The Court of Appeal for Bermuda

CIVIL APPEAL No. 12 of 2017

B E T W E E N:

THE COMMISSIONER OF POLICE

Appellant

- v -

DR MAHESH SANNAPAREDDY

Respondent

Before: **Clarke, P**
Kay, JA
Bell, JA

Appearances: Mark Diel and Dantae Williams, MDM Ltd., for the Appellant; Lord Peter Goldsmith QC and Delroy Duncan, Trott & Duncan Ltd., for the Respondent

Date of Hearing: **4 March 2020**
Date of Judgment: **20 March 2020**

JUDGMENT

Unlawful arrest – failure to take into account relevant considerations – was the claim to judicial review within the scope of the leave given.

CLARKE P:

The Respondent

1. The Respondent ("Dr Reddy") is a prominent medical practitioner who has been on the King Edward VII Memorial Hospital Staff since 2001 and Treasurer of the Bermuda Medical Doctors Association since 2014. He has been employed by Bermuda Health Care Services ("BHC") since 2000, and its Medical Director since 2011.

Background Facts

2. At 7:00 a.m. on Thursday, 19 May 2016 officers of the Bermuda Police Service ("BPS") attended at Dr Reddy's house and arrested him under section 23 (6) of the **Police and Criminal Evidence Act 2006** ("PACE"). They then searched his house. This included searching the purse of a female friend who happened to be there and Dr Reddy's wallet, a cabinet in the kitchen, which had within it five patient files, and taking those files and two IPAD tablet computers. Dr Reddy contends, and Kawaley CJ (as he then was) has held, that that arrest and the subsequent search of his home, without a search warrant, purportedly effected under section 18 or 31 of PACE was unlawful.

3. On 16 June 2016 Dr Reddy's attorneys sent a letter before action which included the following:

> "*As you will be aware, a constable may only arrest an individual summarily if she/he on reasonable grounds suspects the individual of having committed an offence, and reasonably considers that the alternatives to summary arrest would be impracticable in the circumstances. This condition that a constable may not unreasonably arrest an individual summarily is an application of the requirement that the State not unreasonably deprive individuals of their liberty and flows directly from Articles 1 and 5 of the Constitution of Bermuda, as well as the common law and Bermuda's obligations under the European Convention on Human Rights.*
>
> ***The summary arrest of Dr. Reddy was unreasonable and therefore unlawful***
> *It seems highly unlikely that the officers who ordered the raid on 19 May 2016 considered any alternatives to summary arrest [and the search consequent on it] and, even if they had, the decision to proceed summarily to arrest our client was patently unreasonable. …*
>
> …

> *Any officer who had given any good faith consideration to the alternatives to the summary arrest of our client would have concluded them not only to be workable but preferable."*

Procedural background

4. The procedural background to this case is set out in the following paragraphs of the judgment of Kawaley CJ ("the judge") of 23 June 2017 which I gratefully adopt, with an addition which is underlined:

> *"3. The Applicant applied for judicial review of the Respondent's decision to arrest him (and search his residence) without a warrant on May 19, 2016, by Notice of Application dated July 26, 2016. Kawaley CJ gave leave on 4 August 2016. The Applicant filed his Notice of Originating Application on August 5, 2016 and it was issued returnable for August 18, 2016. On the morning of August 18, 2016, the Respondent filed a Summons seeking to strike out or stay the Applicant's Notice ("the Strike-out Summons"). I gave directions for the hearing of the Strike-out Summons on August 18, 2016. On September 20, 2016 the Respondent filed a Summons which was issued on October 4, 2016 seeking to set aside the grant of leave ("the Set Aside Summons").*
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> *4. The Strike-out Summons and the Set Aside Summons were both heard on January 24, 2017 when I dismissed both Summonses with costs. I subsequently gave reasons for that decision.* ***No directions were sought for leave to cross-examine any of the deponents.*** *Accordingly, the substantive determination of the present application primarily depends upon an analysis of the law and an application of the principles which are found to govern the relevant arrest to substantially uncontroversial facts".*
> [Bold added for emphasis in this and other paragraphs]

5. The application to set aside the leave and strike out the Notice of Motion was made primarily on the basis that Dr Reddy had an adequate alternative remedy in that he should wait and see if criminal charges were laid and (a) if he was charged, raise the issue of the unlawfulness of the arrest in those proceedings;

and (b) if no charges were made, pursue a civil action. The judge, in his ruling rejecting the application, held that this argument "*distorted the established alternative remedies doctrine almost beyond recognition*" [28]. He dismissed the applications with costs.

Uncontroversial evidence

6. The judge set out in his judgment a summary of certain uncontroversial evidence about the search in the following terms:

> *"7. The First Affidavit of Senior Investigator John Briggs stated that the Bermuda Police Service ("BPS") believed based on protracted investigations that the Applicant was involved in administering unnecessary diagnostic tests for financial gain based on, inter alia, the following information:*
>
> - *data suggesting that the Applicant had ordered more CT and MRI scans than any other doctor on the Island;*
>
> - *witnesses who stated that some tests were "blatantly unnecessary".*
>
> *8. Shortly after 7.00am on Thursday May 19, 2016, the Applicant responded to forceful knocks on his door in his dressing gown. He found what he believed was as many as 8 (but which the Respondent asserts were six) Police Officers at his door. The Officers were led by Senior Investigator Briggs and DS Hoyte. The Applicant was arrested on suspicion of fraud and money laundering. His home was searched, his female friend's purse and his own wallet were searched and five patient files, other medical documents from a BHCS binder and two iPads were seized.*
>
> *9. At approximately 9.00am he was taken to Hamilton Police Station. He was permitted to call his lawyer, Mr Duncan, who arrived approximately 1.5 hours later. The Applicant's friend brought his passport to the Station and handed it in. The Applicant was released on Police bail without being formally questioned because no time for*

such questioning on the day of the Applicant's arrest was convenient to Mr Duncan. He has to date never been formally questioned[1] about the suspected offences which formed the basis for his arrest on May 19, 2016."

7. The judge then set out certain unchallenged and largely uncontroversial evidence about pre-arrest and post-arrest events;

> "*10. According to the First Affidavit of Deputy Commissioner Wright, the Applicant's arrest arose out of "a large-scale fraud and corruption inquiry, which commenced in 2012".*
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> *11. The Applicant deposed in his First Affidavit that on September 25, 2013, the day after a Nursing Associate had been terminated by BHCS for gross misconduct, she filed a complaint (supported by three other former employees) with the Bermuda Medical Council against the Applicant in relation to, inter alia, conducting an unnecessary MRI test in relation to a patient. Following an investigation in which the Applicant responded to the allegations made, the Bermuda Medical Council wrote the Applicant on May 16, 2014 advising him the Professional Conduct Committee had recommended "that no further action be taken".*
>
> *12. The Applicant in his First Affidavit also stated that he had been subjected to two embarrassing interactions with the BPS before the search. Firstly, on July 31, 2014, he was questioned by a Police Officer at LF Wade International Airport at passport control about his travel arrangements in front of a queue of other passengers. He was invited to contact Detective Sergeant Hoyte on his return to Bermuda.*
>
> *13. His lawyer wrote to the Respondent to complain about this incident on August 5, 2014. The Applicant himself called DS Hoyte on August 14, 2014 and offered to submit to questioning,* ***an offer which was never taken up****. His lawyers wrote the Respondent again on*

[1] This would appear to require qualification: see paragraph 17 of the judgment referred to at paragraph 7.

August 20, 2014 to complain that the Applicant as a result of the July 31, 2014 incident was experiencing difficulties in obtaining a US visa. By letter of August 20, 2014, Deputy Commissioner Wright forwarded to the Applicant's lawyer a copy of a letter to the US Consul General confirming that the BPS "has no concerns [of] regarding Dr. Reddy's travel to any country. The Applicant also made a complaint to the Police Complaints Authority.

14. On May 8, 2015, the Applicant was again questioned by Police at passport control when departing Bermuda for the United States. The Respondent replied to a further letter of complaint from the Applicant's lawyer by apologizing for a mistake caused by the failure to delete an "old enquiry" that was closed.[2]

15. The Applicant also deposed to a third incident which involved the US Department of Homeland Security and the Department of Justice. On January 3, 2016 at JFK Airport when he was travelling back to Bermuda, he was paged and then questioned about healthcare fraud at BHCS by a Federal Agent near the Departure Gate in sight of friends, colleagues and other passengers. The agent suggested that Dr Ewart Brown (founder of BHCS and Premier of Bermuda between 2006 and 2010) had:

> *"orchestrated the alleged fraud and instructed me to order unneeded diagnostic tests…the agent told me that I should provide testimony against Dr Brown and that if I refused and returned to Bermuda, I would be arrested, jailed and prosecuted there, and then be deported back to my native country of India. The agent also told me that there might be adverse consequences for my family in the US if I did not provide testimony against Dr Brown."*

16. The Applicant engaged US counsel who, after initially contacting the Federal Agent who questioned the Applicant in New York, met US Department of Justice prosecutors on February 25 and April 8, 2016. Questions were raised about potential over-utilisation of MRI and

[2] The BPS also confirmed on 22 May 2015 that the BPS "*has no official interest in Dr Reddy",*

> *CT scans at BHCS and the Brown-Darrell clinics, as well as the Applicant's medical training and qualifications. The Applicant's counsel supplied the prosecutors with documentation including documents relating to the Applicant's medical qualifications. Since the second April 8, 2016 meeting, no further information was requested of the Applicant or his US counsel by the Department of Justice. The averment as to the Applicant's belief that the BPS "enlisted the aid of the US and this Homeland Security agent" (First Affidavit, paragraph 33) was not challenged in the Respondent's evidence.*
>
> *17. After the arrest, an interview of the Applicant was arranged at a time convenient to his lawyer but the Applicant declined to answer any questions. The Respondent did not publicize the Applicant's arrest. Dr Ewart Brown first formally publicised the arrest at a press conference in which a lawyer participated and complaints were made that the arrest and search were unlawful."*

8. The offer to DS Hoyle to be interviewed was in wide terms set out in paragraph 26 of Dr Reddy's first affidavit. He offered to be interviewed voluntarily and by appointment. He said that, if the police wanted to question him, he would make himself available at any time of the day or night in any part of the world but asked the BPS not to harass him at the airport in Bermuda in front of his friends, colleagues and patients.

9. The judge then set out the most important facts which the Court could accept as having been proved, directly or inferentially:

> - *"the Applicant was or ought to have been aware by the date of the arrest and search on May 19, 2016 as a result of a combination of (1) the complaint to the Bermuda Medical Society in 2013-2014 (which was dismissed in May 2014), (2) his being questioned by the BPS when leaving Bermuda in July 2014 and May 2015, and (3) his interactions with US law enforcement officials between January and April 2016, that he was*

suspected by the BPS of involvement in a fraudulent scheme of administering unneeded MRI and CT scans;

- *accordingly, it was unlikely that the Applicant, appreciating he was under investigation, would keep incriminating evidence in his home;*

- *the suspected fraud offences were not straightforward to establish, as (absent direct evidence of deliberate over-testing) whether or not tests were necessary or unnecessary would presumably be dependent on medical opinion analysing factors such as patient history and comparative international testing practices and/or standards. One complaint of unnecessary testing made by a former employee of the Applicant had been investigated and found not to have been proved by the Bermuda Medical Society in 2014;*

- *the BPS enlisted the assistance of US law enforcement agents;*

- *a Department of Homeland Security agent in New York in January 2016 invited the Applicant, in terms which he viewed as "aggressive and overly confrontational", to pursue the option of assisting the [BPS] as a witness against Dr Brown as an alternative to the Applicant himself being charged and potentially convicted and deported from Bermuda. The Applicant was warned of potential negative consequences for his US-based relatives if he did not cooperate;*

- *the BPS investigators were or ought to have been aware by May 19, 2016 as a result of a combination of their interactions with the Applicant in August 2014 and their enlistment of the support of the Homeland Security agent who questioned the Applicant in January 2016 in New York, that the Applicant (1) was inclined to respond to even minor encounters with the BPS with a legal response utilising lawyers, (2) was (purportedly at least) willing to cooperate with the BPS to clear his name, and (3) that a heavy-handed response*

might provoke a hostile legal response from the Applicant rather than encourage him to voluntarily assist the investigation;

- *the arrest and search took place, for reasons which were never explained, on the morning of a working day which meant that the Applicant's working schedule would inevitably be interrupted placing his patients' welfare at risk and increasing the likelihood that the fact of his arrest would enter the public domain and prompt gossip and speculation. This could have been avoided (or mitigated) by an arrest and interview at the Police Station by appointment at a mutually agreed time; and*

- *the Applicant's arrest was not part of a series of related arrests triggering a need to adopt a uniform approach to all suspects to avoid complaints of preferential treatment."*

10. Dr Reddy points out that he provided extensive (and uncontested) affidavit evidence of his background and his involvement with the investigation leading up to his arrest in his first affidavit dated 26 July 2017. This, it is submitted, establishes, as in my view it does, a number of matters which clearly discharge the evidential burden to show *prima facie* unlawfulness in the BPS' exercise of its power of summary arrest:

i. Dr Reddy is a medical doctor who, at the time of the arrest, had successfully practised medicine in Bermuda for some fifteen years. His disciplinary, let alone his criminal, record was (and remains) clean;

ii. He was (and remains) completely integrated in Bermuda with significant family as well as community ties;

iii. He had been aware of, and actively engaged with, several regulatory and law enforcement inquiries into his practice with respect to diagnostic

scans and his association with his employer, Dr. Ewart Brown. No complaint or concern had ever been registered at his responsiveness to or co-operation with these inquiries;

iv. His uncontradicted evidence was that he had made the BPS aware of his willingness to be interviewed, and he further stated that he would have continued to cooperate with any inquiries made of him by them:

> "I *had made clear to DS Hoyte that I was prepared to be interviewed in relation to any suspicions the police may have had. If there was particular information and documents the police wanted to review, I would have provided them voluntarily, assuming my professional obligations (primarily patient confidentiality) did not prevent me from doing so."*

v. The evidence submitted on behalf of the BPS (in particular that of Detective Inspector Tomkins, see below) confirmed Dr Reddy's offer to be interviewed and the BPS did not apply to cross-examine him to challenge his co-operative attitude.

11. The BPS did not initially file evidence as to why the decision to arrest was made, at least partly, it seems, because the position adopted at the strike out stage was that it would be prejudicial to the ongoing investigation for evidence justifying the arrest to be filed.

12. But later (on 6 March 2017) Senior Investigator Briggs came to depose as follows (the summary is that of the judge [21] together with his comments, which I have italicised)

- that the decision to arrest was very carefully considered, *without particularising what form the consideration took (e.g. one or more meetings)*

and which officers were involved and with no suggestion that legal advice was sought and/or obtained;

- that there were "compelling reasons" for the arrest, *without identifying what was compelling;*

- that one purpose of the arrest was to interview the Applicant, but that it was felt that an interview under caution would be more effective *without offering any explanation (apart from wholly irrelevant post-arrest events) as to why an interview under caution after an arrest at a Police Station following voluntary attendance there was not a viable alternative; and*

- that it was desired to gain control over the Applicant's movements by placing him on Police bail, *without identifying any or any clear basis for fearing that the Applicant was a flight risk (apart from a reference to the fact that a substantial part of the benefit from the alleged scheme had been invested outside Bermuda).*

13. The judge also found [22] that there was no or no credible evidence that the BPS consciously evaluated whether or not an early morning arrest at the Applicant's home on a working day was appropriate as opposed to less intrusive means of achieving the underlying objectives of the search. He said that there had been no suggestion that an arrest and search of the Applicant's home was necessary to search for vital evidence which might have been disposed of had an application for a search warrant been obtained. The search was not said to be the rationale for the arrest at all. In the judge's judgment it was quite predictable, based on the way the Applicant had responded to far milder interactions with the BPS, that the Applicant would decline to assist the BPS in an interview under caution after such a heavy-handed early morning search and arrest.

14. The judge accepted that careful consideration had been given as to two conditions which he described as reasonable subjective [sic] suspicion that the Applicant had committed offences and objectively reasonable suspicion, which were made out. But those, he held, were the only two conditions which the BPS' attorneys, prior to the final hearing, contended had to be met. There was no evidence that legal advice was sought about the legal implications of arresting the Applicant and searching his home against a background of his having (i) deployed lawyers to complain about the far less intrusive interactions he had had with the BPS at the Bermuda International Airport, and (ii) volunteered to answer any questions the BPS might have. He said that, if the BPS had sought legal advice and obtained a view of the law corresponding to Mr Diel's submissions at the end of the case, either (a) a far more extensive analysis of the arrest decision would have been carried out before the arrest and would have been carefully documented and clearly explained in evidence, or (b) the arrest would have been effected by arrangement at a police station so that the Applicant could be interviewed under caution, or (c) no arrest would have been carried out at all. Further if, which was not conceded, the main object of the arrest was to effect the search, the search would have been undertaken pursuant to a warrant.

15. The judge then referred to the affidavits that had been sworn, starting with the First Affidavit of Ian Tomkins, sworn on January 20, 2017, in which the Senior Investigating Officer deposed:

> "8…*The BPS wanted to interview the Applicant about some of the information that was gathered and about his medical practice in MRI and CT scans* ***so he could assist the investigation as he had previously stated he would.*** *The interview was not carried out because the Applicant's lawyer stated that he wished to be present during the interview. The BPS respected this request and did not interview the Applicant."*

This was a reference to the proposed interview of Dr Reddy immediately after his arrest.

16. The judge had referred to this evidence in his striking out ruling, where he had had observed [11] that this affidavit contained no (or no coherent) explanation of why it was considered necessary to carry out the arrest at all. The assertion in the affidavit that "*BPS took great care and attention when considering the decision to arrest the Applicant and search his home*" offered, he said, no insight into why, assuming that lawful grounds to make an arrest and carry out a search without a warrant *prima facie* existed, it was considered necessary to deploy those powers at all.

17. As the judge observed in the course of his ruling [12]:

> *"For example, there was no suggestion that the arresting officers did find or expected to find evidence which might have been destroyed if the officers had requested [Dr Reddy] to voluntarily assist them with their enquiries rather than carrying out the arrest. There was no suggestion that the summary arrest was essential because of a fear that [Dr Reddy] would tip-off co-conspirators. On the contrary, the Applicant complained that confidential patient files had been seized and Detective Inspector Tomkins deposed that the Police did not expect to find such documents at the Applicant's home. When the legal nature of (Dr Reddy's) central complaint is properly understood, it ought to have been possible to explain why it was considered necessary summarily to arrest [him]…This assumes, of course, that this question was asked at all. If the arrest decision was <u>not</u> made with [Dr Reddy's] novel in Bermudian terms construction of section 23(6) in mind, the analytical exercise it is said to require would never have been thought about, let alone carried out."*

18. At paragraph 13 of the Strike Out Ruling, the judge concluded that at that stage:

> *"there was virtually no evidence before the Court which was responsive to **the main thrust** of [Dr Reddy's] case: that his summary arrest and subsequent search was*

> *unlawful because no sufficient reasons for exercising those powers existed, even if in general terms sufficient grounds for an arrest could be made out*

19. At paragraph 23 of the same ruling, the judge speculated as to the reason why the BPS had failed to provide any relevant evidence:

> *"This is presumably because the true position is that the officers concerned, relying upon a literal reading of section 23(6), did not consider that they were legally required to apply their minds to the question of whether the summary arrest power should be exercised, once the substantive grounds for exercising the power were made out. If this is indeed the true position, it is to the [Appellant]'s credit that no effort has been made to retrospectively 'manufacture' justifying assessments which were not at the time actually carried out."*

20. I make reference to what the judge said in the striking out ruling since it was apparent from what he then said that the question that was going to arise on the hearing of the judicial review application was whether there were reasons which justified the summary arrest rather than some less intrusive approach.

21. In his judgment under appeal the judge observed [24] that Mr Tomkins' affidavit gave no explanation as to why Dr Reddy's offer of assistance was not taken up so that a dawn raid would not have been necessary. Nor was any explanation proffered as to why a search was considered to be necessary as an incident to the summary arrest.

22. As for the search, all that was offered in that affidavit was, the judge said, the following "*by way of mitigation rather than by way of defence":*

> *"10. As it relates to the search of the Applicant's home…it was not anticipated that the Applicant would possess confidential medical files at his home. As such, it was not expected that special procedure material would be found.*"

Evidence after the strike out ruling

23. The first affidavit of Senior Investigator Briggs ("Mr. Briggs") was, as I have said, sworn on 6 March 2017 after the strike out ruling of 24 January 2017 (reasons for which were given on 6 February 2017). In it he explains that at a later date after the arrest an interview was arranged but the Applicant declined to answer a single question. The judge considered this evidence [26], which, he said, made no attempt at all to explain, let alone justify, the search of the Applicant's home, his personal effects and those of his guest nor did it explain why various items (including medical files) were seized. He said that this affidavit could be viewed as the third opportunity for the BPS to explain the search.

24. The first attempt was made by letter dated June 30, 2016 in response to the Applicant's letter before action which complained, *inter alia*, that the reason for the summary arrest was to avoid having to apply to court for a search warrant. It was asserted by the BPS in answer that:

> "*In the circumstances the CoP is satisfied that this search was lawful under both sections 18 and 31 of PACE…The CoP is satisfied that the officers were lawfully entitled to seize the items which they removed from the premises under both sections 18(2) and 19(3) of PACE. So far as the five patient files you mention are concerned, the very fact that these items were found at Dr Reddy's home address gives cause for concern, especially since one of the patients in question appears to have died as long ago as December 2014. We reject your contention that any of the items seized was irrelevant to the investigation."*

25. Dr Reddy's attorneys submit that this analysis by the judge was entirely apposite. Mr Briggs purported to justify the decision summarily to arrest Dr Reddy by reference to a number of factors, none of which had been mentioned by his superior DI Tomkins ("Mr. Tomkins") and all of which are, it is submitted, unsubstantiated, illogical and/or irrelevant.

26. The judge went on to observe that the fact that the Applicant was placed on Police bail lent some credence to the assertion that one purpose of the arrest was to ensure that the Applicant would attend his trial and not flee the jurisdiction. But he found that was a very tenuous ground for carrying out the arrest in the way it was carried out because the same result could have been achieved by arranging for Dr Reddy to attend to be arrested at a Police Station. There was, he held [27]:

> *"no credible evidence before the Court that the [Respondent] was reasonably viewed as a flight risk in any event. In none of his previous interactions with the BPS (and the US agent whose aid the BPS enlisted) had he indicated anything other than a desire to meet any allegations against him. He had not been confronted with overwhelming evidence of his having committed a crime which was easy to prove …* (e.g. a crime of passion supported by DNA *evidence). The crime he was suspected of did not fall into that category."*

27. In addition, as Dr Reddy's counsel observes, Mr Briggs makes no mention of the decision to search Dr Reddy's home, and how it related to the decision summarily to arrest him. In truth, it is submitted, Mr Briggs's affidavit does not provide any evidence that the BPS' decision summarily to arrest Dr Reddy by means of a multi-officer dawn raid followed any coherent reasoning weighing objectives to be achieved by the arrest against the availability of any less oppressive means of achieving them and the human rights involved. On the contrary, it would have been, it is submitted, open to Kawaley CJ to find that Mr Briggs's evidence had all the hallmarks of an after-the-fact attempt to recreate a process of reasoning which had not in fact been undertaken.

The Law

28. Section 23 (6) of PACE provides:

> *"Where a police officer has reasonable grounds for suspecting that an arrestable offence has been committed, he may arrest without a warrant anyone whom he has reasonable grounds for suspecting to have committed the offence"*

29. An "*arrestable offence*" is one for which an offender may be sentenced under any provision of law to imprisonment for a term of three months or more. It was common ground that the police who arrested Dr Reddy had reasonable grounds for suspecting that an arrestable offence had been committed and reasonable grounds for suspecting that Dr Reddy had committed it.

30. The central issue of law before the judge was whether in addition to those two conditions for the lawfulness of arrest there was a third, namely that the arresting officer had also determined that it was necessary at most, or appropriate at least, to make an arrest having regard to other options involving less intrusion into the liberty of the citizen.

31. Section 23 (6) of PACE is the Bermudian equivalent of section 24 (2) of the *UK Police and Criminal Evidence Act 1984* ("UKPACE").

32. In 2005 UKPACE was amended by the *Serious Organised Crime and Police Act 2005* ("SOCPA") so as to include the following:

> "*(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—*
>
> *(a) to enable the name of the person in question to be ascertained (in the case where the constable does not know, and cannot readily ascertain, the person's name, or has reasonable grounds for*

doubting whether a name given by the person as his name is his real name);

(b) correspondingly as regards the person's address;

(c) to prevent the person in question—

(i) causing physical injury to himself or any other person;
(ii) suffering physical injury;
(iii) causing loss of or damage to property;
(iv) committing an offence against public decency (subject to subsection (6)); or
(v) causing an unlawful obstruction of the highway;

(c) to protect a child or other vulnerable person from the person in question;

(d) to allow the prompt and effective investigation of the offence or of the conduct of the person in question;

(f) to prevent any prosecution for the offence from being hindered by the disappearance of the person in question.

33. The judge declined to accept the submission (which he described as *"Lord Goldsmith's case at its highest*" [31]) that the reasons set out in the six sub paragraphs above should be regarded as making explicit what was already implicit in the English decided cases on the original section 24 (2). The effect of this submission, if well founded, would have been that the arrest was unlawful unless the BPS had reasonable grounds to believe that the arrest was *necessary* for one or more of the stipulated reasons.

34. The judge was, in my judgment right to reject the submission. The SOCPA which amended section 24 of the 1984 Act tightened up the accountability of police officers in respect of arrestable offences and introduced a criterion of necessity: *see Hayes v Chief Constable of Merseyside Police* [2012] 1 WLR 517 [15].

35. The judge found the most persuasive case law to be the English cases concerning the provisions which were identical to Bermuda's current section 23 (6) of PACE. He referred to a passage in the judgment of Hughes, LJ (as he then was) in *Hayes* which, he said [38]:

> *"strongly implies that restrictions on the exercise of the discretion to arrest are required to ensure compliance with auricle 5 of ECHR/ Accordingly, I also accept the Applicant's ultimately uncontroversial submission that sections 5 and 7 of the Bermuda Constitution and articles 5 and 8 of the European Convention on Human Rights ("ECHR") are engaged by the present application as an aid to interpretation. In other words, in construing section 23(6), the presumption of constitutionality and the presumption that Parliament does not intend to legislate inconsistently with Her Majesty's international obligations in respect of Bermuda come into play"*

The English cases

36. The judge found particular assistance in two cases: *Holgate-Mohammed-v-Duke* [1984] 1 A.C. 437 and *Castorina-v-Chief Constable of Surrey* (1988) LGRR 241.

37. In the former case a lady complained that she had been wrongfully arrested and questioned on suspicion of stealing jewellery from a house she formerly resided at. Jewellery had clearly been stolen and there were reasonable grounds for suspecting her to be the thief. Lord Diplock, in a seminal judgment, explained that the lawfulness of the arrest involved consideration of whether the officer's discretion had been wrongly exercised. He said (at 446 B-D):

> *"In my opinion the error of law made by the county court judge in the instant case was that, having found that Detective Constable Offin had reasonable cause for suspecting Mrs. Holgate-Mohammed to be guilty of the burglary committed in December 1979, to which he rightly applied an objective test of reasonableness, the judge failed to recognise that lawfulness of the arrest*

and detention based on that suspicion did not depend upon the judge's own view as to whether the arrest was reasonable or not, but upon whether Detective Constable Offin's action in arresting her was an exercise of discretion that was ultra vires under Wednesbury principles because he took into consideration an irrelevant matter. For the reasons that I have given and in agreement with the Court of Appeal, I do not think that in the circumstances Detective Constable Offin or any other police officers of the Hampshire Police acted unlawfully in the way in which they exercised their discretion."

38. In relation to this passage the judge said:

> *"In other words, the legality of the decision to arrest could only be challenged on the grounds that the arresting officers took into account irrelevant matters, failed to take into account relevant matters, or exercised their discretion in a way which no reasonable officer would. As in all judicial review applications, it is not for the Court to substitute its own views as to the merits of an administrative law decision."*

39. The judge found support for his reading of *Holgate-Mohammed* in Woolf LJ's judgment in *Castorina-v-Chief Constable of Surrey* (1988) LGRR 241 at 248-249:

> *"There is, however, one case which I regard as important and that is Holgate-Mohammed v. Duke (1984) 1 Q.C. 437 because in that case in a speech with which the other members of the House agreed Lord Diplock analysed the structure of section 2(4) of the Criminal Law Act 1967. Basing myself on Lord Diplock's speech at pages 442 and 443 I suggest that, in a case where it is alleged there has been an unlawful arrest, there are three questions to be answered:*
>
> *1. Did the arresting officer suspect that the person who was arrested was guilty of the offence? The answer to this question depends entirely on the findings of fact as to the officer's state of mind.*

> *2. Assuming the officer had the necessary suspicion, was there reasonable cause for that suspicion? This is a purely objective requirement to be determined by the judge if necessary on facts found by a jury.*
>
> *3. If the answer to the two previous questions is in the affirmative, then the officer has a discretion which entitles him to make an arrest and in relation to that discretion has [it] been exercised in accordance with the principles laid down by Lord Greene M.R. in Associated Provincial Picture Houses Ltd. v. Wednesbury Corporation [1948]1 KB 223"*

Hereafter I call these "Questions 1, 2, and 3".

40. The judge regarded the statements of Lord Diplock and Woolf LJ as authoritative and clear statements of the legal approach that the Court should adopt particularly given that the Judicial Committee of the Privy Council (Lord Clarke) had in general terms approved Lord Diplock's "*well known*" statement in *Holgate-Mohammed* and in *Ramsingh-v-Attorney-General (Trinidad and Tobago)* [2013] 3 LRC 461 at 465e. He rejected the submission that the Court of Appeal in *Al-Fayed and Others v Commissioner of Police of the Metropolis* [2004] EWC Civ 1579 established some narrower legal test.

41. I agree that he was right to do so. It is true that in that case the Court referred to dicta of Parker LJ in *Plange v Chief Constable of South Humberside* [1992] 156 LG Rev 1024 to the effect that it would only be in very exceptional circumstances that a Wednesbury challenge could succeed if the first two *Castorina* questions were answered in the affirmative. The judgment also refers [82] to the difficulty of seeing *"by what intellectual mechanism the ambit of Wednesbury discretion given to the suspecting and arresting officer should be reduced"*. But, as the judge indicated in his judgment, the relevant facts in that case served as a useful guide for how police officers could avoid a legal challenge when they proposed to arrest

a well-resourced and hitherto respectable citizen who was likely to pounce on any missteps.

42. He summarised the relevant facts in *Al Fayed* as follows:

- a prominent businessman, Tiny Rowland, complained to the Police about theft from and criminal damage to a safety deposit box he was renting from Harrods Department Store, which was owned by the equally prominent Mohamed Al Fayed. The Police suspected Al Fayed and others and wished to interview the suspects under caution. They were arrested and sued for wrongful arrest;

- prior to the arrest, the Police sought legal advice in relation to the reasons for the proposed advice and whether the discretion to arrest for the purposes of an interview under caution could validly be exercised;

- the pros and cons of interviewing without an arrest and after an arrest were discussed by the investigating team with an inspector playing the role of devil's advocate;

- consideration was given to the importance of treating the prominent Al Fayed in a manner consistent with the less privileged other suspects;

- the suspects attended the Police Station by agreement after negotiations with their lawyers and were arrested, cautioned and interviewed there.

43. Cresswell J held that the decision to arrest was not perverse. The arresting officers exercised their discretion in each case; did not fail to take account of the relevant or take account of the irrelevant. His decision was upheld by the Court of Appeal.

44. In a later paragraph [50] the judge set out the approach which ought to be made to a challenge to the legality of a summary arrest pursuant to section 23 (6) of PACE where questions 1 and 2 have been answered in the affirmative:

> "*I find that it is both consistent with principle and a proper understanding of the above persuasive authorities that whether or not the discretion to effect an*

> *arrest has been lawfully exercised must be determined by reference to **all** of the Wednesbury principles. The decision to arrest where the first two arrest preconditions have been met can be impugned on the grounds that the arresting officers, assuming of course that the arrest powers were exercised in good faith, either (1) failed to have regard to a materially relevant consideration, (2) took into account materially irrelevant considerations, or (3) made a decision which was unreasonable in the perversity sense, i.e. made a decision which no reasonable public officer, properly directing themselves, would make. The need to apply the reasonableness or perversity test (which is merely one of the Wednesbury principles for challenging the legality of a public law decision) may or may not arise depending on the factual and legal way in which individual cases are argued."*

45. In my judgment, the judge was right to reach this conclusion. Until the hearing before him the BPS had maintained that the third *Castorina* question did not arise so that, in effect, evidence as to the reasoning behind the arrest of Dr Reddy by the BPS was essentially irrelevant if the first two questions were answered in its favour.

46. The judge accepted that if the BPS established that the arresting officer suspected that Dr Reddy had committed an arrestable offence and had reasonable grounds for his suspicion, the onus lay on him to establish on *Wednesbury* principles that the exercise or non-exercise of the power of arrest was unreasonable.

47. The judge's conclusions were supported, he found, by the provisions of sections 5 and 7 of the Bermuda Constitution. Section 5 provides:

> *"Protection from arbitrary arrest or detention*
> *5 (1) No person shall be deprived of his personal liberty save as may be authorised by law in any of the following cases:*
> *…*

(e) upon reasonable suspicion that he has committed, is committing, or is about to commit, a criminal offence…"

48. Section 7 provides:

"(1) Except with his consent, no person shall be subjected to the search of his person or his property or the entry by others on his premises.

(2) Nothing contained in or done under the authority of any law shall be held to be inconsistent with or in contravention of this section to the extent that the law in question makes provision—

(a) that is reasonably required—

(i) in the interests of defence, public safety, public order, public morality, public health, town and country planning, the development of mineral resources, or the development or utilisation of any other property in such a manner as to promote the public benefit; or

(ii) for the purpose of protecting the rights and freedoms of other persons.

(b) …

(c) …

except so far as that provision or, as the case may be, the thing done under the authority thereof is shown ***not to be reasonably justifiable*** *in a democratic society."*

Powers of search

49. Section 18 of PACE provides:

Entry and search after arrest
18 (1) Subject to the following provisions of this section, a police officer may enter and search any premises

*occupied or controlled by a **person who is under arrest for an arrestable offence**, if he has reasonable grounds for suspecting that there is on the premises evidence, other than items subject to legal privilege, that relates—*

(a) to that offence; or

(b) to some other arrestable offence which is connected with or similar to that offence.

(2) A police officer may seize and retain anything for which he may search under subsection (1).

*(3) The power to search conferred by subsection (1) is only a power **to search to the extent that it is reasonably required for the purpose of discovering such evidence.***

*(4) Subject to subsection (5), **the powers conferred by this section shall not be exercised unless an officer of the rank of inspector or above has authorized them in writing.***

(5) A police officer may conduct a search under subsection (1)—

(a) before taking the person to a police station; and

(b) without obtaining an authorization under subsection (4),

if the presence of that person at a place other than a police station is necessary for the effective investigation of the offence"

50. There was no evidence before the judge, or before us, that an officer of the requisite rank had given the necessary authorisation in writing. Accordingly, as Mr Diel accepted, there was probably no power to search under section 18.

51. However, section 31 of the same Act provides:

"(1) A police officer may search an arrested person in any case where the person to be searched has been arrested at a place other than a police station, if a police officer has reasonable grounds for believing that the arrested person may present a danger to himself or to others.

(2) ***Subject to subsections (3) to (5), a police officer shall also have power in any such case*** *–*

(*a) to search the arrested person for anything –*

(i) which he might use to assist him to escape from lawful custody; or
(ii) which might be evidence relating to an offence; and

(b) to enter and search any premises in which he was when arrested or immediately before he was arrested for evidence relating to the offence for which he has been arrested.

(3) The power to search conferred by subsection (2) is only a power to search to the extent that is reasonably required for the purpose of discovering any such thing or any such evidence.

(4) …

(5) …

(6) A police officer shall not search premises in the exercise of the power conferred by subsection (2)(b) unless he has reasonable grounds for believing that there is evidence for which a search is permitted under that paragraph on the premises.

52. The judge pointed out [61] that Part III of PACE contains an elaborate code for obtaining search warrants with Court supervision which is replete with protections for private property rights. Special protections are enacted for "excluded material", "personal property", "journalistic material" and "special procedure material".

53. It is, he held [62]:

> *"accordingly, self-evident, taking a high-level view of the scheme of PACE in light of section 7 of the Constitution, that the power to search premises when a person is under arrest (section 18) is intended to be subservient to the dominant power of summary arrest (section 24(6)). Where the primary aim of the Police is to carry out a search of private premises, a summary arrest may not be used to sidestep the elaborate protections for private property which PACE provides under the umbrella of the search warrant regime"*

The judge's findings

54. The judge found [64] that:

> "*the discretion to arrest in a case as significant as the present one (involving an investigation running over 4 years in which a former Premier was a target) should not have been exercised without:*
>
> - *legal advice being sought as to the scope of the powers of summary arrest and search it was proposed to exercise (optionally);*
> - *a conscious evaluation of the appropriateness of making an arrest as opposed to less intrusive means of achieving the investigative objectives (mandatorily);*
> - *a rational explanation as to why a summary arrest was considered preferable to a voluntary interview and/or an arrest by appointment at a Police Station (mandatorily);*
> - *a clear explanation of why the search and seizure of the Applicant's property without a warrant was "reasonably required*".

55. His overall conclusion was that the summary arrest and related search and seizure of property which occurred on 10 May 2016 was unlawful because (65):

- *"the Respondent has adduced no or no credible evidence that the discretion to utilize the summary arrest power (where the other conditions for its exercise were met) was exercised at all in the legally requisite sense. It is quite obvious based on the evidence before the Court that the investigating officers did not evaluate the appropriateness of exercising the power of arrest in the way it was exercised as against other less intrusive options.* ***This was a fatal failure to consider crucially relevant matters.*** *It is impossible to believe that such an evaluative exercise would have been omitted if the Respondent had received advice along the lines of his own counsel's final submissions before this Court about the legal requirements for a valid arrest*

- *alternatively, the arrest was unlawful because,* ***in the absence of any or any coherent explanation for why the intrusive arrest was preferred over less intrusive alternative, obvious and apparently viable options****, the decision to arrest was unreasonable and/or irrational;*

- *the Respondent adduced no evidence to explain why the search of the Applicant's home and wallet and seizure of certain property was "reasonably required". It is not self-evident why it was appropriate to side-step the elaborate protections of the PACE search warrant regime in the Applicant's case. The decision to use the exceptional power to search as an incident to an arrest may require little explanation in some circumstances. In every case it ought to be easy to explain why the search was undertaken, using generic terms where it is desired to avoid revealing sensitive information which forms part of an ongoing investigation. In the absence of any explanation the decision to search and seize was*

> *unreasonable and/or irrational and accordingly unlawful.*

56. In the light of those conclusions the judge quashed the decision summarily to arrest Dr Reddy and subject him to bail conditions; declared that the search of his home was unlawful; directed the Police Service to return to him any retained items seized during the unlawful search and adjourned the application for damages to a date to be fixed.

57. The judge observed at the end of his judgment:

> *"[67] The Applicant is entitled to the protections of the fundamental rights and freedoms of our Constitution, whatever his national origins or local political affiliations may be. Without even directly applying these high level principles, it is clear that his rights under PACE, conservatively construed, were infringed by being subjected to an unlawful arrest and search on May 19, 2016. In my judgment this most likely occurred because of a genuine misunderstanding as to the terms and effect of the summary power of arrest as applied to a factually exceptional investigation which raised legal issues which have not previously been judicially considered as matter of Bermudian law. The present case has served to demonstrate that the Police and Criminal Evidence Act 2006, properly understood, confers suitably flexible powers of arrest and search on the Police which are counterbalanced by important safeguards for the fundamental rights and freedoms of the individual. "*

The BPS' grounds of appeal

Issue 1: Scope of leave

58. In its written submissions the original 20 grounds of appeal were refined into six issues; and in oral argument these, essentially, boiled down to two.

59. The first issue is the contention that the judge only granted leave for Dr Reddy to argue the legal point that Section 23 (6) of PACE should be construed in a

manner consistent with the amended section 24 of UKPACE; and that the judge erred in law in considering anything going beyond this point. I refer to this as "the construction point".

60. Mr Diel, for the BPS, drew attention to the contents of Form 86 A completed on behalf of Dr Reddy. In a part headed "*The correct interpretation of section 23 (6) of PACE*" the form referred at [67] to the fact that applying the pre-SOCPA section 24 of UK PACE, the courts nevertheless confirmed that the section contained implicit limits on the power of summary arrest based on principles of public law "*reasonableness*", as well as Article 5 of the ECHR. It then referred to what Woolf LJ had said in *Castorina*, and what Hughes LJ had said in *Haye*s. The form continued:

> *"[72] It follows from these authorities that even though section 24 of UK PACE expressly limits the English police's powers of summary arrest, those limits are no more than the codification of restraints from common law principles of protection of individual liberty,* ***the obligation of public authorities not to act unreasonably a****nd the UK's obligations under the ECHR. It is submitted that those limits apply with equal force to the BPS' power of summary arrest.*
>
> *Conclusion on the correct interoperation of section 23 (6) of PACE*
> *[73] It is submitted that the Legislature must have intended that the limits on the police's power summarily to arrest an individual, which necessarily flow from the Constitution of Bermuda, the common law protection of individual liberty and the ECHR be implicit in section 23 (6) of PACE. The English authorities lend irresistible support to that conclusion.*
>
> *[75] Although UK PACE is not directly applicable in Bermuda, the limits on the power of summary arrest set out in sub-sections 24 (4) and (5) of UK PACE represent the codification of limits resulting*

> *from common law principles of protection of individual liberty,* ***the obligation of public authorities not to act unreasonably a****nd the ECHR, It is accordingly submitted that section 34 of the Constitution of Bermuda enjoins this Honourable Court to interpret section 23 (6) of PACE so as to give effect to them. If, in the alternative, this Honourable Curt is unable so to interpret section 23 (6) of PACE, it is submitted that it follows that the section is outside the powers of the Legislature and the Governor under sections 34 and 35 of the Constituent of Bermuda and this Honourable Court should so declare pursuant to section 15 (2) of the Constitution"*

61. As is apparent, these paragraphs expound the construction point. Mr Diel submits that that was the only point for which leave was given and that it was referred back to in Dr Reddy's reply skeleton of 19 May, filed very shortly before the judicial review hearing. In fact Dr Reddy's team had a change of tack and put forward a general contention that there had been *Wednesbury* unreasonableness. But they should not, without an amendment, have been allowed to argue any point other than the construction point, but, despite Mr Diel's protests, they were.

62. This argument, is in my view, unsound. In the letter before action Dr Reddy's attorneys made plain that their contention was that Dr Reddy's summary arrest was unreasonable and therefore unlawful, in particular because the officers who ordered the raid had not considered any alternatives to summary arrest and, if they had, the decision summarily to arrest him was unreasonable. Thus, from the start the issue went beyond whether the first two Castorina questions fell to be answered in the affirmative, and extended to whether the arrest was unlawful because, to use the words of Form 86 A [30] there was "*no necessity or justification for a summary arrest, still less for a newsworthy dawn raid with multiple officers*".

63. Form 86 A sets out the construction point in the paragraphs set out above; but it is plain from them that Dr Reddy invoked the obligation of public authorities not to act unreasonably.

64. In his Ruling on the papers on the question of leave the judge referred to the fact that "*in broad brush terms, the Applicant complains that there was no sufficient basis for his arrest and the subsequent search and seizure was accordingly also unlawful*". He made clear that he had only considered the primary unlawful arrest complaint (which would appear to be the construction point). He referred to the letter before action and the response from the AG's Chambers to the effect that the arrest was lawful under section 23 (6) of PACE. He referred to the fact that the Applicant conceded that on its face section 23 (6) appeared to justify the arrest (i.e. that Castorina questions 1 and 2 could be answered in the affirmative). He cited a passage in Mr Duncan (for Dr Reddy)'s skeleton to the effect that leave to apply for judicial review should be granted if, on the material available, the Court thought that there was an arguable case for granting the relief sought by the applicant *"without going into the matter in great depth*" and a further passage which said, *inter alia*, that the decision not to seek an arrest warrant must be reasonable in accordance with, *inter alia*, the common law.

65. In relation to the merits of the appeal the judge said that on a cursory review of the Bermudian statutory schemes it was far from clear that limits placed on the power of arrest under PACE were completely aligned with those under the corresponding English provisions but the applicant's case clearly raised issues which were fit for further investigation. He gave leave without conditions and without limitation.

66. It seems to me tolerably clear that the judge gave leave on the basis that there was an arguable case for affording the applicant the relief sought; but that it was

questionable whether the limits on the power of arrest in Bermuda were completely aligned with those in the UK. But, if they were not, it would still be for consideration as to what exactly those limits were.

67. The Notice of Originating Motion contended at [75] that *"the limits on the power of summary arrest set out in sub-sections 24 (4) and (5) of UKPACE represent the codification of limits resulting from common law principles of protection of individual liberty, the obligation of public authorities* ***not to act unreasonably*** *and the ECHR."*. Whether or not sections 24 (4) and (5) of UK PACE codified the limits resulting from those principles, such that the limits thus codified should be regarded as part of the common law of Bermuda, it was plainly being said that those principles were applicable.

68. In his Ruling on the application to set aside leave and the strike out applications the judge pointed out [13] that *"by the time of the hearing of the two summonses in January 2017 there was virtually no evidence before the Court which was responsive to the main thrust of the Applicant's case that his summary arrest and subsequent search was unlawful because no sufficient reasons for exercising those intrusive powers existed, even if in general terms sufficient grounds for an arrest could be made out".* It must (or should) have been plain that that is what the judge thought to be the main thrust of the case for which he had given leave; that the BPS needed to produce evidence as to the reasons; and that the validity of these reasons would be subject to scrutiny.

69. The judge set out the essence of Dr Reddy's legal argument as contained in the Notice of Originating Motion. He recorded [17] that "*The Respondent's submissions did not engage with the central argument advanced by the Applicant at all. They studiously ignored them. [Miss Weekes] was unable to advance any coherent riposte to the argument that* ***the reasonableness*** *of the exercise of that discretionary summary arrest power was amenable to judicial review" … [18]*

While the merits of the interpretation the Applicant placed upon section 23 (6) and its application were not conceded, no (or no meaningful) attempt was made to suggest that the point was not arguable." This latter point may be said to be limited to the construction argument,

70. He also pointed out [20] that the BPS' submission and its evidence did not address the facts which were highly relevant if Dr Reddy was right to contend that the summary arrest power could only be exercised on objectively reasonable grounds; and [23] "*shed no evidential light on why it should be considered to have been reasonable in all the circumstances of the present case to have deployed the summary arrest power as opposed to seeking voluntary assistance or obtaining a warrant of arrest and/or search".*

71. The position, as it seems to me, is clear. The judicial review was launched on the basis, set out in the letter before action that the arrest and subsequent search were unlawful because, although *Castorina* questions 1 and 2 were answered in the affirmative, it was said that there had been a breach of *Wednesbury* common (public) law requirements. The arrest was said to be unreasonable because the BPS had not considered any alternatives to summary arrest and, if they had, the decision summarily to arrest him was unlawful. The application advanced the contention that UKPACE represented a codification of common public law principles applicable to the power of summary arrest. But whether it did or not the applicants were saying that there was a duty to act reasonably which had been broken.

72. In any event, the judge made clear in his ruling on the strike out applications that the reasonableness of the arrest was the critical question, on which the BPS had, so far, not filed any evidence, its case then being that if questions 1 and 2 were answered in the affirmative the police had a complete discretion. The judge was the best judge of the scope of his ruling and he made plain what he meant it to cover.

73. In the light of that Ruling the BPS filed the further evidence of Mr Briggs. That can only have been relevant on the footing that the issue of the reasonableness of the arrest was going to be one of the issues at the hearing, and Mr Diel accepted that it was put forward to deal with the reasonableness issue. The evidence was not put forward on the basis that it showed that the BPS had reasonable grounds for believing that the arrest was necessary for any of the reasons mentioned in UKPACE. Mr Diel accepted that it would be very difficult to say that the "necessary" criterion was satisfied.

74. The evidence put forward in Mr Briggs' affidavit was put forward to deal with the reasonableness question. As with most judicial review applications the question fell to be determined on affidavit evidence, absent some request for cross examination. Dr Reddy was entitled to submit that the evidence showed a breach of the *Wednesbury* principles. His lawyers were not bound to cross examine the BPS witnesses in order to do so.

75. Consistently with its position at the strike out application the BPS maintained until the hearing of the judicial review application that question 3 did not arise; a position that then changed to an acceptance that it did.

76. In short, I do not accept that the leave given to Dr Reddy was limited to the construction point.

The remaining issue

77. If issue 1 was not decided in his favour, Mr Diel accepted that the remaining issue boiled down to the question as to whether the decision to arrest Dr Reddy was unreasonable or, as he put it, whether, given the fact that Dr Reddy had volunteered to come forward no right thinking police officer could have decided to arrest him.

78. As to that he drew attention to the fact that the judge had found that the officers had acted in good faith [30]. The alternatives open to the BPS were (a) to invite him for a voluntary interview; (b) to invite him to attend at the police station and arrest him there; and (c) to use the arrest powers under section 24 (6). It had been suggested on behalf of Dr Reddy that the BPS could have used the procedure under section 3 of the *Criminal Jurisdiction and Procedure Act 2015* by laying an information and seeking from the Court a warrant to arrest him. The judge rejected this suggestion on the basis that the section is concerned with someone who has been charged. It is headed "*Issue of summons to accused person*" and "*accused person*" is defined in the Act as a person in custody or on bail or against whom a summons or warrant has been issued who has committed or who is suspected of having committed an offence. The judge found that the section only applies after an information charging a person has been laid in the Magistrates' Court.

79. I entertain some doubt on that score. Since the section gives the Magistrates' Court a power to issue a summons, or a warrant to arrest, it is difficult to see how the power can fall to be used against someone against whom a summons or warrant has been issued. It may be that the definition of accused person simply reflects the fact that a court can make an order under section 3 issuing a summons or a warrant to arrest and when it does so the person against whom such an order is made will fall within the definition of accused person, to whom reference is made in the heading. It is not necessary to reach a decision on this. At the lowest it was unclear whether that section could be used.

80. Mr Diel submitted that it was obvious that the BPS intended to arrest Dr Reddy (a) in order to search his house and (b) in order to interview him. The object of the search would not be achieved by inviting him to attend at the police station, because he would then be tipped off and the search might be unfruitful on that account. The BPS were concerned to discover documents that related to the money laundering allegations which might include bank statements and credit

card material. He submitted that the case of *R (on the application of Singh (also known as Virdee) and another) v National Crime Agency and another [2018] EWHC 1119 (Admin,),* decided after the judgment in the present case, shows that if the police have two powers it is entirely up to them to decide which one to use.

81. In that case the Divisional Court held that the law permitted both the use of the search warrant procedure and of the post-arrest powers to search and that the statutory provisions in UKPACE revealed no preference for one procedure over the other. In that case, however, it was conceded that the arrest of the applicant was lawful. The argument on his behalf was, in essence, that the police should not have used the statutory power of search ancillary to that arrest but should have used the search warrant procedure. As to that the Court said:

> *"77. In our judgment, the statutory provisions which we have considered reveal no indication of priority or preference as between the use by a constable of the search warrant procedure and the use of the post-arrest powers: they are distinct powers, with distinct criteria. Where the criteria for both processes can be fulfilled, there is a choice, as in Simkus. Provided that the course adopted by a law enforcement agency fulfils the relevant criteria, there is nothing in the statutory provisions which makes it unlawful for the agency to rely on one power rather than the other. Different considerations would no doubt arise if there was an element of bad faith or improper motive in the making of the choice; but nothing of that sort is alleged here, and the consequences of bad faith or improper motive in this context must await decision in a case where the issue arises.*
>
> *78. We add, in view of the alternative submission which was made by Mr Lennon, that we can see no basis on which it could be said that the statutory provisions require the use of the search warrant procedure, rather than the post-arrest powers, in certain categories of case for example, pre-planned arrests, or complex cases, or lengthy investigations. There is no reason in principle why any distinction of that sort should be drawn; and in our view it would be likely to prove unworkable in*

> *practice, and to give rise to disputes as to how a particular investigation should be categorised. The difficulties of any such categorisation rapidly became clear from a debate at the Bar as to whether the requirement should apply to "pre-planned" arrests, or should be imposed by reference to the number of persons conducting the search. Mr Lennon listed a number of factors which he relied on as indicating that applications for search warrants should have been made in this case; but his list merely emphasised the difficulties which would arise if the court acceded to the submission that the post-arrest powers could not be used in certain circumstances. We therefore take the view that the suggested requirement, that the search warrant procedure be used in some but not"*

82. It is, however, apparent from that case that the decision summarily to arrest someone needs to be justified on its own terms. The judgment refers [60] to submissions by counsel for the police that:

> *"an agency which relies on the post-arrest powers has to give prior consideration to whether it is entitled to make an arrest: if an unlawful arrest is made, the post-arrest powers do not arise, and a private law action will lie for the recovery of any property unlawfully seized. In the present case, it is not submitted that the arrest of either claimant was a contrivance or device to trigger the use of post-arrest powers, or was otherwise unlawful."*[3]

83. *Singh* is therefore, Dr Reddy's attorneys submit, authority for the proposition that it is not a proper exercise of the discretion summarily to arrest that it is done so in order to avoid having to apply for a search warrant.

84. As to counsel's submission the court said [72]:

> *"72. We do not accept the suggestion, implicit in Mr Lennon's submissions, that there is a stark contrast between the search warrant procedure, which affords*

[3] [2018] 1 W.L.R. 5073, 5094E-F, at paragraph 60.

> *necessary safeguards to the person whose premises are to be searched, and the post-arrest powers, which are unaccompanied by any comparable safeguards. Nor do we accept his later submission that sections 18 and 32 of PACE afford some, but insufficient, protection.* **It must be remembered that the post-arrest powers can only lawfully be exercised after a lawful arrest;** and a lawful arrest requires that a constable has reasonable grounds for suspecting that an offence has been committed**.** *Whilst there is no advance judicial scrutiny of the lawfulness of a search under the post-arrest powers, it can be challenged afterwards. Furthermore, the post-arrest powers are limited in a number of ways, and we accept Mr Bird's submission that there will be many cases in which the use of those powers, rather than the search warrant procedure, may be disadvantageous to the law enforcement agency. There is not, therefore, the black and white contrast which some of Mr Lennon's submissions implied",*

85. These citations beg the question as to whether the police could use the power of arrest under section 23 (6) when the sole purpose of doing so was so that the police could conduct a search. Mr Diel submitted that that was so. In his judgment the judge said:

> *[62] "It is accordingly, self-evident, taking a high-level view of the scheme of PACE in light of section 7 of the Constitution, that the power to search premises when a person is under arrest (section 18) is intended to be subservient to the dominant power of summary arrest (section 24(6)). Where the primary aim of the Police is to carry out a search of private premises, a summary arrest may not be used to sidestep the elaborate protections for private property which PACE provides under the umbrella of the search warrant regime"*

86. In relation to this question, the position seems to me to stand thus. The power of search in respect of persons under arrest requires that they have been lawfully arrested. It is, therefore, necessary to consider whether the power of arrest was validly exercised in this case as a question separate from, and prior to, the

question whether the search was valid. If the arrest was invalid, the power to search does not arise. Conversely the power to arrest does not arise simply because the police wished to be able to carry out a search. As Lord Goldsmith put it, you cannot make an arrest lawful because the reason for it was in order to enable you to search. If, however, the arrest was lawful it does not seem to me that the search was invalid because the prime reason for the arrest was to enable the police to make use of the powers of search which, following a valid arrest, would arise. That that is so appears to me to follow from *Singh*. It is not, however, necessary to decide that latter question.

87. As to the exercise of the power of arrest Mr Diel pointed out that, although Dr Reddy was of previous good character, he was, at the relevant time, reasonably believed by the BPS to be guilty of serious criminal offences. In those circumstances it was reasonable both to arrest him and to search his premises afterwards. Inviting him down to the police station was inappropriate because, if he was a party to the criminal activity it was unlikely that he would show up and cooperate. Further it was not necessary for the BPS to consider if there was an alternative option to arresting him given that one of their purposes was to carry out a search. This latter proposition seems to me to run contrary to the position as I find it to be, that the power of arrest has to be considered separately.

88. In relation to the question of arrest the critical findings of the judge were in paragraph 65 of his judgment which I repeat:

> - *the Respondent has adduced no or no credible evidence that the discretion to utilize the summary arrest power (where the other conditions for its exercise were met) was exercised at all in the legally requisite sense. It is quite obvious based on the evidence before the Court that the investigating officers did not evaluate the appropriateness of exercising the power of arrest in the way it was exercised as against other less intrusive options.*

> ***This was a fatal failure to consider crucially relevant matters. It*** *is impossible to believe that such an evaluative exercise would have been omitted if the Respondent had received advice along the lines of his own counsel's final submissions before this Court about the legal requirements for a valid arrest*
>
> - *alternatively, the arrest was unlawful because,* ***in the absence of any or any coherent explanation for why the intrusive arrest was preferred over less intrusive alternative, obvious and apparently viable options****, the decision to arrest was unreasonable and/or irrational;*

89. As to that, it was in my view plainly relevant to consider the appropriateness of arrest (in a dawn raid) as against other less intrusive options, having regard in particular to Dr Reddy's section 5 and common law rights to personal liberty. This was particularly the case given that Dr Reddy was well aware of the nature of the case being made i.e. that there had been unnecessary diagnostic tests; had supplied the US Department of Justice with documentation; and had also offered to provide information to the BPS - an offer that had not been taken up.

90. In deciding whether the judge was entitled to come to the conclusion that he did it is necessary, in my view, to determine what matters, on the evidence before him, the BPS did take into account **at or before the time the decision to arrest was made**. The answer to that question is to be found in the first affidavit of Mr Briggs of 6 March 2017 and the affidavit of Mr Tomkins of 20 January 2017. In the latter Mr Tomkins says that the BPS took great care and attention when considering the decision to arrest the defendant and search his home.

91. It is apparent from that material, and what was common ground, that the BPS suspected on reasonable grounds that Dr Reddy had been party to substantial fraud involving unnecessary diagnostic tests from the carrying out of which he

and others derived substantial financial benefit. The BPS wanted to interview him about "*some of the information that was gathered and about his medical practice in MRI and CT scans* ***so he could assist the investigation as he had previously stated that he would"*** (**Tomkins**, para 8). The sort of information that the BPS had received is referred to in Mr Tomkins' affidavit. His affidavit does not indicate why the offer of assistance was not taken up; nor does it indicate that any comparative evaluation of the relevant options took place.

92. In Mr Briggs' affidavit he says that there had `been "*real concerns about Dr Reddy's status as a medical doctor and the documents he had produced upon his registration to the BHC asked questions about their own veracity":* **Briggs 4.3.** It is not clear to me when those concerns arose. That paragraph goes on to exhibit a series of letters between BPS and Dr Reddy after the arrest which are said "*to call in question Dr Reddy's assertions that he was willing to provide assistance to BPS*". Since these letters postdate the arrest, they cannot have been material taken into account in any decision whether to arrest him. It appears from the BPS letter of 27 May 2015 that the medical qualification documentation was reviewed by the BPS after the interview on 25 May. A reference to the fact that the documents "*ask questions about themselves*" appears in the BPS letter of 31 May 2015. But even if those concerns pre-dated the arrest the fact that the BPS had them provides no reason for arrest rather than interview.

93. In paragraph **4.4**. Mr Briggs says "*The suggestion that Dr Reddy would readily assist the police had already been tested, where he had previously lied to law enforcement when questioned as to the whereabouts of his original medical practicing certificate and qualifications.*" However, it is apparent from paragraph 5 of the affidavit that this supposed lie is said to have arisen because, <u>after</u> his arrest Dr Reddy told the arresting officer that another lawyer representing him was in possession of his original medical certification documents; and when questioned by the BPS that lawyer said that he held no such documentation as

claimed. Reference is then made to subsequent correspondence where Dr Reddy refused to assist, which again cannot have been material which was taken into account before or at the time of his arrest.

94. Then Mr Briggs says [**4.5**]:

> *"On another note, whilst there had been some consideration as to whether the BPS should be seeking assistance from Dr Reddy into the ongoing investigation, his position appeared to be more of a co-conspirator and principal in the alleged offences. As such [it] the BPS formed the view that it would be unreasonable to expect Dr Reddy to have been able to provide honest assistance, by way of a voluntary interview, into the ongoing investigation without incriminating himself in various offences and professional misconduct.*

95. Taken at face value this indicates that the BPS did consider whether to invite Dr Reddy for a voluntary interview but took the view that as he appeared to be party to the fraud any honest answers would incriminate him. But that would be the position whether he was invited for interview or arrested. Further as the judge pointed out it was quite predictable, based on the way Dr Reddy had responded to a far milder interaction with BPS, that he would decline to assist the BPS in an interview after caution following an early morning search and arrest [22]. Mr Briggs provides no reason why Dr Reddy might be thought to be more willing to incriminate himself after a dawn raid.

96. Then Mr Briggs refers to the fact that a substantial amount of financial benefit derived from the scheme had been moved out of the jurisdiction to the USA to purchase properties there (**4.6**) which were said to be "*disguised*" in his ex-wife's name, and to purchase properties in India and that over $800,000 of the financial benefit was held in Bermuda in cash. That does not seem to me to take the matter any further.

97. Next he says that a further consideration was *"the public expectation of how such serious allegations would be treated by the police and in the light of those allegations how the police would deal with an alleged offender* [**4.7**]. What exactly the BPS thought that expectation to be is unclear. He appears to be saying that the public might expect that the BPS should arrest an offender who was subject to such serious allegations. But if an evaluation of the alternatives showed that an arrest was not appropriate at this stage, the fact, if it be such, that the BPS might think that the public would expect an arrest is an irrelevant consideration.

98. Lastly it is said that "*there were compelling reasons for arresting Dr Reddy and retaining some control over his movements by the use of bail*" [**4.8**]. In paragraph 8 of his affidavit Mr Briggs refers to the imposition of bail conditions – which were said to be (i) reporting conditions to attend Hamilton Police station (ii) no interference with witnesses; and (iii) police seizure of his passport – which Mr Briggs explained to Dr Reddy to be necessary because Dr Reddy was only a "Guest Worker"; he had significant cash reserves in Bermuda which could be accessed from anywhere in the world and was under investigation for fraud from which he was said to have derived benefit of millions of dollars. Mr Briggs says that the imposition of those conditions was part of the considerations concerning the need to arrest.

99. Mr Diel accepted that that aspect of the matter could have been dealt with by inviting Dr Reddy to turn up at the police station where he could have been arrested and bailed. Further the judge accepted that there was no credible evidence that Dr Reddy, who had family and community ties and continuing professional obligations, was reasonably regarded as a flight risk in any event [27]. In none of his previous interactions with the BPS and the US agent whose assistance the BPS had enlisted had he indicated anything other than a desire to meet any allegations against him.

100. Noticeably Mr Briggs' evidence makes no mention of the decision to search Dr Reddy's home and how it related to the decision to arrest him.

101. In the light of that evidence it seems to me that the judge was entitled to find, as he did, that there was no or no credible evidence that the investigating officers had evaluated the appropriateness of the options. That was a judgment for him to make and I detect no error of law in his making it. On that basis the arrest was unlawful because it was made without taking into account the question of the relative appropriateness of the options – a highly relevant consideration.

102. In those circumstances it is not necessary to decide whether the judge was right in his alternative conclusion that in the absence of any coherent explanation as to why the intrusive arrest was preferred the decision was unreasonable and/or irrational. As to that, the Wednesbury unreasonableness test is sometimes expressed as requiring the court to consider whether or not the decision to arrest was one which no police officer *applying his mind to the matter* could reasonably take: see *Al Fayed* at [43]; or, as the judge put it, whether the BPS "made a decision which no reasonable public officer*, properly directing themselves,* would make." The judge's alternative finding is that in the absence of a coherent explanation the decision was unreasonable. The absence of a coherent explanation arose because the BPS did not apply their minds to the relevant consideration. It seems to me, therefore, preferable to proceed on the basis that the decision to arrest was unlawful on the judge's primary ground, rather than to apply the Wednesbury unreasonableness doctrine to a decision which did not take into account all relevant considerations. It may be that a decision to arrest which did involve the BPS taking into account all relevant considerations could have been reasonable in Wednesbury terms. But no such decision was ever taken.

103. Since the power to search did not arise it is unnecessary to determine whether the search was reasonably required for the purpose of discovering evidence falling within section 18 or, more relevantly, section 31.

104. The BPS contends that the judge was in error when he said [65] that it adduced no evidence to explain why the search of Dr Reddy's home and wallet, and seizure of certain property was "*reasonably required*", and that, in the absence of any explanation the decision to search and seize was unreasonable and/or irrational and accordingly unlawful.

105. As to that, the BPS submits, the affidavits of Mr Tomkins and Mr Briggs speak to some of the reasons for the search of Dr Reddy's home, which included:

a. the need to locate Dr Reddy's original medical certificates (as questions arose concerning his qualifications as a doctor). Dr Reddy is said to have lied to the BPS when questioned as to the whereabouts of his medical certificates; and

b. concerns over Dr Reddy's personal finances (significant cash reserves in Bermuda) and banking records.

106. Further, it appears from Dr Reddy's first affidavit that the search of his home lasted approximately 2 hours and that the following items were seized:

a. 5 patient files containing confidential and sensitive patient information;

b. 1 USHosp health document bearing a patient's name;

c. Various documents and reports from a Bermuda Healthcare Services binder; and two IPad tablet computers.

Additionally, the BPS wrote down information from Dr Reddy's credit card numbers.

107. The BPS case is that all the items seized by the BPS were seized for the purposes of the BPS' investigation into multiple criminal offences committed by Dr Reddy, including: money laundering, medical fraud, corrupt practices and practicing medicine without a valid license. In the circumstances, the judge was wrong to conclude that the BPS needed to adduce evidence to explain why the search of Dr Reddy's home and wallet and the seizure of certain property was "reasonably required". Mr Briggs' affidavit stated that there were significant concerns about Dr Reddy's medical certificate and over testing of patients.

108. If the arrest was valid, then it seems to me that a search of the premises was reasonably required. The BPS had reasonable grounds to suspect that Dr Reddy was guilty of a substantial fraud of which he was the beneficiary. They had reached the stage where they thought it was appropriate to interview him. In those circumstances there were reasonable grounds to suspect that there would be on his premises evidence that related to the applicable offences (section 18, if applicable), and the officer had power to search his premises for evidence relating to the offences for which he had been arrested (section 31). The power was to search to the extent that was reasonably required for discovering the evidence. It seems to me that some evidence relating to the offences was intrinsically likely to be at his home. I accept that discovery of financial material would not be likely to reveal whether there had been overuse of diagnostic tests but it would be potentially relevant to the money laundering claim and his medical certificates would also be relevant to the offences in question. It does not appear that the extent of the search went further than was reasonably required for the purpose of discovering any evidence.

109. Accordingly, I would dismiss the appeal. I would also dismiss the appeal against the judge's ruling on costs. The reality of the position is that Dr Reddy was the

winner. The BPS' contention was that they were the winners on the only point for which leave was given, namely the construction point and should accordingly have been awarded their costs below. But, as I have indicated that was not the only matter for which leave was given. I would order that those costs be taxed on the standard scale and that Dr Reddy should have a certificate for two counsel.

KAY JA:

110. I have read my Lord President's judgment in draft and I agree.

BELL JA:

111. I also agree.

C.S.P.S.C.J.

CLARKE P

Maurice Kay

KAY JA

BELL JA