Neutral Citation Number: [2020] EWHC 3246 (Admin)

IN THE HIGH COURT OF JUSTICE
HIGH COURT APPEAL CENTRE LEEDS
On appeal from NEWCASTLE-UPON-TYNE COUNTY COURT
Order of RECORDER NOLAN dated 18th October 2019
County Court case number: E06YX525

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 27/11/2020

Before :

MRS JUSTICE COLLINS RICE
- -

Between

MR PATRICK REAY
MR CALUM SHERLOCK
Claimants and Appellants

- and -

CHIEF CONSTABLE OF NORTHUMBRIA POLICE
Respondent and Defendant

- -

Ms Fiona Murphy (instructed by **Ben Hoare Bell LLP**) for the **Appellants**
Mr Stephen Morley (instructed by **Northumbria Police Legal Services Department**) for the **Respondent**

Hearing date: 10th November 2020
- -

Approved Judgment

Covid-19 Protocol: This judgment was handed down by circulation to the parties and release to Bailli. The date and time for hand-down was deemed to be 10.00am on Friday 27 November 2020.

Mrs Justice Collins Rice:

Introduction

1. This is a case about individual liberty, the policing of a major political demonstration and counter-demonstration, and the exercise of the police power of summary arrest.

2. It arises from events on bank holiday Saturday, 25th May 2013, in the centre of Newcastle. The English Defence League (EDL) intended to march through the city. The EDL's political agenda is well known and evokes strong views. A coalition of groups with strong views opposed to the EDL agenda - 'Newcastle Unites' (NU) - formed to organise a counter-demonstration and protest. Northumbria police planned an operation to facilitate free speech for all while maintaining public order and safety.

3. The Appellants belonged to the Revolutionary Communist Group (RCG). The RCG is also known by the title of its newspaper – *Fight Racism, Fight Imperialism*. It is strongly opposed to the EDL and all it stands for. The RCG had wanted to join the NU coalition's event, but had been rebuffed by its organisers. Nevertheless, around a dozen of them, including the Appellants, turned up on the day, ready to make their voices heard. Before any of the demonstrations got under way, and while they were peacefully leafleting the public in the city centre, they were all arrested by the police on suspicion of conspiracy to commit violent disorder (section 2 of the Public Order Act 1986). They challenge the lawfulness of this arrest.

The Legal Framework

4. There is no dispute as to the applicable legal framework. The general power of the police to arrest without warrant is set out in section 24 of the Police and Criminal Evidence Act 1984 (PACE). Section 24(2) provides that, where the police have reasonable grounds for suspecting that an offence has been committed, they may arrest without a warrant anyone they have reasonable grounds to suspect of being guilty of it.

5. However, by section 24(4), that power is exercisable only if the police have reasonable grounds for believing that it is *necessary* to arrest the person, for one of a limited number of specified reasons. Those reasons include, in section 24(5)(c), preventing the person arrested from causing physical injury (to themselves or anyone else), suffering physical injury, causing loss or damage to property, or causing an unlawful obstruction of the highway. These are known as the preventive reasons.

6. For a summary arrest to be lawful therefore, on the basis relevant to this case, there is both a subjective test and an objective test. The police must have genuinely suspected an offence had been committed and the arrestees were guilty of it. They must also have genuinely believed arrest was necessary for one of the preventive reasons. These together form the subjective part of the test - a question of fact about the state of mind of the arresting officers.

7. The objective part of the test is what creates public accountability for summary arrest. As the liberty of the individual is at stake, the decisions and actions of the police are held up to objective scrutiny. The test requires that their genuine suspicion must be demonstrably

reasonable; and that their genuine belief in the necessity of arrest for one of the preventive reasons must be demonstrably based on reasonable grounds. These are mixed questions of law and fact, and, where arrest is challenged, will ultimately be decided by a judge.

8. 'PACE Code G' gives guidance to the police about the lawful exercise of their s.24 powers. It sets out that the power of arrest must be used fairly, responsibly, with respect for the arrestee and without unlawful discrimination, taking steps to foster good (community) relations. It must be used proportionately, respecting the protected fundamental right of individual liberty. It must always be fully justified and the police should consider whether necessary objectives can be achieved by other less intrusive means.

9. Code G specifically addresses the necessity test, including the preventive reasons, as an essential part of police operational decision-making. A constable must consider the nature of the offence and the circumstances of the suspect. Examples are given. Where practicable, the arrestee should be told why the arrest is necessary.

10. Code G is further elaborated in notes on the guidance. In particular, the notes provide that:

> "For a constable to have reasonable grounds for believing it necessary to arrest, he or she is not required to be satisfied that there is no viable alternative to arrest. However, it does mean that in all cases, the officer should consider that arrest is the practical, sensible and proportionate option in all the circumstances at the time the decision is made."

The notes also direct the police to consider whether it is practicable to give a warning before proceeding with arrest. If the warning is heeded, the arrest may be avoided; if ignored, that may support the need for the arrest.

11. Further guidance is provided by the decided legal cases, and these are considered below.

In the County Court

12. The Appellants brought an action in the County Court to establish that the arrests were unlawful and to claim compensation. There was a five-day trial in October 2019, before a judge (Recorder Nolan QC) and jury, at which a considerable amount of evidence was considered. The jury found, on the questions of fact put to them, that the decision-making police officers did genuinely suspect that the Appellants and other members of the RCG had conspired to commit violent disorder, and did genuinely believe that the arrest of the group was necessary. The subjective parts of the test for a lawful arrest under section 24 of PACE were therefore met.

13. It then fell to the judge to apply the objective parts of the test. He concluded that the genuine suspicion of the police officers was also a reasonable one. He concluded that they had reasonable grounds for believing that the arrests were necessary. He accordingly decided that the Appellants had been lawfully arrested and dismissed their claims.

The Issue on Appeal

14. The jury's findings of fact – the subjective part of the s.24 PACE test – are not challenged in these proceedings. I must therefore work on the basis that the relevant police officers did genuinely suspect that the RCG had conspired to commit violent disorder at the 25th May 2013 demonstrations in Newcastle, and that they genuinely believed it was necessary to arrest the Appellants and the others on the day.

15. One of the Recorder's conclusions is also unchallenged - his finding that the police officers' suspicion that the RCG members had conspired to commit violent disorder on the day of the demonstrations was reasonable. That is also the basis on which I must proceed.

16. The sole issue before me on appeal is therefore whether the Recorder went wrong in concluding that the police had reasonable grounds for their belief that the arrests were necessary for one of the preventive reasons. It is common ground that that requires me to evaluate the question of necessity myself, in the relevant context faced by the police, considering the options available to them, and with the assistance of the decided legal authorities in comparable cases. I begin by placing these arrests in the context of the police operation as a whole.

The Police Operation

17. This was not the first time the EDL and the RCG had arrived together in the middle of Newcastle with a view to demonstration and counter-demonstration. Three years previously, on the occasion of another EDL rally, the police received a last-minute tip-off from an informer that the RCG were planning as a group physically to charge at the EDL, in other words to commit violent disorder. They did exactly that on the day, and the police only just had time to organise a cordon to keep the two sides apart.

18. It is accepted that in the months before the 2013 event, the police made good and careful plans, and engaged fully and constructively with the EDL and the NU coalition, each of which was preparing to steward their event in a well-organised fashion. The RCG made consistent efforts to engage with NU, but there was a degree of friction between the two. It may be that NU had the 2010 events in mind in not wishing to include the RCG in their march, or it may be that personalities and politics played a part. The RCG persisted, including by turning up uninvited at a couple of NU meetings, causing minor disruption; they were physically evicted from one. The police also tried hard, right to the last minute, to persuade NU organisers to include the RCG. It would have made policing simpler. They suggested the RCG could join the NU march but stay separated at the back, but NU would have none of it. In any event, the police knew, as the event drew closer, both that the RCG were planning to turn up, and also that the policing arrangements that had been made with NU were not agreed to include them. It is said that the police made some efforts at engaging with the RCG directly in these circumstances, but that this was unproductive.

19. The police were concerned in the weeks of April and early May 2013 that the risks to public order and safety of the Newcastle events were increasing. The EDL had been making inflammatory public comments about a series of high-profile Crown Court convictions, unconnected other than by the ethnicity of the offenders. This was likely to increase the EDL presence, both as to controversy and as to numbers (some 400 were expected).

20. The police also received intelligence, from the same source that gave the tip-off in 2010, that the RCG would be joined by anarchists on the day, and were planning 'something spectacular' in public order terms, including occupying a public landmark and a direct encounter with EDL after the marches in a pub setting. This intelligence was assessed as being highly reliable. Hence, in all the circumstances, the reasonableness of the police's suspicion of a conspiracy to commit violent disorder.

21. On 22nd May, a few days before the event, Northumbria police held a last general planning meeting, with representatives from Newcastle city council, other emergency services and transport providers, to confirm final arrangements for the day. These included muster points for both EDL and NU (around a mile apart), the timings and routes of the marches, and arrangements for dispersal. Both groups were to assemble by, and set off at, 1.30pm, arrive at the demonstration sites at 2pm, have an hour for their activities, and disperse at 3pm. It was recorded that discussions had taken place with 'organisers around some of the more radical groups who seek to attach themselves to the NU march', and that a tactical contingency for them had been approved by senior strategic police command, involving an alternative designated demonstration site at a location (Cow Hill/Barrack Road, near St James Park) said to be about half way between the EDL and NU sites.

22. On that same day, 22nd May 2013, after the planning meeting was over, the brutal and notorious murder of a British soldier, Fusilier Lee Rigby, was committed on the streets of London by Michael Adebolajo and Michael Adebowale, telling bystanders they were avenging the killing of Muslims by the British army overseas. The EDL took to social media. Northumbria police's risk assessment increased in proportion. In the event, the EDL presence on the day was in the order of ten times what had originally been planned for – three or four thousand rather than hundreds. Feeling on both sides ran stronger than ever. The police risk assessment was exceptionally high.

23. Over a thousand officers were deployed in Newcastle that day. As it turned out, from the police perspective, their operation was successful. The demonstration and counter-demonstration passed off according to plan without serious incident or disruption to public order and safety. The arrests now complained of were the sole exception. The background, however, sets the scene for considering what happened between the police and the RCG.

The Arrests

24. The basic chronology is not in dispute, and appears from the police logs and other evidence in the case. Shortly after 11am, a police officer recognised an RCG member in the Haymarket, in Newcastle city centre, who confirmed that the RCG were planning to 'attend the protest' later on. The police tactical commander on the day, Chief Superintendent Neill, detailed police (community) liaison officers to go down to the spot and engage with the RCG members present to try to establish more about their plans 'and accommodate a counter protest in terms of their needs'.

25. By 11.40, the liaison officers had reported back to CS Neill that the RCG were 'not engaging' with them or indicating their intentions. He decided that the RCG were to be informed of the pre-planned alternative protest site at Cow Hill and the 'implications' of continuing to remain where they were in the Haymarket. At 11.55, CS Neill directed that the liaison officers were to attend and deliver that message to the RCG, and that the RCG

members were to be arrested if they refused to comply with directions to move to the alternative site. It is common ground that this was an instruction to arrest if, but only if, the RCG refused an instruction to move to the Cow Hill site. It is also common ground that they were not in the event given that instruction or that specific option. There is no clear evidence that they were given any other express warning. They were all summarily arrested as a group, including Mr Reay at 12.44 and Mr Sherlock at 1.15pm. There is no clear evidence that the necessity for the arrests was explained to them.

26. The Appellants have no quarrel in this case with CS Neill's instruction, nor with the pre-prepared plan of which it was a part. The RCG – and the police – had wished and hoped right up to the end that they could join the NU event. If the RCG were not going to be allowed to do that, then, they say, they should have been told there was an alternative demonstration site for them to use, and allowed to get there and make the most of it. That was CS Neill's plan and it was a good one. If they had unreasonably refused to go along with it then they accept that might well have given the police reasonable grounds for a decision that arrests were necessary. As it was, they say, the arresting officers simply failed to carry out the plan. When CS Neill issued his contingent instruction to arrest at 11.55, he was already well aware that the RCG were 'not engaging' and had factored that into his plan. The arresting officers did not communicate the clear instruction which was the single valid condition for the arrest to be necessary and lawful. Nothing else material happened in the intervening time apart from the same (polite and peaceful) 'not engaging' and no other justification for the arrests being necessary is proposed. There was a perfectly good alternative to arrest. Therefore, the Appellants say, there was no objectively recognisable justification that the arrests were 'necessary'. It is as simple as that.

27. The police, however, say it is not as simple as that, and that it is important to take care in this case both with the precise meaning of the objective necessity test and with its application to what was really going on on the ground by way of 'not engaging'.

The Objective Necessity Test

28. As set out above, Code G provides guidance to the police themselves on how to make sure that an arrest will be able to pass the objective necessity test. There are positive requirements: values such as fairness and respectfulness are mentioned, and synonyms such as 'practical, sensible and proportionate'. The test is also put negatively: it does not mean that an officer has to be satisfied that there is 'no viable alternative to arrest'. It is in the end a matter of judgment, and context is always important.

29. Unsurprisingly, the authorities also strongly emphasise context and fact-specificity, and give the same sort of positive and negative guidance, when it comes to the function of a judge in applying the objective test. They were reviewed and summarised in *Hayes v Chief Constable of Merseyside Police* [2012] 1 WLR 517 paragraphs 30-39; and further considered in *R (L) v Chief Constable of Surrey Police* [2017] 1 WLR 2047, *Commissioner of Police v MR* [2019] EWHC 888 (QB), and *Rashid v Chief Constable of West Yorkshire* [2020] EWHC 2522 (QB). From these, the following may be distilled.

30. The test is above all a practical, not a theoretical, exercise – to be applied to a real-life process or moment of decision. That is why context is so important. The test has to be applied on the basis of what is known at the time by the police and the situation faced by

them, without benefit of hindsight. It must also be applied to the particular circumstances of the arrestee.

31. Context is also why the question of alternatives inevitably arises. The test does not mean that there must be no feasible or viable alternative, or that arrest must in every case be a matter of last resort. Rather, it must be 'the practical and sensible option' (the definite article has a limiting effect). So, for example, while it may not require interrogating a suspect as to whether he will attend a police station voluntarily, it is at least relevant to see whether that is a practical alternative. Again, with a suspect who is expected to be cooperative, an arrest cannot reasonably be thought necessary unless the suspect then refuses to cooperate or gives the appearance of refusing to cooperate. In many instances, the alternatives will require no more than a cursory consideration. But a belief not based on some evaluation of the options is unlikely to be found to be based on reason. A judge should hesitate to second guess the operational decisions of experienced police officers, but there must be a rational justification for an officer to reject alternatives to arrest.

32. The function of the court is to hold the police to account, but not to 'subject the process of arrest to the rigour of a public law reasons challenge'. The test of necessity is a high bar, more than simply 'desirable' or 'convenient' or 'reasonable'. At the same time, while it sets a high objective standard, it is being applied to a unique form of operational decision-making. It is uniquely momentous as a summary deprivation of individual liberty – hence the high standard of accountability. It is also uniquely vital for the operational public interest purposes reflected in the 'preventive reasons' – hence the significance of real-life practical context. Though there is technically no philosophical room for manoeuvre in a binary decision where it is either necessary to arrest or unlawful (i.e. necessary not) to arrest, the job of the court is not an abstract thought experiment. It is a distinctively practical balancing exercise, upholding individual liberty and police accountability *on the terms of* the operational realities of public interest policing and the choices available on the ground.

Applying the Test

(i) The County Court Judgment

33. Mrs Justice Thornton set out the best approach for an appeal court in <u>*Commissioner of Police v MR*</u> at paragraph 30:

> "A decision on the existence of reasonable grounds … as to the need for arrest, is treated as a question of law rather than of fact, although it will involve an evaluation of the facts and, in many cases, a weighing of different factors. The question is one on which an appellate court has to reach a conclusion of its own, rather than limiting itself to deciding, for example, whether the trial judge's conclusion was plainly wrong. If, however, the trial judge has approached the task correctly, it will generally be appropriate to place weight on their assessment, given their proximity to the evidence and their better overall "feel" for the case. An appellate court is likely to be slow in practice to interfere with the trial judge's conclusion: *Alford v Chief Constable of Cambridgeshire Police* [2009] EWCA Civ 100 at [33]. Accordingly, and at Counsels' request I approach my

> judgment by considering the judgment below before forming my own view on the matters in question."

34. In giving permission to appeal in the present case, Mr Justice Jay remarked on the detailed nature of the evidence and the comparative lack of detail or 'grappling with the real issues' in the way the Recorder dealt with it. The Recorder's application of the objective necessity test is dealt with, among other things, in the last four paragraphs of what appears to be a transcribed extempore judgment. These take a holistic view and are unhesitating in their endorsement of the necessity of the arrests and of the strength of the evidence supporting that. The holistic explanation does not straightforwardly map across to the task of applying the precise part of the test on which I must focus, as guided by the authorities. I have therefore approached my task on appeal afresh.

35. I apply the objective necessity test on the basis of the now largely uncontested factual evidence before me, including returning to some of the detail. I am guided in that by Counsel. I was grateful to Counsel for their assistance in clarifying the principles and focusing the issues, not least to Ms Murphy, herself coming fresh to the case at the appeal stage and making incisive points on behalf of the Appellants going to the need for particularly close scrutiny in this case.

(ii) Alternatives

36. The authorities are clear that the test does not require exhaustive examination and elimination of all alternatives to arrest, nor that arrest must be the absolute last resort. At the same time, an arrest will not easily be found to be rationally 'necessary' unless the alternatives have been thought about, and rejected for reasons which are themselves sensible.

37. Here, it is plain that at least some alternatives were thought about. This is not a case in which the evidence suggests a pre-planned programme to arrest regardless; on the contrary it has all the hallmarks of arrest being something of a last-minute decision. Indeed, the Appellants base their case principally on the very obviousness of the alternative – CS Neill's own fall-back plan for an alternative protest site. Their challenge is that that was abandoned for no good reason.

38. Further alternatives were also considered and rejected. One was containment of the group ('kettling'). CS Neill said that this was really only appropriate where imminent breach of the peace is expected, and that those conditions did not arise in this case while the RCG was just peacefully leafleting. It was the wrong tool for the job. The objective was not to manage a freestanding breach of the peace by the RCG, but to manage their interaction with the EDL and NU protesters. I am satisfied that that is a reasonable explanation.

39. The more appropriate tool for achieving that objective, short of arrest, was the exercise of powers under section 14 of the Public Order Act 1986 to impose conditions on public assemblies. Section 14 provides (as relevant):

> (1)If the senior police officer, having regard to the time or place at which and the circumstances in which any public assembly is being held or is intended to be held, reasonably believes that—

> (a)it may result in serious public disorder, serious damage to property or serious disruption to the life of the community, or
>
> (b)the purpose of the persons organising it is the intimidation of others with a view to compelling them not to do an act they have a right to do, or to do an act they have a right not to do,
>
> he may give directions imposing on the persons organising or taking part in the assembly such conditions as to the place at which the assembly may be (or continue to be) held, its maximum duration, or the maximum number of persons who may constitute it, as appear to him necessary to prevent such disorder, damage, disruption or intimidation.
>
> (2)In subsection (1) "the senior police officer" means—
>
> (a)in relation to an assembly being held, the most senior in rank of the police officers present at the scene…
>
> (5)A person who takes part in a public assembly and knowingly fails to comply with a condition imposed under this section is guilty of an offence, but it is a defence for him to prove that the failure arose from circumstances beyond his control.

40. The Appellants say that deals exactly with the situation on the ground in this case, and was an alternative not considered. CS Neill said in his evidence that it was considered and rejected. Perhaps neither is exactly the right way to put it. It seems to me that section 14 was precisely the legal underpinning of CS Neill's plan: that involved, on the basis of the (reasonable) apprehensions of the police of the public order risks of 'losing control' of the RCG element of the day's demonstrations, giving directions as to where the RCG could and could not assemble and demonstrate. If they deliberately failed to comply they would be committing an offence and could be arrested.

41. I agree therefore with the Appellants that, so far as the consideration of alternatives is concerned, the necessity test comes down in this case to whether there was a sensible rationale for abandoning the plan to give section 14 directions rather than going straight to arrest. Only one rationale is offered by the police: that the Appellants were 'not engaging'.

(iii) The Arrestees: 'not engaging'

42. The authorities are clear that whether or not a potential arrestee is expected to be co-operative is a relevant consideration in thinking about the practicability of alternatives to arrest. So the question of 'engaging' properly arises. But where a test is highly fact-sensitive, it all rather depends on what is meant by 'not engaging'.

43. There is no dispute that on the day the police knew that the RCG wanted to turn up and participate in events, that NU were not prepared to take responsibility for stewarding them, and that there was therefore no pre-organised and agreed plan for what they were going to do. The RCG had not given the police any details about their intentions, but they suspected, on reasonable grounds, that the RCG had a pre-prepared plan to commit violent disorder. What they were actually doing, while everyone was gathering in Newcastle in the last

couple of hours before the marches to set off, was peacefully leafleting passers-by, and responding politely, if non-committally, to police questions about what they were up to.

44. What the Appellants say about this 'not engaging' is that it was not only wholly compatible with CS Neill's plan, it was known about and factored into the plan. In fact, the plan was a thought-through response to the 'not engaging', the reasonable next stage: if the RCG were not ready to be forthcoming about their own plans, they should be given an ultimatum: comply with the police's plans or face arrest. They were quiet, they were listening to what the police were having to say, they could easily have been given section 14 directions. So they say that 'not engaging' is not a good reason for rejecting this alternative.

45. Furthermore, they say, there is another point to bear in mind. If section 14 directions had been given, there would have been enough time for a distinction to emerge between those who were prepared to co-operate and those who were deliberately putting themselves in the way of arrest. Any arrests made would then be properly needful, as recognised by the Code G guidance. As it was, the arrests were not only not needful, they were indiscriminate.

46. The police answer is to say that this is a theoretical analysis only, and that to apply the test properly I need both to pull back the focus to the wider context and also to zoom in more carefully to the detail.

47. As to context, they say that I am to remind myself of the exceptionally high general risk of disorder that day and the sheer scale of the police operation. The preventive reasons were intensely front and centre of the duties of the police at all relevant times – not only in general terms, but in terms specific to the RCG. Whatever the ins and outs of the previous negotiations, there was no agreed arrangement with the RCG and the police had reasonable grounds for suspecting a conspiracy to commit violent disorder. It was essential to ensure that that did not happen. Time was running out. All of that meant that 'not engaging' was a far from neutral activity. On the contrary it was further reasonable grounds for suspecting that the RCG posed a major, imminent and unpredictable threat to public order.

48. As to detail, the police say I have to look not just at CS Neill's plan but at its match with the unfolding reality on the ground. No plan can or should be more than an operational framework, or be expected to survive contact with reality without re-evaluation. I was taken to the evidence of the police liaison team whose assessment of 'not engaging' triggered the decision to arrest. What they say about the 'not engaging', and how they interpreted it, is this.

49. First, as to the facts: the police liaison team spent a good half hour trying to establish some kind of rapport. The RCG were 'polite and pleasant', but they were 'blanking any sorts of questions or responses around what their intentions were for protest'. The standard response was: 'Are we doing anything wrong? We're handing out leaflets, there's no problems, is there, officer?'. Cow Hill may not have been mentioned, but as well as simply asking about the RCG's plans, the police did allude to possible alternative arrangements, including at other (unspecified) sites. This was standard practice. They asked if there were other places the RCG might wish to attend if they could not join the main march. They got no interest or response.

50. Second, as to interpretation: it is the function and training of the police liaison teams to establish rapport and a basic framework of constructive co-operation. This is first base – the prerequisite for any form of sensible alternative to arrest. The liaison officers felt they

tried hard to get to this first base; the length of time they spent trying to be constructive and getting stonewalled was unusual and troubling. The experience convinced them that what they were dealing with were the signs of stubborn or passive-aggressive resistance entirely consistent with a concerted purpose of violent disorder, that there was no prospect of a dependably co-operative alternative and therefore no point in going further along the path of pursuing the detail of other outcomes. The pattern of behaviour was concerted, sustained and not really compatible with any solution relying on good faith and law-abiding purpose. The 'preventive reasons' were pressing priorities. The RCG, acting as a group, was 'giving the appearance of refusing to co-operate'. Therefore group arrest was the only sensible thing left to do.

51. I am invited to agree that that provides a complete answer to the challenge to justify not formally issuing section 14 directions.

(iv) Evaluation

52. The question I have to answer is whether, taking all these circumstances into account, this is a proper basis for concluding that the objective necessity test is passed. I remind myself that it is a high standard: I must not 'second guess' but I must properly scrutinise this decision and hold the police to account for what they did.

53. The questions the Appellants invite me to ask myself are, I am satisfied, the right ones. The lack of an ultimatum on the day, the lack of evidence that an explanation of necessity was given at the time, and the circumstances of a group arrest do demand a convincing explanation.

54. In testing how convincing the explanation given is, I bear in mind the high intensity of the policing operation in Newcastle that day, and the telescoping timescale. There was a lot of pressure on the police – requiring decisive action, but also raising the risk of less considered reaction.

55. I also bear in mind the nature of the offence of which the police had reasonable suspicion. I am mindful not to fall into the trap of eliding the objective tests for reasonable suspicion and for necessity of arrest, but the authorities are clear that the nature of the offence suspected is relevant to the necessity test. Conspiracy to commit violent disorder is an offence of concerted group activity, and inchoate – unfinished business. Suspected impending group violent disorder is a long way from the 'relaxed' circumstances of arrest dealt with in some of the decided authorities. This was an offence intrinsically and directly related to the preventive reasons: the duty to prevent physical harm, damage to property and obstruction of the highway was fully engaged.

56. I am satisfied on the agreed facts as set out above that sensible alternatives were not only considered, but planned for and to a degree attempted. The only real question is whether 'not engaging' was a good enough reason for abandoning those efforts. I am in all the circumstances persuaded, on balance, and for the following reasons, that it was.

57. I accept that the precondition for pursuing any of the alternatives was the establishment of a basic level of confidence that they were practical and workable, and that that in turn relied on establishing a basic level of confidence that the RCG would reliably co-operate with them. Otherwise they were wholly theoretical alternatives. That includes CS Neill's specific plan, underpinned as it was by the legal framework of the Public Order Act. The

police on the ground formed, and I am satisfied tested over a reasonable period, a view that not only did their confidence not reach that basic level, but that the persistent behaviour they were encountering was suggestive of the precise opposite.

58. I am satisfied on the evidence that that was borne not of preconception on the part of the police, nor simple failure to implement CS Neill's plan, nor excessive nervousness about the challenge of the day's events more generally, nor an unfair focus on their suspicions about the RCG to the exclusion of all else. It was borne out of half an hour's close professional observation and reading of the behaviour of the RCG in its relevant context – trying to see whether the alternative (any alternative) was practical and workable. That is the relevant development as to 'not engaging' which relegated CS Neill's contingent direction to the background: even that plan required some prospect of compliance to get off the ground, and the police's considered interpretation of the conduct of the RCG was that there was no such prospect.

59. I must test that assessment. But when it comes to the task of assessing the police's interpretation of behaviour and body language in a context like this, an appeal court starts to get near the boundary between holding to account and second-guessing. The difference between behaviour which is 'polite, reasonable and potentially open to a co-operative plan' and 'ostensibly polite, passively obstructive, concerted and a proximate danger to public order' is a matter of judging human interaction in the moment and in full context. The police called it the latter way; I am satisfied that they had plenty of time, and, in the whole of the circumstances set out above, reasonable grounds, to do so. They kept the prospects of alternative means of facilitating protest by the RCG, including at other places, in mind and concluded that they were becoming increasingly unrealistic.

60. That being so, there is a degree of artificiality, or indeed unreality, in requiring the mention of a particular alternative location or a formal direction to go there as an essential precondition to the lawfulness of the arrest. It does not seem to me in the end to matter whether a specific alternative site was named (or even known about) if no alternative site solution was realistically going to work because the RCG appeared collectively resolved to be uncooperative. I am satisfied in the end both that the police's reading of 'not engaging' was reasonable and that their conclusion that arrest was something more than 'desirable', 'convenient' or 'reasonable' – was necessary – was on that basis well-founded.

61. In reaching that conclusion, it is perhaps right to make clear what I am not deciding. My conclusion does not mean that the police read the behaviour of the RCG *correctly*. It does not mean that the RCG *were in fact* planning violent disorder. It does not mean that CS Neill's plan was flawlessly executed, or that there was no viable alternative to arrest. It does not mean that the police interaction with the RCG was a model of best practice or conformed to the highest aspirations of Code G. It is no part of my task to say anything about any of these things and I do not do so. I am concerned solely with the Appellants' invitation to apply the objective necessity test to the genuine beliefs of the police, and I have found those beliefs to have an adequate foundation in reason, in particular as to the rejection of alternatives as being impractical.

62. In applying the necessity test in this case, I have thought it right to bring to bear a degree of close scrutiny, beyond what might be the proper approach in other cases. I considered that appropriate to the cogency of the challenge made on behalf of the Appellants. I am on balance persuaded that the challenge is sufficiently answered. The police's belief that

arresting the RCG was ‘the practical and sensible option’ cannot in my view fairly, in all the circumstances, be impugned in law as an objectively unreasonable one.

Conclusion

63. For the reasons set out above, I am satisfied on balance that officers of Northumbria police, believing that it was necessary for one or more of the preventive reasons to arrest the Appellants, had reasonable grounds for so believing. This appeal is dismissed.