjective grounds are made out but the objective basis is not, that argument is wrong, for four main reasons:

    26.1. The circumstances in which the police might be liable under Article 5 of the ECHR for a period of detention after a detainee has left police detention and is ordered by a court to be remanded in custody, will be exceptional. That is so on first principles, because the police have no direct participation in a bail decision,

which is a matter for the court, applying the Bail Act 1976, and because the police do not themselves detain or have any say over the conditions of detention; each being the responsibility of the prison service.

26.2. Neither party had been able to produce authority supportive of the proposition that the police can be liable under Article 5 for detention, post-remand by a court, other than on the application of the principles identified in *Zenati* (which did not apply here). Furthermore, on the Appellant's analysis, if there could never have been any objective grounds for suspicion and adopting a literal reading of Article 5, it would have been open to the claimant in *Zenati* to have argued that his detention had been unlawful from the time of his arrest. Experienced counsel in that case would have been likely to have taken that point, had it been arguable, but had not done so.

26.3. If the Appellant's contention were right, anyone unlawfully arrested because a genuinely held subjective belief was not made out on an objective analysis would automatically succeed against the police for the period of remand imposed by a court. That was contrary to the understanding held by practitioners in the field of police law and there was no authority supportive of such a proposition.

26.4. Were the police deliberately to falsify an arrest and charge in the hope or expectation that a court would refuse bail, they would be liable in misfeasance for an abuse of power and might be liable under Article 5. That concession had been recorded at [60] of the Judgment. Similarly, an incompetent omission to pass on information which disabled the court from forming its own judgment might result in liability. That was not this case; it was to be noted that:

26.4.1. no claim for malicious prosecution had been pursued, because there had been no suggestion of bad faith. Nevertheless, the Appellant's case amounted to a plea that the police ought to be liable under Article 5 of the ECHR because they had *'put* [him] *before the court, otherwise than on a reasonable suspicion of having committed an offence'*, in substance an assertion of bad faith; and

26.4.2. below, the case had not been advanced on the basis that any officer had had a persisting piece of knowledge which meant that he ought to have realised that there had been no reasonable grounds for the Appellant's

continued detention, or which he ought to have brought to the attention of the prosecuting authority.

In short, submits Mr Clemens, the police can be liable under Article 5 of the ECHR, either where they know from the outset that there are no sustainable grounds for an arrest, or (per *Zenati* and *AAA v Chief Constable of Kent Police* [2017] EWHC 3600, QB) where they come into possession of information which renders a previously held reasonable suspicion unsustainable. That was the extent of the jurisdiction, which the Appellant's case fell outside.

27. Accordingly, Mr Clemens submits, this court need not be concerned with the proper construction of Article 5 of the ECHR.

Discussion and conclusions

28. I bear in mind that, in accordance with CPR 52.20, the appeal court has all the powers of the lower court and that, pursuant to CPR 52.21, this appeal is limited to a review of the decision of that court; the appeal will be allowed where the decision of the lower court was wrong (it not being suggested that there was any serious procedural or other irregularity in the proceedings below); and the appeal court may draw any inference of fact which it considers to be justified on the evidence. All grounds of appeal assert a misapplication by the lower court of the principles which it had correctly identified.

Ground 1: objectively reasonable grounds on which to have suspected the Appellant of attempted child abduction

29. As the judge recorded [23], the threshold set by section 24(2) of PACE is a low one and the factors in the mind of the arresting officer fall to be considered cumulatively: *Parker* [115]. I accept Ms Morris' submission that the reasonableness of the grounds for suspicion is to be judged by reference to the offence for which the individual is to be arrested. PC Pullen had suspected the Appellant of attempted child abduction. In the circumstances of this case, a combined reading of section 1(1) of the 1981 Act and section 2 of the Child Abduction Act 1984, defined that offence as being an attempt, without lawful authority or reasonable excuse, to take or detain a child under the age of sixteen, so as to remove her from the lawful control of her parent. By section 3(a) of the 1984 Act, a person shall be regarded as taking a child if he causes or induces the child to accompany him or any other person, or causes the child to be taken. An attempt is statutorily defined to mean the doing of an act which is more than merely preparatory to

the commission of a substantive offence to which section 1 of the 1981 Act applies, with intent to commit that offence.

30. The factors which the judge identified as having provided objectively reasonable grounds for suspicion were set out at paragraph 24 of the Judgment:

> *'...he had received a briefing when the incident had been discussed; he had read the Athena log which referred to Mr Andrews dancing towards a young girl with his arms open inviting her to dance; the log referred to a witness who considered that Mr Andrews was trying to coerce the young girl away from her mother; the mother had to intervene as the child was moving towards Mr Andrews; he had been informed during the briefing of Mr Andrews' previous convictions which included an offence involving children; he had noted that Mr Andrews had returned to the area the girl was in having initially driven away.'*

31. In support of her contention that those matters, whether or not considered cumulatively, did not extend beyond the merely preparatory, Ms Morris relied upon the caselaw identified above, which I now turn to consider:

    31.1. In *Rowley*, so far as material for current purposes, the Appellant appealed from his conviction for attempting to incite a child under the age of 14 years to commit an act of gross indecency, in circumstances in which he had left notes for boys, in public places. The contents of those notes had been in similar terms, inviting boys to act as his 'pretend son', or as a messenger, in return for sweets and pocket money. If interested, the boy was directed to fill in the back of the note and leave it for Mr Rowley to collect. In two cases, the notes had been in more explicit sexual terms. The police had begun surveillance of the area and Mr Rowley had been seen entering public lavatories and remaining there for 15 minutes or more. He had been arrested at his home. Entries found in his diary had indicated a desire for sexual activity with boys and had been linked with the notes. At the outset of the trial, counsel for Mr Rowley had applied to quash the indictment, so far as the criminal attempt was concerned on the basis that the acts done had been no more than merely preparatory. That application had been refused. A later submission of no case to answer, made on the same basis, had also been rejected. Allowing the appeal and quashing the conviction, the Court of Appeal held [1025 B-C] that the effect of section 4(3) of the 1981 Act[3] was that it was for the jury to determine whether or not the act had been more than merely preparatory, but only, in

[3] *'Where, in proceedings against a person for an offence under section 1 above, there is evidence sufficient in law to support a finding that he did an act falling within subsection (1) of that section, the question whether or not his act fell within that subsection is a question of fact.'*

circumstances upon which the judge has to rule, where there is some evidence fit for their consideration on that issue. It held that [1025 D-F]: *'Here the notes relied upon went no further than to seek to meet with the boy or boys in question. In our judgment this could not be regarded as more than a preparatory act, even on the assumption that the ultimate intention of the appellant was gross indecency. Incitement to commit gross indecency would require a proposition to be made for that specific purpose. A letter sent by an accused inviting a boy to commit gross indecency which did not reach him would be an attempted incitement. Reg. v. Ransford (1874) 31 L.T. 488, was such a case. It involved a letter sent to a boy at school, the letter being intercepted and handed to the school authorities. That was an attempt because the defendant had done all he could towards inciting the boy to commit an unnatural offence. Here, however, the note went no further than to seek to engineer a preliminary meeting. No proposition or incitement to the offence had emanated from the defendant. At most he was preparing the ground for an attempt. Accordingly, in our judgment, there was no evidence upon which he could be convicted. We are wholly sympathetic to the need perceived by the prosecuting authorities to take action in the circumstances of this case, but in our judgment the evidence was not capable of supporting the charges laid. Accordingly this appeal must be allowed.'*

31.2. In *Geddes*, the appellant had stood trial, so far as material, for attempted false imprisonment, from his conviction for which he appealed. Mr Geddes had gone into the boys' lavatory block, at a school. He had had no connection with the school and no right to be there. At about midday, a teacher had seen him in the boys' lavatory and had spoken to him. Mr Geddes had had a rucksack with him. A police officer, who had happened to be on the premises, had seen him and shouted at him, and Mr Geddes had left. In a cubicle in the lavatory block, a cider can which had belonged to Mr Geddes had been found. In the course of leaving the school, he had discarded his rucksack, which had been found in some bushes. Its contents had included a large kitchen knife, some lengths of rope and a roll of masking tape. Mr Geddes had been arrested three days later and identified by the teacher and some pupils from the school. The Crown had alleged that the presence of the cider can showed that Mr Geddes had been inside a cubicle in the lavatory block and that the contents of the rucksack were capable of being used to catch and restrain a boy who entered the lavatory. The rope could have been used to tie the boy; the knife to frighten him; and the tape to cover his mouth, to prevent him from screaming. The Defence had contended that the Crown's case

was based on speculation: the cider can did not establish that Mr Geddes had been hiding in the cubicle, since he could well have entered the cubicle for normal purposes and left the cider can there. Alternatively, since the partitions in the lavatory had not extended from floor to ceiling, the can could have rolled or been thrown into the position in which it had been found. There were other explanations for the contents of the rucksack. As identified by the Court of Appeal, the central point taken on appeal was that the evidence before the jury did not permit it to conclude that the Mr Geddes had done any act which had been more than merely preparatory to the commission of a crime. *Rowley* was amongst the caselaw considered by the Court of Appeal, which held:

> *'The cases show that the line of demarcation between acts which are merely preparatory and acts which may amount to an attempt is not always clear or easy to recognise. There is no rule of thumb test. There must always be an exercise of judgment based on the particular facts of the case. It is, we think, an accurate paraphrase of the statutory test and not an illegitimate gloss upon it to ask whether the available evidence, if accepted, could show that a defendant has done an act which shows that he has actually tried to commit the offence in question, or whether he has only got ready or put himself in a position or equipped himself to do so.*
>
> *In the present case, as already indicated, there is not much room for doubt about the appellant's intention. Furthermore, the evidence is clearly capable of showing that he made preparations, that he equipped himself, that he got ready, that he put himself in a position to commit the offence charged. We question whether the cider can in the cubicle is of central importance, but would accept that in the absence of any explanation it could lead to the inference that the appellant had been in the cubicle. But was the evidence sufficient in law to support a finding that the appellant had actually tried or attempted to commit the offence of imprisoning someone? Had he moved from the realm of intention, preparation and planning into the area of execution or implementation? ... Here it is true that the appellant had entered the school; but he had never had any contact or communication with any pupil; he had never*

confronted any pupil at the school in any way. That may well be no credit to him, and may indeed reflect great credit on the vigilance of the school staff. The whole story is one which fills the court with the gravest unease. Nonetheless, we cannot escape giving an answer to the fundamental legal question. We accept, as the judge did, that the evidence of Nicola Green must be treated as irrelevant. So, for this purpose, must the contents of the rucksack, which give a clear indication as to what the appellant may have had in mind, but do not throw light on whether he had begun to carry out the commission of the offence. On the facts of this case we feel bound to conclude that the evidence was not sufficient in law to support a finding that the appellant did an act which was more than merely preparatory to wrongfully imprisoning a person unknown. In those circumstances we conclude that the appeal must be allowed and the conviction quashed.'

31.3. In *R v MS*, decided after the lower court had determined this matter, the defendant had separated, in acrimonious circumstances, from the father (AC) of her 12 year-old daughter, and had started a new relationship with a man who was a national of a North African country. She had asked AC if he would permit her to take their daughter to live abroad, but he had refused. Subsequently, the Family Court had issued a prohibited steps order, which had prohibited the defendant from taking her daughter out of the jurisdiction. However, she had already started to make plans to leave the country, having forged AC's signature on a form ostensibly giving her permission to take her daughter abroad and booked a ferry from Dover to Calais, for the following day. On the day of the crossing, the defendant and her boyfriend had packed all of their belongings into their car and, together with the defendant's daughter, had driven south from their home in Stoke-on-Trent. They had been stopped by police that afternoon, at a service station on the M25, south of London. The police had taken possession of five United Kingdom passports, along with documents regarding the ferry booking and hotel bookings in France. When interviewed, the defendant had denied intending to leave the jurisdiction, stating that they had been travelling to the home of a relative in Southampton. She had been charged with attempted child abduction, contrary to section 1(1) of the 1981 Act and section 1 of the Child Abduction Act 1984. On the second day of trial, at the close of the Prosecution case, the judge had acceded to a Defence

submission of no case to answer, finding that, since the defendant had been stopped some 85 miles from the port of Dover, her alleged acts had not been more than merely preparatory to the commission of the offence, a ruling from which the Crown appealed.

31.4. The Court of Appeal noted that [22]: '*The locus classicus on the interpretation of section 1(1) of the Criminal Attempts Act 1981 was provided by Lord Lane CJ in R v Gullefer [1990] 1 WLR 1063, 1066: "It seems to us that the words of the Act of 1981 seek to steer a midway course. They do not provide . . . that . . . the defendant must have reached a point from which it was impossible for him to retreat before the actus reus of an attempt is proved. On the other hand the words give perhaps as clear a guidance as is possible in the circumstances on the point of time at which . . . [the] 'series of acts' begin. <u>It begins when the merely preparatory acts come to an end and the defendant embarks upon the crime proper.</u> When that is will depend of course upon the facts in any particular case." (Our emphasis.)'* It went on to review relevant caselaw, including *Geddes*, and *Moore v Director of Public Prosecutions* [2010] RTR 36, in which Owen J, giving the lead judgment, had observed:

> *'23. Under the Criminal Attempts Act 1981 acts that are merely preparatory are excluded from the ambit of an attempt to commit an offence. But all acts short of those necessary for the commission of the intended substantive offence are in some sense preparatory. The introduction of the qualifying adverb 'merely' in the Criminal Attempts Act must have been intended by Parliament to distinguish acts which, although preparatory, are sufficiently close to the final act or acts to be properly regarded as part of the execution of the defendant's criminal course of conduct, from those which are not. All will turn on the facts of the case.'*

and Toulson LJ, in the course of his concurring judgment, had spoken *'approvingly of a passage from the Law Commission's Consultation Paper on Conspiracy and Attempts (Law Com Consultation Paper No 183), taken from the first and last sentences of para 14.5:*

"27. . . .'To elaborate further, preparatory conduct by D which is sufficiently close to the final act to be properly regarded as part of the execution of D's plan can be an attempt . . . In other words, it covers the steps immediately preceding the final act necessary to effect D's plan and bring about the commission of the intended offence'."

31.5. Having so noted, the Court of Appeal observed that ([33] and [34]), *'... "the line is fine" but the court must avoid conflating an admitted mens rea with the decision as to whether a "sufficient actus reus" has been established… It is important in our judgment not to lose sight of the considerable differences that exist between the various offences which may be attempted (essentially the entire criminal calendar, with some clear exceptions such as attempting to commit the crime of conspiracy …, along with multiple different ways in which even similar or identical offences are attempted. The facts of the cases considered above serve to demonstrate the sheer variety of both circumstances and offending. This results in highly fact-specific decisions as to whether the steps taken by the accused were no more than merely preparatory. …But no single factor, including proximity, constitutes a uniform test that applies to all species of offences… Whether, prima facie, steps had been taken as part of the execution of the plan which were sufficiently close to the final act will always depend, therefore, on the ingredients of the offence and the facts of the case.'* It held that, in the trial with which it was concerned, it was entirely confident that the various steps taken by the defendant, viewed together, had formed part of the execution of the defendant's plan to abduct the child. They had been [36] *'steps immediately preceding the final act that were necessary to complete her plan and to bring about the commission of the intended offence (viz by travelling on the ferry to France). Put otherwise, when arrested, she was in the position of attempting to commit the offence in question, rather than simply getting ready or putting herself in a position to do so, and we have no doubt she had embarked "upon on the crime proper". The distance they had yet to travel to Dover on the motorway, which was a critical factor for the judge, was essentially unimportant given the multiple steps that, by the time they were intercepted, had been taken and the overall stage in the venture that had been reached. It was open to the jury, in our judgment, to conclude that the defendant was attempting to abduct SS.'* Accordingly, the ruling of the trial judge was reversed, as having been wrong in law, and a new trial was ordered.

31.6. In *Perry*, also decided after the proceedings before the lower court, Lane J considered an appeal from a district judge's refusal to overturn the Secretary of State for the Home Department's decision to extradite the appellant to face trial, in California, for offences of kidnap, threats to kill and associated conduct in respect of offences against the person. In so doing, he considered whether the conduct relied upon by the respondent, if proven, would constitute the offence of attempted child abduction under the law of England and Wales. The parties had been agreed that, for the purposes of section 137 of the Extradition Act 2003, the offence under section 1 of the Child Abduction Act 1984 would have been completed if the appellant had taken the child (L) out of the United States of America, rather than merely out of the State of California, which he had not done, having been arrested in Palm Springs. The issue was whether Mr Perry had committed acts which had been more than merely preparatory to taking L out of the USA. There had been no dispute that he had possessed the necessary mens rea, having had the intended aim of taking L to China. Lane J reviewed earlier caselaw (not including *R v MS*), before finding, at [74] to [77]:

> *'74. Mr Caldwell submits that, in the present case, the appellant had "embarked on the offence proper". By removing L from the current supervision of her mother and the court, the appellant had put his plan into action. His conduct was more than merely preparatory. When arrested, the appellant had been anxious that the iPad not be seized. When examined, the iPad disclosed the email correspondence with the appellant's father regarding the plan to go to China. The District Judge had correctly described L's removal from the shopping mall as "covert" and correctly found that the appellant had "deliberately sought to avoid the monitor". The only possible inference, therefore, was that the appellant knew about the importance of the text messages on the iPad and sought to deceive the detectives so that they would not seize it. The appellant had taken L, had packed large suitcases, had his passport with him, had moved a considerable distance from Los Angeles, had enquired about the cost of a journey to Phoenix, and had told his father of his intentions. All this, according to Mr Caldwell, "indicates that he was about to*

take [L] out of the country". Whether or not the appellant might ultimately have succeeded is not relevant. Whether or not the appellant's attempt would be rendered doomed to failure or even impossible because he was not in possession of L's passport does not determine whether an offence of attempt might nevertheless have been committed.

75. *Whilst fully conscious of the fact-sensitive nature of the requisite assessment and of the need to avoid mechanistic comparisons with the facts of other cases, I am in no doubt that the case law on section 1 of the 1981 Act is such as to preclude a finding to the criminal standard that the appellant's alleged conduct, if proved, would constitute the offence of attempted child abduction. There is more than a reasonable doubt that the series of actions relied upon by the respondent are not such as to show that the appellant, where arrested, had embarked on the "crime proper". True, he had taken a number of steps that were plainly necessary if he were to cause L to leave the USA. He had removed her from E's custody and control and was concealing himself and L from E and the authorities. But there were many things that still remained to be done before the appellant could remove L from the jurisdiction. He needed to obtain passport documentation for her, or to devise the means of enabling her to leave the USA without it. The factual summary does not indicate that the appellant's suitcases contained anything other than his own clothes and other possessions. He was not at, or even near, an international transport hub. He had not obtained any travel tickets. Gullefer and Mason show just how temporally and physically close one needs to come to the completed act before a criminal attempt may occur. The appellant was far removed in both respects.*

76. *In his oral submissions, Mr Caldwell raised the possibility that the appellant could have taken L to Mexico, which is relatively near to Palm Springs. The factual summary, however, discloses no suggestion of such a plan or of any*

step taken to move towards the US/Mexico border. The submission is, I consider, demonstrative of the fact that the appellant had simply not, at the time of his arrest, taken sufficient steps to satisfy section 1 of the 1981 Act.

77. I accordingly find that the conduct relied upon is not such as to be capable of a finding to the criminal standard that the appellant would have committed the offence of attempted child abduction under the law of England and Wales.'

32. In my judgement, the principles to be drawn from the caselaw summarised above are as follows:

32.1. For the actus reus of attempt required by section 1(1) of the 1981 Act to be proved, an individual need not have reached a point from which it is impossible for him to retreat. The relevant series of acts begins when the merely preparatory acts come to an end and the individual embarks upon the crime proper: *R v Gullefer.*

32.2. Whilst the line is fine, care must be taken to avoid conflating the required mens rea with the decision as to whether a sufficient actus reus has been established: *R v MS*.

32.3. Preparing the ground for an attempt is not capable of supporting a charge under section 1(1) of the 1981 Act: *Rowley*.

32.4. The demarcation between acts which are merely preparatory and those which may amount to an attempt is not always clear or easy to recognise. There is no rule of thumb test and there must always be an exercise of judgment, based on the particular facts of the case. An accurate paraphrase of the statutory test is whether the available evidence, if accepted, could show that an individual has done an act which shows that he has actually tried to commit the offence in question, or whether he has only got ready, or put himself in a position, or equipped himself to do so. Had he moved from the realm of intention, preparation and planning into the area of execution or implementation?: *Geddes*.

32.5. All acts short of those necessary for the commission of the intended substantive offence are, in some sense, preparatory. The qualifying adverb 'merely' is intended to distinguish acts which, although preparatory, are sufficiently close to the final act(s) properly to be regarded as part of the execution of the individual's criminal course of conduct, from those which are not. Steps immediately preceding the final act necessary to effect the individual's plan and bring about the commission of the intended offence fall into the former category. All will turn on the facts of the case: *Moore v Director of Public Prosecutions*.

32.6. The sheer variety of both circumstances and offending encompassed by section 1(1) of the 1981 Act results in highly fact-specific decisions as to whether the steps taken by an individual are more than merely preparatory to the commission of the substantive offence. No single factor constitutes a uniform test which applies to all species of offence. Whether, prima facie, steps have been taken as part of the execution of the plan which are sufficiently close to the final act will always depend, therefore, on the ingredients of the offence and the facts of the case: *R v MS*.

33. It is important to keep in mind the relevance of those principles for the purposes of Ground 1 in this appeal. In order to satisfy the requirements of section 24(2) of PACE, PC Pullen need only have had reasonable grounds for suspecting that the offence of attempted child abduction had been committed by the Appellant, in the sense explained by Sir Brian Leveson, in *Parker*. It had not been incumbent upon him to consider whether the matters of which he had been made aware would be admissible in evidence, or whether any subsequent charge would be made, or proven by the Crown at any trial. He had not even been required to have been satisfied of a prima facie case against the Appellant. In my judgement, and notwithstanding her disavowal of the same, the fundamental flaw permeating Ms Morris' submissions on Ground 1 is their premise that a lawful arrest required that the matters known to PC Pullen at the time of arrest be such as would be capable of being left to a jury, or required to convict the Appellant. Were, in due course, the Appellant to be charged and tried, there would be a question of fact, for the jury, as to whether he had moved from the realm of intention, preparation and planning into the area of execution or implementation, possibly preceded by a question of law for the judge as to whether the evidence then available sufficed in law to enable such a finding. We are not, here, concerned with either such question, or with whether there had been sufficient evidence on the basis of which to charge the Appellant. It follows that it was not incumbent upon the lower court to be satisfied that, taken at their highest, the

acts of which PC Pullen had been aware at the time of the Appellant's arrest in fact constituted the actus reus required by section 1(1) of the 1981 Act. None of the cases relating to attempt on which Ms Morris relies was concerned with the issue which is before me.

34. Once that is appreciated, it is clear that the lower court, having correctly identified the applicable legal principles, was entitled to reach the conclusions which it drew, viewing the facts as found and agreed cumulatively. The acts identified at paragraphs 2 and 24, coupled with the wider matters described at paragraphs 7 to 10, of the Judgment, all as known to PC Pullen at the time of arrest, amply justified that conclusion. In particular:

Acts by the Appellant

34.1. Following an initial interaction with the child's father, at a time when her mother had been inside the store, the Appellant had gone back to his car;

34.2. He had then driven his car around the car park, stopping directly in front of the young girl, when she had appeared to be unattended;

34.3. He had called out to her, stating that his music was loud and clear, 'just for [her]';

34.4. He had then got out of his car, dancing and shimm[y]ing towards her, with his arms wide open, asking if she wanted to dance;

34.5. After the child's mother had put her arm around her (as the child had begun to move towards the Appellant) and said, 'No, she's fine, thank you', he had driven off;

Wider matters

34.6. In the view of a witness, the Appellant had been trying to coerce the child away from her mother, requiring the mother to intervene as the child had moved towards him; and

34.7. The Appellant's previous convictions had included an offence involving a child.

35. The judge had been entitled to conclude that, viewed in the round, those facts and matters had given PC Pullen objectively reasonable grounds for suspecting that the Appellant had

been attempting, without lawful authority or reasonable excuse, to take a child (by inducing that child to accompany him). In their context, the series of acts identified at paragraphs 34.2 to 34.4 above was capable of showing that the Appellant had actually tried to commit the substantive offence in question, by seeking to induce the child to accompany him - in the course of argument, Ms Morris submitted that, had the Appellant said to the child, *'come with me'*, that would have sufficed. That being so, it does not seem to me that one or more acts conveying the same invitation ought to be viewed differently. Taken at their lowest, the acts in question were capable of being viewed as being sufficiently close to the final act properly to be regarded as part of the execution of a criminal course of conduct - alternatively expressed as having been steps immediately preceding the final act which had been necessary to complete the plan and to bring about the commission of the intended offence - and, hence, more than merely preparatory to the commission of that offence.

36. Nothing in the facts of the cases on which Ms Morris relies compels or suggests a different conclusion. First, the point at which merely preparatory acts come to an end and the individual embarks upon the crime proper is always fact-sensitive. Secondly:

    36.1. by contrast with those in *Rowley*, the acts here under consideration may themselves be seen as constituting efforts by the Appellant to induce the child to accompany him, rather than the taking of preliminary steps;

    36.2. unlike in *Geddes*, the Appellant had directly interacted with the child; the acts in question were not simply indicative of his intent;

    36.3. as in *MS*, the fact, if it be the case, that additional steps might have needed, or been intended, to be taken by the Appellant, was nothing to the point, given the steps already taken at the point at which the child's mother had intervened. In any event, unlike the position in *MS*, it is not clear that any further act would have been required in order to complete the offence (as indicated by the child's reaction);

    36.4. in *Perry*, a different conclusion was reached on the particular facts (and apparently without the benefit of *MS*), on the basis that *'there were many things that still remained to be done'* and that *'the appellant had simply not, at the time of his arrest, taken sufficient steps to satisfy section 1 of the 1981 Act.'*. That is not true of this case (see above).

37. No part of that analysis is undermined by the reasons put forward by Ms Morris for the asserted improbability of the alleged attempt (which, in any event, underplay the acts carried out by the Appellant). Here again, it is important to bear in mind that the issue was whether PC Pullen had had objectively reasonable grounds for suspicion, not whether a counter-argument could be advanced as to whether the offence in question had in fact been committed, could be charged, or left to a jury. Each such matter requires the application of a different test and is of no assistance for current purposes.

38. Ground 1 fails.

Ground 2: the lawfulness of the Appellant's detention, having regard to section 37 of PACE

39. Ground 1 having been rejected, its premise cannot itself found a contention that PS Bloomfield's decision to authorise the Appellant's detention was, by extension, unlawful.

40. I turn to consider Ms Morris' alternative submission that the judge had erred in failing to have considered the information known to PS Bloomfield, according to his own evidence, and, thereafter, in failing to have applied the test of objective reasonableness in the context of that information.

41. Section 37 of PACE provides (materially):

> *'37 **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,*
>
> *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.*
>
> **…**

(3) If the custody officer has reasonable grounds for believing that the person's detention without being charged is necessary to secure or preserve evidence relating to an offence for which the person is under arrest or to obtain such evidence by questioning the person, he may authorise the person arrested to be kept in police detention.

…'

42. In my judgement, nothing in section 37 of PACE expressly or implicitly requires a custody officer reasonably to suspect a person of the offence for which he has been arrested. That officer's statutory focus is on (1) whether he has before him sufficient evidence to charge the individual in question with the offence for which he has been arrested; and, if not, (2) whether he has reasonable grounds for believing that that individual's detention without charge is necessary for the purposes set out in section 37(3) of PACE. It is not his or her role to police, or second-guess, the separate and different statutory duties incumbent upon an arresting officer under section 24 of PACE. Furthermore, in a particularly complex matter, s/he would be in no position to assess whether the circumstances giving rise to arrest, taken at their highest, could establish the offence for which the suspect had been arrested and it cannot be the case that different duties arise according to the offence or circumstances in question.

43. That is not to ignore the provision made by section 34 of PACE (so far as material):

'34 Limitations on police detention

(1) A person arrested for an offence shall not be kept in police detention except in accordance with the provisions of this Part of this Act.

(2) Subject to subsection (3) below, if at any time a custody officer—

(a) becomes aware, in relation to any person in police detention, that the grounds for the detention of that person have ceased to apply; and

(b) is not aware of any other grounds on which the continued detention of that person could be justified under the provisions of this Part of this Act, it shall be the duty of the custody officer, subject to subsection (4) below, to order his immediate release from custody.'

There is a substantive difference between the imposition on a custody officer of a proactive obligation to consider/review the matters to which an arresting officer is obliged to have regard and the imposition of a duty (itself unsurprising) where a custody officer 'becomes aware' that the grounds for detention have 'ceased to apply' and is not aware of any other grounds on which continued detention of that person could be justified. Such language is focused upon the position as matters stand at the relevant time. Given the careful framing of the different statutory duties incumbent upon each

officer in the particular circumstances specified by PACE, clear language to the effect for which Ms Morris contends would have been required, which is not to be found. I have been taken to no authority supportive of the obligation or construction for which she contends.

44. In those circumstances, it is unsurprising that the lower court's focus was on PS Bloomfield's evidence, as recorded at paragraph 39 of the Judgment, in relation to the matters of which section 37(3) of PACE had required him to be satisfied. Ms Morris is wrong to categorise that evidence as constituting simply the reasons for which detention might have been 'convenient'. The custody record detention log made clear the offence for which the Appellant had been arrested and the statutory reasons for his arrest. It also identified the statutory reasons why PS Bloomfield had authorised his detention, which (rightly) are not the subject of independent criticism; self-evidently, it had been necessary to question the Appellant and to search his vehicle. Whilst not determinative, I note, as did the judge, that, in evidence, the Appellant had stated that he had no criticism to make of PS Bloomfield.
45. I am satisfied that the lower court was entitled to conclude that PS Bloomfield had had reasonable grounds for authorising the Appellant's detention.

46. I turn to the criticism made of the three reviews of the Appellant's detention undertaken prior to his remand in custody by Norwich Magistrates' Court. Mr Clemens is right to note that those reviews are not formally the subject of Ground 2 (which refers only to section 37 of PACE), but section 40 of PACE cross-refers to that section (in relation to a person who, at the time of review, has not been charged) and I have heard full argument on the matter.

47. Here again, Ms Morris asserts a duty on the part of each review officer akin to that for which she contends in relation to PS Bloomfield and on essentially the same basis.

48. So far as material, section 40 of PACE provides:

> ***'40 Review of police detention.***
>
> *(1) Reviews of the detention of each person in police detention in connection with the investigation of an offence shall be carried out periodically in accordance with the following provisions of this section—*
>
> *(a) in the case of a person who has been arrested and charged, by the custody officer; and*

(b) in the case of a person who has been arrested but not charged, by an officer of at least the rank of inspector who has not been directly involved in the investigation.

(2) The officer to whom it falls to carry out a review is referred to in this section as a "review officer".

(3) Subject to subsection (4) below—

(a) the first review shall be not later than six hours after the detention was first authorised;

(b) the second review shall be not later than nine hours after the first;

(c) subsequent reviews shall be at intervals of not more than nine hours.

...

(8) Subject to subsection (9) below, where the person whose detention is under review has not been charged before the time of the review, section 37(1) to (6) above shall have effect in relation to him, but with the modifications specified in subsection (8A).

(8A) The modifications are—

(a) the substitution of references to the person whose detention is under review for references to the person arrested;

(b) the substitution of references to the review officer for references to the custody officer; and

...

(9) ...

(10) Where the person whose detention is under review has been charged before the time of the review, section 38(1) to (6B) above shall have effect in relation to him but with the modifications specified in subsection 10(A).

...

(12) Before determining whether to authorise a person's continued detention the review officer shall give—

(a) that person (unless he is asleep); or

(b) any solicitor representing him who is available at the time of the review, an opportunity to make representations to him about the detention.

(13) Subject to subsection (14) below, the person whose detention is under review or his solicitor may make representations under subsection (12) above either orally or in writing.

(14) The review officer may refuse to hear oral representations from the person whose detention is under review if he considers that he is unfit to make such representations by reason of his condition or behaviour.'

49. All review officers gave evidence before the lower court. By operation of sub-sections 40(8) and (8A), the duty imposed on a review officer prior to the charging of the Appellant, is that which applied to PS Bloomfield, which, for the reasons set out above, did not require a review of the original basis for detention. Only the first review occurred prior to charge. The detention log records that it was conducted, in person, by Inspector Miller[4], at 14:49 on 15 June 2017. The Appellant and his solicitor were present and each was given an opportunity to make representations. None was made. Here again (albeit not determinative), the judge noted that, in evidence, no criticism had been made by the Appellant of this, or any other, review.

50. By operation of sub-sections 40(10) and (10A), the duty imposed upon a review officer post-charge is set out in section 38 of PACE, which, so far as material, provides:

'***38 Duties of custody officer after charge.***

(1) Where a person arrested for an offence otherwise than under a warrant endorsed for bail is charged with an offence, the custody officer shall, subject to section 25 of the Criminal Justice and Public Order Act 1994, order his release from police detention, either on bail or without bail, unless—

(a) If the person arrested is not an arrested juvenile—

(i) his name or address cannot be ascertained or the custody officer has reasonable grounds for doubting whether a name or address furnished by him as his name or address is his real name or address;
(ii) the custody officer has reasonable grounds for believing that the person arrested will fail to appear in court to answer to bail;

(iii) in the case of a person arrested for an imprisonable offence, the custody officer has reasonable grounds for believing that the detention of the person arrested is necessary to prevent him from committing an offence;

(iiia) in a case where a sample may be taken from the person under section 63B below, the custody officer has reasonable grounds for believing that the detention of the person is necessary to enable the sample to be taken from him;

[4] who, by the time of trial, held the rank of Chief Inspector

(iv) in the case of a person arrested for an offence which is not an imprisonable offence, the custody officer has reasonable grounds for believing that the detention of the person arrested is necessary to prevent him from causing physical injury to any other person or from causing loss of or damage to property;

(v) the custody officer has reasonable grounds for believing that the detention of the person arrested is necessary to prevent him from interfering with the administration of justice or with the investigation of offences or of a particular offence; or

(vi) the custody officer has reasonable grounds for believing that the detention of the person arrested is necessary for his own protection;

(b) if he is an arrested juvenile—

...

(c) the offence with which the person is charged is murder.

(2) If the release of a person arrested is not required by subsection (1) above, the custody officer may authorise him to be kept in police detention but may not authorise a person to be kept in police detention by virtue of subsection (1)(a)(iiia) after the end of the period of six hours beginning when he was charged with the offence.

(2A) The custody officer, in taking the decisions required by subsection (1)(a) and (b) above (except (a)(i) and (vi) and (b)(ii)), shall have regard to the same considerations as those which a court is required to have regard to in taking the corresponding decisions under paragraph 2(1) of Part I of Schedule 1 to the Bail Act 1976 (disregarding paragraphs 1A and 2(2) of that Part).

(3) Where a custody officer authorises a person who has been charged to be kept in police detention, he shall, as soon as practicable, make a written record of the grounds for the detention.

...'

51. As with section 37 of PACE, nothing in that section requires an ab initio review of the type for which Ms Morris contends. The detention log records the second review as having been conducted in person by Temporary Sergeant Williamson[5], at 23:45 on 15 June 2017 (the Appellant having been charged at 21:52 and refused bail, by Sergeant Egmore, at 22:03, in relation to which his solicitor had made no representations). The Appellant's solicitor had not been present. No representations were made. The Appellant was informed that his detention was being authorised as being necessary to place him before a court – the reasons for the earlier refusal of bail having been recorded at that

[5] who, by the time of trial, was PS Cunningham

time. There is no challenge in this appeal to the lower court's separate conclusion [52] that PS Egmore had had reasonable grounds for detaining the Appellant post-charge. The detention log records the third and final review as having been conducted in person by PS Johnson, at 08:23 on 16 June 2017. No representations were made. The Appellant's detention was authorised in order to ensure attendance and prevent commission of further offences (being factors identified, respectively, at sub-sections 38((1)(a)(ii) and (iii) of PACE). I have previously addressed the proper construction of section 34 of PACE which, accordingly, cannot ride to the Appellant's rescue in relation to any review.

52. Having regard to the ambit of the statutory requirements incumbent upon them, the judge was right to conclude that PS Bloomfield and each subsequent review officer had acted lawfully. It follows that Ground 2 fails.

Ground 3: breach of Article 5 of the ECHR

53. Ground 3 is dependent upon the merit in Ground 1 and Ground 2, and, thus, necessarily fails because the proviso in Article 5(1)(c) of the EHCR was satisfied. It follows that the appeal from the alternative finding of the judge is moot but, in case this matter goes further, I address it below, beginning with a review of the caselaw upon which Ms Morris relies.

54. In *Zenati*, the claimant had claimed judicial review against the defendants, the Commissioner of Police of the Metropolis and the CPS (sued in the name of the Director of Public Prosecutions), in respect of his detention for the possession of a false passport, after they had become aware that the passport was genuine but had failed so to inform the court. Permission to proceed was refused and the private law parts of the claim were transferred to the county court for trial. The county court judge ordered that particulars of claim be filed, by which the claimant sought aggravated and exemplary damages for breach of Article 5 of the ECHR and for false imprisonment. The judge then granted an application by the defendants to strike out the entire claim, on the basis that it disclosed no reasonable cause of action, from which order the claimant appealed. At [20] and [21], Lord Dyson MR held:

> *'20 The next question is what article 5 requires to be done where the investigating authorities cease to have a reasonable suspicion that the detained person committed the offence in question. In my view, it must be implicit in article 5.1(c) as well as article 5.3 that the investigating/prosecuting authorities are required to bring the relevant facts to the attention of the court as soon as possible. In this*

way, the court can review the situation and order the person's release if it is satisfied that there are no longer any grounds for the continuing detention.

Conclusion on the article 5.1(c) claim

21 On the facts of this case, the earliest time when it is arguable that the police ceased to have a reasonable suspicion of the offence was on 19 January 2011 when PC Smith received information from the NDFU that the passport was genuine. The earliest time when the CPS was made aware of this was late on Friday, 4 February shortly after the plea and management hearing on the same day. In my view, it is arguable that, by failing to inform the CPS (and thereby the court) as soon as possible after 19 January of the results of the examination by NDFU, the police caused a breach of article 5.1(c). At the very least, it is arguable that, by failing to inform the court of the position at the plea and management hearing on 4 February, the police were responsible for a breach of article 5.1(c) in relation to the detention between 4 until 9 February. I see no basis for attributing any responsibility for this to the CPS who were unaware of the results of the examination until late on Friday, 4 February and brought the facts to the attention of the court on 9 February.'

55. At [42] to [44], Lord Dyson held, in relation to Article 5(3)[6], with emphasis added:

'42 I therefore accept…that the obligation of "special diligence" is imposed on the courts and not on authorities such as the defendants. We have not been shown the source of the phrase "special diligence" or any authority which explains the rationale for it. It seems to me that the explanation must lie in the gravity for the individual of a deprivation of liberty and the imperative of preventing arbitrary detention. That is why it is particularly important that a court that is charged with the responsibility of monitoring the detention of an individual who has been arrested on suspicion of the commission of an offence must conduct the proceedings with particular expedition or special diligence.

43 That is not, however, to say that the conduct of the investigating/prosecuting authorities is irrelevant to article 5.3. It is relevant in two ways. First, as the Strasbourg jurisprudence shows, lack of diligence on the part of those who are responsible for investigating the case and preparing for trial will always be relevant to the question of whether the court has conducted the proceedings with "special diligence" and whether a detention has been for an unreasonably long period. It is the duty of the court to grant bail where a detention has been for an unreasonably long time. What is unreasonable will depend on all the circumstances, including the time taken by the investigating authorities (where these are distinct from the court). If delay on the part of the investigating/prosecuting

[6] *'Everyone arrested or detained in accordance with the provisions of paragraph 5(1)(c) of this Article shall be brought promptly before a judge or other officer authorised by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release pending trial. Release may be conditioned by guarantees to appear for trial.'*

authorities causes the court to fail to conduct the proceedings with special diligence, then those who are responsible for the delay will be responsible for the breach of article 5.3.

44 Secondly, if the investigating authorities fail to bring to the attention of the court material information of which the court should be made aware when reviewing a detention, this may have the effect of causing a decision by the court to refuse bail to be in breach of article 5.3. The investigating authorities must not prevent the court from discharging its duty of reviewing the lawfulness of the detention fairly and with a proper appreciation of all the relevant facts of which the authorities should make the court aware. Unless this is done, there is a risk that the court will make decisions which lead to arbitrary detention in breach of article 5.3.'

56. At [53], Lord Dyson rejected the submission that a detention in violation of Article 5, constitutes the tort of false imprisonment, observing that its acceptance would involve *'crossing the line that has hitherto been clearly drawn between detention as a result of executive decision and detention sanctioned by the court'* and run contrary to authority. In any event, Article 5(5) provided a right to compensation in the event of a breach of Article 5.

57. At [64], McCombe LJ held, with emphasis added:

'64 … I agree, as Lord Dyson MR says in para 43, that if delay on the part of the investigative/prosecuting authorities causes the court to fail to conduct the proceedings with special diligence then those who are responsible for that delay will be responsible for the breach of article 5.3. Accordingly, in my view, it is not necessary to draw fine lines between the courts and authorities such as the defendants in this case for the purpose of examining whether the state overall has contravened article 5. Where a breach is established, then the particular emanation of the state that has caused the breach will bear the responsibility for it in our domestic law.'

58. In *AAA*, Martin Spencer J considered the defendant chief constable's application to strike out the claim, alternatively for summary judgment. He described the relevant claims thus ([3] to [4]):

'3. In the claim form, the claim of both of the claimants is for damages consequent upon the defendant's alleged breach of "the first claimant's article 5 ECHR right to liberty and security, because a criminal prosecution was proceeded with and the claimant remanded in custody when the defendant knew or ought to have known that the case was not sustainable".

4. Although a point was taken by the defendant as to whether the police were strictly prosecutors once the matter had been transferred into the hands of the Crown Prosecution Service, in the course of argument, it

has been conceded and agreed that any defect in the pleading would be remedied were the pleading to be amended to plead that the defendant had unlawfully failed to disclose to the court various matters which it is said should have been disclosed and that they thereby breached the claimant's article 5(1) right to liberty. The matter can be considered upon that better basis.'

59. Having considered *Zenati*, at [36] Martin Spencer J concluded, with emphasis added:

'36. In my judgment, where, at the instigation of the police, a person has been remanded in custody upon grounds and evidence as put forward by the police, then as soon as the police have grounds to believe that the basis for detention is false, and there is no longer "reasonable suspicion of his having committed an offence", they have a duty to bring that information to the attention of both the representatives of the defendant and to the CPS and to the court as soon as possible. If they fail to do so, then for the period between the time when the defendant would have been released had they done so, and the time when the defendant is actually released, it is arguable that the detention was in breach of Article 5 ECHR and that this breach was caused by the police.'

continuing (at [37], [40] and [41]):

'37. ...What is said is that for a third party public body to be held liable (by which I mean a public body which is not the prosecutor or the court), it is necessary that the third party has disabled the court from exercising its own judgment on the question of whether there is reasonable suspicion. It is accepted that it doesn't matter whether that happens by the withholding of critical evidence, as occurred in Zenati, or by the provision of critical evidence, what is important is the test, namely that the court has been disabled from exercising its own judgment. For the claimants, Mr Chippeck accepts that that is the correct and appropriate test.

...

40. These cases are cited to me, and I refer to them in this judgment, to emphasize that, in my judgment, the immunity which the police enjoys at common law, and the reasons for that immunity, inform the approach of the court to the cause of action which is allowed under the English law pursuant to the Human Rights Act and the Convention. Although, as Zenati shows, such an action is viable in theory, the threshold for the police to surmount is not a high one, and it would be a truly exceptional case, such as Zenati, where liability would be found.

41. Effectively, as it seems to me and as was submitted by Mr Johnson QC, there must be some "game-changing" information or factor which was not before the court, but which should have been, and which would have made all the difference to the court's decision and approach.'

60. In my judgement, it is clear from *Zenati* that the focus must be on the party responsible for the relevant alleged infringement of Article 5 ECHR. In *AAA*, too, the focus was on the party who bore responsibility for withholding relevant material from, or providing it to, the defendant's representatives, the CPS and the court. Whilst not bound by the rationale and conclusions of Martin Spencer J, I respectfully agree with them. It would be an exceptional case, in circumstances of the nature set out at paragraph 41 of *AAA*, in which liability would be found in the cause of action which is permitted under English law, pursuant to the HRA and the ECHR.

61. So viewed, Ms Morris' submission in relation to the period during which the Appellant had been remanded in custody by the Magistrates' Court inevitably fails. 'Setting the wheels in motion', as she puts it, does not equate with an infringement of Article 5 for which the police may be held liable (were it to have been the case that the Appellant's arrest and detention in police custody had been unlawful). No exceptional circumstance had been prayed in aid before the lower court, or this one. This was not a case in which new information had come to light which had changed the basis upon which the Appellant had been put before the Magistrates' Court, or in which that court had been disabled from exercising the requisite judgment on the question of bail. There is no appeal from the lower court's findings rejecting the alleged failures by the Respondent concerning the ABE interview of the child. It had been the CPS which, in the knowledge of all relevant facts and matters, had taken the decision to authorise a charge, applying the threshold test (necessarily entailing that it had been satisfied that (amongst other matters) there had been reasonable grounds to suspect that the Appellant had committed the offence) and, thereafter, to object to the grant of bail by the Magistrates' Court. At and from the time at which the Appellant had been remanded in custody by that court, there had been no operative act or omission by the Respondent, exceptional or otherwise, of the nature addressed in *Zenati* or contemplated in *AAA*. No other authority supportive of the approach which Ms Morris urges has been provided.

62. I reject Ms Morris' contention, in terrorem, that such a conclusion has the perverse consequence that a person unlawfully arrested is in a position inferior to that of a person whose arrest was lawful but whose detention thereafter became unlawful. Once it is appreciated that the focus must be on the causative potency of the act of which any legitimate criticism may be made, in relation to detention at the relevant point in time; and on the person(s) responsible for that act, no difficulty arises. In this case, Ms Morris essentially contends for a 'but for' test, which will not suffice.

63. Accordingly, I am satisfied that there was no error in the lower court's finding [60], in the alternative, that the Respondent would not have been liable for a decision which had been made by the CPS. Ground 3 fails in its entirety.

Disposal

64. All three grounds of appeal having failed, the appeal is dismissed.