Neutral Citation Number: [2025] EWCA Civ 367

Case No: CA-2024-000813

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE COUNTY COURT AT CHELMSFORD
The Honourable Mr Justice Martin Spencer
G75YJ756

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: Wednesday 9 April 2025

Before :

THE LADY CARR OF WALTON-ON-THE-HILL
THE LADY CHIEF JUSTICE OF ENGLAND AND WALES

PRESIDENT OF THE KING'S BENCH DIVISION
DAME VICTORIA SHARP
and
LORD JUSTICE EDIS

- -

Between :

MATTHEW CARTER	**Appellant**
- and -	
THE CHIEF CONSTABLE OF ESSEX POLICE	**Respondent**

- -
- -

Maya Sikand KC and **Daniel Wand** (instructed by **Kesar & Co Solicitors**) for the **Appellant**
Paul Stagg KC and **David Messling** (instructed by **Weightmans LLP**) for the **Respondent**

Hearing date: Wednesday 26 March 2025

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Approved Judgment

This judgment was handed down remotely at 10.00am on Wednesday 9 April 2025 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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The Lady Carr of Walton-on-the-Hill, CJ:

Introduction

1. This appeal concerns the treatment of detainees in police custody and the powers of custody officers to order the complete removal of a detainee's clothing without consent and with force.

2. S. 54 of the Police and Criminal Evidence Act 1984 (PACE) deals with the search of persons detained at a police station. By s. 54(1), it is the duty of a custody officer, amongst other things, to ascertain everything that a detained person has with them when they are brought to a police station after arrest. By s. 54(3), a custody officer may seize and retain any such thing or cause any such thing to be seized and retained, subject to s. 54(4). S. 54(4) provides:

> "(4) Clothes and personal effects may only be seized if the custody officer-
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> a) believes that the person from whom they are seized may use them –
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> i) to cause physical injury to himself or any other person;
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> ii) to damage property;
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> iii) to interfere with evidence; or
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> iv) to assist him to escape; or
>
> b) has reasonable grounds for believing that they may be evidence relating to an offence."

3. By s. 54(6) a non-intimate search may be carried out if the custody officer considers it necessary to enable them to carry out their duty under s. 54(1) and to the extent that the custody officer considers necessary for that purpose.

4. The central question of law on this (second) appeal is whether the custody officer's relevant belief for the purpose of s.54(4)(a) must be not only genuine but also based on reasonable grounds.

5. Following trial in 2022, Recorder Dagnall (the recorder) held that to be the case. However, on appeal in 2024, Martin Spencer J (the appellate judge) disagreed, holding that genuine (relevant) belief on the part of the custody officer, whether reasonable or not, is all that is required. That conclusion is the subject of the first ground of appeal.

6. There are also challenges to:

   i) the appellate judge's reversal of the recorder's findings a) that the custody officer did not hold a reasonable belief that the person from whom the clothes were being seized might use them to cause physical injury to himself or any other person (ground 2) and b) that it was not necessary for police officers to have used the force that they did (ground 3);

ii) the appellate judge's conclusion that the recorder's assessment of damages was "too high" (ground 4).

The key facts in outline

7. Around 4.35pm on 14 December 2017 the appellant, Mr Matthew Carter, then aged 52, was arrested after reports that he had assaulted two women at the Dickens pub in Southend. He was taken to Southend Police Station (the police station), where he arrived at 4.45pm.

8. The custody suite was busy and so he was placed in a holding cell. He was refused access to a toilet because officers were unable to obtain the necessary permission from the custody officer. As a result, at 5pm, Mr Carter urinated himself. He was brought to the custody desk in his soiled clothing 20 minutes later in order to be booked in by the custody officer, Police Sergeant Bailey (PS Bailey). He was handcuffed at the front and in an agitated state, shouting. He started shouting, stating that he was innocent and needed to go to his partner's funeral (taking place the next day). He declined to answer repeated risk assessment questions posed by PS Bailey. He was directed or pushed face down onto the custody desk but tried to rise and turn towards officers. On a final occasion he stood, turned back spinning to his right and moving his handcuffed arms across his body and upwards.

9. At this stage, at 5.23pm, he was taken to the floor in front of the custody desk by seven police officers, struck several times and placed in handcuffs and leg restraints. During this exercise, Mr Carter bit the middle finger of one of the officers, tearing the officer's blue latex glove. In the course of the struggle, PS Bailey shouted "Cell 26", a direction to officers to take Mr Carter to a cell in order to have his clothes forcibly removed. The custody record recorded, amongst other things, the following:

> "[t]he DP is violent and had to be taken to the cell. A strip search is only being authorised for the purpose of changing him into anti self-harm clothing as cannot be risk assessed. This will involve the exposure of intimate parts of his body."

10. Mr Carter was carried to Cell 28 by officers. He was laid face down on a mat on the floor of the cell. His clothes were then forcibly removed by six police officers between 5.26pm and 5.33pm. Officers surrounded him and removed his shoes, socks, jeans and underwear. They cut off his down coat, resulting in feathers being distributed everywhere, and causing Mr Carter to splutter. The remainder of his clothing was also cut off. He was extremely agitated. He was then moved, now naked but still restrained, to Cell 26, because of the feathers in Cell 28.

11. At 5.34pm Mr Carter was laid down on a mat on the floor of Cell 26, and his handcuffs removed. An anti-self-harm suit was on the bench bed. Inadvertently, officers left a blue latex glove behind. At 5.39pm Mr Carter was pacing around the cell, upset, naked and swearing. He was asked to pass the glove out. Initially Mr Carter threw the glove at the door. He then picked it up and challenged the police to come and get it. He hid the glove in his hand and made a gesture towards his mouth. At this stage police officers entered the cell and forcibly removed the glove from him. There was an altercation, during which Mr Carter struck his head on a wall and received a number of blows to his arm, designed to make him release the glove and open his mouth. His detention was authorised at 5.50pm.

12. There is extensive CCTV footage of the events at Southend Police Station outlined above, and the court has viewed the relevant sections in private.

13. Mr Carter was taken for medical examination in hospital later that evening, and returned to police custody at 11.15pm. Mr Carter remained in custody the next day, which was the day of his partner's funeral. He was medically examined in hospital again, and later that evening interviewed and charged with assault and assault on a police constable. Shortly before 10pm he was bailed to attend Southend Magistrates' Court and released from police custody at 10.20pm.

14. Mr Carter throughout denied the allegations of assault, maintaining that he had been the victim of racial abuse. In the event, on the day of trial, the Crown offered no evidence against him.

The proceedings and judgments below

The claim

15. Mr Carter commenced proceedings against the respondent (the Chief Constable) in October 2020, claiming assault and battery in respect of the various uses of force to which he had been subjected, including at the custody desk (phase 1), in Cell 28 (phase 2) and in Cell 26 (phase 3). He claimed damages for physical and psychiatric injuries, injury to his feelings, special damages, and aggravated and exemplary damages. The Chief Constable defended the claim in its entirety.

The trial

16. The trial on liability lasted five days in February 2022. The following witnesses gave oral evidence:

    i) Mr Carter;

    ii) Six of the police officers involved in dealing with Mr Carter at the police station on 14 December 2017.

17. There was a written statement from a friend of Mr Carter to support the damages claim, and written reports from an expert clinical psychologist, Dr Jenny McGillion, instructed on behalf of Mr Carter. Written submissions followed in March and April 2022.

The judgment of the recorder

18. The recorder first gave a very lengthy oral judgment on liability in relation to phases 1 and 2 (on 25 April 2022), but ran out of time to complete his judgment on phase 3, indicating only that he would be giving judgment in favour of the Chief Constable on phase 3. He gave a full oral judgment on liability in relation to phase 3 on 15 July 2022. He then went on immediately to hear submissions on causation/quantum, giving judgment on quantum on the same day.

19. The end result was as follows. The recorder dismissed the claim in relation to phases 1 and 3, holding that the force then used was lawful. He gave judgment in favour of Mr Carter in relation to phase 2 and awarded damages in the sum of £23,035.00 (plus interest), broken down as follows:

i) Injury to feelings: £10,000;

ii) Psychiatric injury: £7,125;

iii) Aggravated damages: £5,000;

iv) Special damages: £910.

20. The recorder held that the uses of force at the custody desk and in Cell 26 (phases 1 and 3) were lawful, but that Mr Carter had been subjected to battery when his clothes were forcibly removed in Cell 28 (phase 2). In summary, he found that:

i) The reasons for PS Bailey ordering the removal of clothing were that she knew that Mr Carter had refused to answer the risk assessment questions; she concluded that he had done something which appeared to involve a risk that he would be violent; she knew that Mr Carter had struggled and sought to resist including by a bite which tore a rubber glove; she thought that there was a general direction from superiors that clothing should be forcibly removed where a detainee had refused to answer risk assessment questions (because the risk of self-harm could not then be assessed); the decision was on the spur of the moment and she decided that there was no reason to revisit it; she thought that she was ordering it to avoid the potential for Mr Carter harming himself;

ii) In order forcibly to remove clothing the police would need a "reasonable belief" that such a step was necessary to prevent the clothing being used to cause physical injury to the claimant or to the police and must act proportionately and reasonably;

iii) "Neither the decision to forcibly remove the clothing, nor the method that being affected by an instant transport and immediate forcible removing by stripping and cutting off the claimant's clothes, was either reasonable or proportionate";

iv) "The fear that there was a real likelihood or possibility that Mr Carter, if given time to reflect, would self-harm or be violent to police officers was not a reasonable belief for [PS] Bailey and officers to hold";

v) "The beliefs that the purpose of removal of clothing was to prevent the claimant using it to harm himself or police officers both lacked any reasonable basis and also were potentially irrational";

vi) It was not necessary for force to have been used in order to effect the removal of Mr Carter's clothing, relying on the fact that there was "no need to take an instant decision to remove the clothing". The officers gave Mr Carter no warning or opportunity to consider any of the potential options. It would have been "easy for them to have waited some minutes for the claimant to calm down".

<u>The judgment of the appellate judge [2024] EWHC 126 (KB); [2024] 1 WLR 3848</u>

21. In overview, the appellate judge held that:

i) There was no requirement of reasonableness to be imported into s. 54(4)(a). The omission by Parliament of the word "reasonable" must have been deliberate. He relied on the fact that, by contrast, the word "reasonable" appears in s. 17 of PACE (power of entry to search) and s. 24 of PACE (power of arrest). He considered that there was a good policy reason for a lower threshold;

ii) In any event, the recorder was wrong to conclude that PS Bailey did not have a reasonable belief that Mr Carter might use his clothing to harm himself. PS Bailey's decision to authorise the removal of Mr Carter's clothes in order to place him in an anti-self-harm suit was not based to a material extent on "standard procedure" if a detainee could not immediately be risk-assessed because he was not answering the relevant questions;

iii) PS Bailey had properly and sufficiently directed her mind to whether the requirements of s. 54(4) were met. It was a sufficient basis for authorising the removal of Mr Carter's clothes that Mr Carter had failed to answer risk assessment questions. In his judgment, "a custody officer is entitled to take a precautionary approach and assume that these questions, if addressed, would, or may well, have been answered in the affirmative". A custody officer "would be entitled to take the approach, or even follow a policy, which dictated that such a person should have their clothes removed and be put into an anti-self-harm suit unless there was some positive indication pointing away from the need for such precautions";

iv) The recorder was wrong to conclude that the use of force in effecting the removal of Mr Carter's clothing was unnecessary and that the force used was necessary and reasonable in the circumstances.

22. The appellate judge further expressed the view that the award of damages by the recorder was too high, although he declined to determine by how much. The Chief Constable had contended that an award of £5,000 was sufficient to cover all injury to feelings, psychiatric injury and aggravated damages.

Ground 1: the proper interpretation of s.54(4)(a)

The relevant framework: PACE and Code C

23. There have been numerous amendments to PACE and the Codes of Practice issued under it. References below to PACE and the Codes of Practice issued under it are references to PACE and the Codes of Practice as in force on 14 December 2017.

24. In Part II of PACE, headed "Powers of Entry, Search and Seizure", s. 17(2) provides materially that, except for the purpose of saving life or limb or preventing serious damage to property:

> "…the powers of entry and search conferred by this section:
>
> (a) are only exercisable if the constable has reasonable grounds for believing that the person whom he is seeking is on the premises;…"

25. In the same Part, by s. 19(2), the constable may only seize anything on the premises if, amongst other things, they have "reasonable grounds for believing" that it is evidence in relation to an offence under investigation or any other office.

26. In Part III of PACE, headed "Arrest", s. 24 provides materially that:

> "(1) A constable may arrest without a warrant:
>
> …(c) anyone whom he has reasonable grounds for suspecting to be about to commit an offence;
>
> (d) anyone whom he has reasonable grounds for suspecting to be committing an offence.
>
> (2) If a constable has reasonable grounds for suspecting that an offence has been committed, he may arrest without a warrant anyone whom he has reasonable grounds to suspect of being guilty of it.
>
> (3) If an offence has been committed, a constable may arrest without a warrant:
>
> (a) anyone who is guilty of the offence;
>
> (b) anyone whom he has reasonable grounds for suspecting to be guilty.
>
> (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 any of the reason mentioned in subsection (5) it is necessary to arrest the person in question.
>
> (5) The reasons are:…
>
> (c) to prevent the person in question-
>
> (i) causing physical injury to himself or any other person;…"

27. In Part IV of PACE, headed "Detention", s. 39 provides materially that it is the duty of the custody officer at a police station to ensure that "all persons in police detention at that station are treated in accordance with this Act and any code of practice issued under it and relating to the treatment of persons in police detention."

28. Codes of Practice are issued by the Secretary of State for Justice. The relevant code for present purposes is Code C (Code of Practice for Detention, Treatment and Questioning of Persons by Police Officers). The version in force at the material time was the 2017 version (Code C).

29. Section 3 of Code C addresses initial action for detained persons at a police station ("normal procedure"). Paragraph 3.5(c) states that the custody officer shall determine whether the detainee is or might be in need of medical treatment. Paragraph 3.6 states that, when determining the needs in paragraph 3.5 (c), the custody officer is responsible for initiating an assessment to consider whether the detainee was likely to present specific risks to custody staff, any individual who might have contact with the detainee, or themselves. Paragraph 3.8 states that risk assessments must follow a structured

process which clearly defines the categories of risks to be considered and the results must be incorporated in the detainee's custody record. Paragraph 3.9 states:

> "3.9 The custody officer is responsible for implementing the response to any specific risk assessment e.g.;
>
> - reducing opportunities for self harm;
> - calling an appropriate healthcare professional;
> - increasing levels of monitoring or observation;
> - reducing the risk to those who come into contact with the detainee..."

30. Section 4 addresses the detainee's property. It states, amongst other things:

> "4.1 ….The custody officer may search the detainee or authorise their being searched to the extent they consider necessary, provided a search of intimate parts of the body or involving the removal of more than outer clothing is only made as in Annex A…
>
> 4.2 …detainees may retain clothing and personal effects at their own risk unless the custody officer considers they may use them to cause harm to themselves or others, interfere with evidence, damage property, effect an escape or they are needed as evidence. In this event the custody officer may withhold such articles as they consider necessary and must tell the detainee why."

31. Annex A of Code C (Annex A) is entitled "Intimate and Strip Searches". At section B it addresses strip searches (which is a search defined as a search involving the removal of more than outer clothing). In 1995, paragraph 10 of Annex A was introduced as follows:

> "(a) Action
>
> 10. …A strip search may take place only if it is considered necessary to remove an article which a detainee would not be allowed to keep and the officer reasonably considers that detainee might have concealed such an article. Strip searches shall not be routinely carried out if there is no reason to consider that articles are concealed…."

32. Paragraph 11 of Annex A goes on to address the conduct of strip searches. It sets out steps to protect the detainee's dignity (for example, the deployment of same sex police officers and the use of a private area).

33. Failure to comply with a provision of a Code does not of itself render a police officer civilly or criminally liable, but if any provision of a code appears to the court conducting criminal or civil proceedings to be relevant to any question arising in the proceedings, it shall be taken into account in determining that question (see ss. 67(10) and (11) of PACE).

34. S.54 appears in Part V of PACE, headed "Questioning and Treatment of Persons by Police". Its material parts are repeated for ease of reference:

"Searches of detained persons

(1) The custody officer at a police station shall ascertain…everything which a person has with him when he is-

(a) brought to the station after being arrested elsewhere….

(3) Subject to subsection (4) below, a custody officer may seize and retain any such thing or cause any such to be seized and retained.

(4) Clothes and personal effects may only be seized if the custody officer-

(a) believes that the person from whom they are seized may use them –

(i) to cause physical injury to himself or any other person;

(ii) to damage property;

(iii) to interfere with evidence; or

(iv) to assist him to escape; or

(b) has reasonable grounds for believing that they may be evidence relating to an offence...

(6) Subjection to (7) below, a person may be searched if the custody officer considers it necessary to enable him to carry out his duty under s. 54(1) above and to the extent that the custody officer considers necessary for that purpose.

(6A) A person who is in custody at a police station or is in police detention otherwise than at a police station may at any time be searched in order to ascertain whether he has with him anything which he could use for any of the purposes specified in subsection (4)(a) above.

(6B) Subjection to subsection (6C) below, a constable may seize and retain, or cause to be seized and retained, anything found on such a search.

(6C) A constable may only seize clothes and personal effects in the circumstances specified in subsection (4) above.

(7) An intimate search may not be conducted under this section…"

(Ss. 54(6A) to (6C) were inserted by s. 147(b) of the Criminal Justice Act 1988.)

35. In Part XI of PACE, headed "Miscellaneous and Supplementary", s. 117 provides:

"Where any provision of this Act-

(a) confers a power on a constable; and

(b) does not provide that the power may only be exercised with the consent of some person, other than a police officer,

the officer may use reasonable force, if necessary, in the exercise of the power."

Analysis

36. The exercise is one of pure statutory interpretation, applying normal principles. The court is required to identify the meaning borne by the words in question in the particular context. Other provisions in a statute and the statute as a whole may provide relevant context. The words of the statute have primacy and are to be interpreted in the sense which best reflects their ordinary and natural meaning and accords with the legislative purpose, an objective concept. (See *R (on the application of O) v Secretary of State for the Home Department* [2022] UKSC 3, [2023] AC 255 at [29] and [31].)

37. As a matter of the plain language of s. 54(4)(a), there is no qualification to the requisite belief of the custody officer. The custody officer must simply (actually) hold the (relevant) belief. The word "reasonably" does not appear.

38. Nor can it be implied in circumstances where the qualification of reasonableness does appear expressly elsewhere in PACE, including most notably in s. 54(4) itself (see s. 54(4)(b)). I refer also to ss. 17(2), 19(2) and 24, as set out above. The conclusion that the omission of a requirement of reasonableness cannot have been accidental is entirely in line with the reasoning in *Khan v Commissioner of Police for the Metropolis* [2008] EWCA Civ 723 at [20], where the proper interpretation of s. 18 of PACE was under consideration. The wider context makes it clear that Parliament was careful to distinguish between those situations where a power could be exercised on the basis of belief, and those where the exercise depended on the existence of reasonable grounds for a belief.

39. Thus, as the appellate judge identified (at [47]), it can only be concluded that the omission of a criterion of reasonableness in s. 54(4)(a) was a deliberate decision by Parliament. This is not to say that the question of reasonableness may not be relevant to an assessment of whether (as a matter of fact) the custody officer actually held the necessary belief, but reasonable belief is not of itself an independent requirement.

40. This is the essential answer to the question of law raised, and sufficient without more to dispose of ground 1. It is consistent with the academic commentary in *Zander: The Police and Criminal Evidence Act 1984* (9th ed.) at paragraph 5-03 and *Hungerford-Welch* [2024] Crim LR 491.

41. In circumstances where the proper meaning of s. 54(4)(a) is clear, there is no need to turn to an examination of the pre-enactment background. However, it is right to record that the Chief Constable also relies on pre-enactment materials in support of its interpretation. It is common ground that amendments to Bills, whether made or moved but rejected, may be a relevant aid to construction of the resulting Act, albeit to be treated with caution (see *Bennion on Statutory Interpretation* (8th ed) at section 24.13). The external context includes other relevant legislation such as Law Commission reports, reports of Parliamentary committees, or Green and White Papers. Where the strict conditions specified by the House of Lords in *Pepper v Hart* [1993] AC 593 are satisfied, reference may also be made to Parliamentary debates as reported in Hansard (see *R (CXF) v Central Bedfordshire Council* [2018] EWCA Civ 2852; [2019] 1 WLR at [21]).

42. There is no significant benefit to be gained from a detailed examination of these materials. The requirements of *Pepper v Hart* are not met, not least because s. 54(4)(a) is not ambiguous, so it is not appropriate to look at any of the Parliamentary debates. Consideration of the other materials, including the Royal Commission report on Criminal Procedure in 1981, followed by a draft Police and Criminal Evidence Bill introduced in 1983, and the various amendments advanced as the draft legislation proceeded through Parliament, simply confirm that Parliament considered the wording of PACE, including the terms of s. 54(4)(a) with care.

43. The imposition of a threshold lower than reasonable belief can readily be understood. It is right that the removal of clothing may be a significant interference with a detainee's bodily and psychological integrity, engaging an individual's rights under Articles 3 and/or 8 of the European Convention on Human Rights (Article 3; Article 8).

44. However, the custody officer has a duty (not just a power) to ascertain everything which a person has with them when entering custody in the police station. The duty is thus not against the whole world but relates only to people who are lawfully under arrest (and there is no dispute that Mr Carter was lawfully under arrest). And the custody officer must use the methods permitted by PACE in order to discharge it, often under pressure of time and in difficult circumstances. The duty exists to ensure the safety of all persons (or property) in the custody area including the detainee, or to prevent escape or to secure (or preserve) evidence for an offence. These are important objectives, at which the seizure of clothes is aimed. Most items of clothing can be used to create a ligature; cell observation may be interrupted by operational emergencies and thus is not an adequate safeguard without more.

45. It follows from the above that I have rejected the submissions for Mr Carter on ground 1, for reasons which I summarise briefly as follows.

46. Ms Sikand KC points to the references to reasonableness in *PD v Chief Constable of Merseyside* [2015] EWCA Civ 114 (*PD*) (at [5]) and in *Yousif v Commissioner of Police of the Metropolis* [2016] EWCA Civ 364 (*Yousif*) (at [66]). However, in those paragraphs the Court of Appeal was doing no more than recording the findings of the first instance judges.

47. The core submission for Mr Carter is that, where the power under s. 54(4) is being used to authorise the complete removal of a detainee's clothes for the purpose of the detainee being changed into an anti-self harm suit, a higher threshold of "reasonable belief" is necessary. This is because of the interference with the detainee's Article 3 and 8 rights. It is said that an objective test of reasonableness is therefore to be inferred. It is submitted that it is for this reason that paragraph 10 of Annex A, dealing with strip searches, refers to reasonable consideration on the part of the police officer. It is argued that s. 54(4)(a), enacted before the Human Rights Act 1998, has to be reconsidered in this light. Reliance is placed on *PD* at [29] to [35], with the suggestion that the court there decided that paragraph 10 of Annex A applied to facts such as these.

48. There are a number of difficulties with this suggested approach.

49. First, s. 3 of the Human Rights Act 1998 requires primary legislation to be read and given effect to in a way that is compatible with Convention Rights "so far as…is possible". In considering what is "possible" the courts have stressed repeatedly the

constitutional importance of maintaining the boundary between "interpretation, which is a matter for the courts and others who have to read and give effect to legislation, and amendment, which is a matter for Parliament" (see *McDonald v McDonald* [2016] UKSC 28; [2017] 1 All ER 961 at [69]).

50. S. 3 applies where legislation would otherwise be in conflict with a Convention right. Only if the ordinary meaning is incompatible with the Convention rights does the interpretative obligation in s. 3 arise. However, s. 3 is not inherently engaged in every case where a detainee's clothing is removed: see *PD* at [41] to [45]; *Yousif* at [70] and [71]; *Pile v Chief Constable of Merseyside Police* [2020] EWHC 2472 (QB); [2021] PIQR P2 at [39] to [48]. Further, if a search under s. 54 contravenes a detainee's Convention rights, a claim can be made under s. 7 of the Human Rights Act 1998.

51. Secondly, the consequence would be, as Ms Sikand fairly accepted, that whether there was a requirement of reasonableness in s. 54(4)(a) would depend on the degree of interference (if any) with Article 3 and 8 rights. So the mere removal of a detainee's belt would require only an actual (relevant) belief on the part of the custody officer; whereas complete removal of clothing would require an actual and also reasonable belief. The existence of a variable interpretation of a single phrase, the correct interpretation depending on the precise circumstances, would be not only "undesirable", as Ms Sikand put it, but remarkable, bringing with it an element of uncertainty which Parliament is hardly likely to have intended.

52. Thirdly, Annex A and the decision in *PD* cannot bear the weight attributed to them for Mr Carter:

    i) Paragraph 10 was not inserted into Annex A until 1995, over 10 years after s. 54(4)(a) was enacted. It is thus not a permissible aid to the construction of the section (see *R (CXF) v Central Bedfordshire Council* [2018] EWCA Civ 2852; [2019] 1 WLR 1862 confirming the point of principle at [22] to [25]);

    ii) In any event, paragraph 10 of Annex A relates to strip searches for concealed articles. It does not apply to the seizure of clothes and personal effects under s. 54(4)(a).

53. As Pitchford LJ identified in *PD* at [35], paragraph 10 of Annex A fails to provide for those situations, anticipated by s. 54, in which the custody officer wishes to seize any clothing that may be used by the detainee to harm themselves (as opposed to the removal of more than outer clothing for the purpose of searching for a concealed article). Pitchford LJ stated that this was "a lacuna" in the Code.

54. However, he considered that paragraph 11 of Annex A applies to any strip search (defined as set out in paragraph 9 of Annex A as a search involving the removal of more than outer clothing). PD was searched within the meaning of s. 54, and strip searched within the meaning of paragraph 9 of Annex A. Thus she was entitled to be searched "so far as the context allowed" in accordance with paragraph 11 of Annex A. Pitchford LJ went on to comment that:

> "It is entirely to be expected that Annex A should protect all those in custody whose clothing is removed under a power given by section 54."

55. This says no more than that it is to be expected that a search under s. 54 is to be conducted, as far as the context allows, in accordance with paragraph 11 of Annex A. There is nothing in paragraph 11 to suggest that a custody officer has to have reasonable grounds for their belief that the detainee may use the clothes or personal effects to be seized to cause physical injury to themselves or any other person.

56. Considering how paragraph 11 would be applied to the situation where a detainee's clothes were being removed for safety reasons "so far as the context allow[s]", the requirements would be, in summary, that the search should be carried out by officers of the same sex as the detainee, somewhere private, with at least two other people present, with proper regard to sensitivity and vulnerability, and as quickly as possible. These are all common sense expectations, to which there could in general terms be no sensible objection.

57. However, I should add that I harbour significant doubts as to whether paragraph 11 of Annex A strictly applies to anything other than a strip search for concealed articles (of the type identified in paragraph 10 of Annex A). I refer, for example, to the following passages in paragraph 11 which can only refer to a strip search for concealed articles:

> "d)…Detainees who are searched shall not normally be required to remove all their clothes at the same time e.g. a person should be allowed to remove clothing above the waist and redress before removing further clothing;
>
> e) if necessary to assist the search, the detainee may be required to hold their arms in the air or to stand with the legs apart and bend forward so a visual examination may be made of the genital and anal areas provided no physical contact is made with any body orifice;
>
> f) if articles are found, the detainee shall be asked to hand them over. If articles are found within any body orifice other than the mouth, and the detainee refuses to hand them over, their removal would constitute an intimate search, which must be carried out as in Part A;
>
> g) a strip search shall be conducted as quickly as possible, and the detainee allowed to dress as soon as the procedure is complete."

58. The better position may therefore simply be that only the "spirit" of paragraph 11 of Annex A should apply to the removal of a detainee's clothes for safety reasons. But there has been no challenge to *PD*, and whether or not my doubts are well-founded makes no difference to the outcome on ground 1.

Conclusion on ground 1

59. In summary, the proper construction of s. 54(4)(a) is clear: in order lawfully to exercise the power under s. 54(4)(a) to seize clothes or personal effects of a detainee brought to a police station after (lawful) arrest, the custody officer must actually (but not necessarily reasonably) hold the relevant belief. This means that the custody officer must consider directly whether, and then believe that, the detainee may use the clothes or personal effects to cause physical injury to themselves or any other person; to damage property; to interfere with evidence or to assist the detainee to escape.

60. The exercise must be carried out on a case by case basis. There is no separate requirement for the relevant belief to be reasonable. However, the more unreasonable the relevant belief, the less likely it is to have been actually held by the custody officer in question.

61. For these reasons, I would dismiss ground 1.

Ground 2: reasonable belief as a matter of fact in phase 2

62. In the light of my conclusion on ground 1, ground 2 does not arise.

Grounds 3 and 4: necessary force in phase 2; causation and quantum in phase 2

63. I have had the benefit of reading in draft the judgment of Edis LJ on grounds 3 and 4. I agree that ground 3 should be dismissed, with the result that ground 4 does not arise, for the reasons that he gives. However, I also agree with his remarks on quantum under ground 4.

Conclusion

64. For the reasons set out above, I would dismiss the appeal.

Edis LJ:

65. I agree with the judgment of My Lady, the Lady Chief Justice, dealing with grounds 1 and 2. This judgment deals with grounds 3 and 4.

Ground 3

66. This ground (and the reason for the grant of permission to appeal to advance it) focusses on the question of whether the appellate judge was entitled to substitute his own evaluative conclusions for those of the trial judge, the recorder. It is framed in this way:

> "8. The Learned Judge was wrong to interfere with the Learned Recorder's finding, based upon his analysis of the evidence, that it was not necessary for the police officers to have used force to effect the removal of the Appellant's clothing so that he could be changed into an anti-self-harm suit (§53 of the Judgment).
>
> 9. More particularly, the Judge was wrong to decide, contrary to the finding and the decision of the Learned Recorder, that the Appellant could not have been initially observed in his cell and/or been given an opportunity to calm down and/or to remove his clothes voluntarily, before force was used upon him, given that the use of force should be a last resort (§53 of the Judgment)."

67. It is therefore necessary to set out the key paragraphs of the recorder's judgment and the key paragraph of the appellate judge's judgment.

68. The recorder said this, in a passage dealing with a number of different issues:

> "182. I have held that Police Sergeant Bailey and the police officers' primary actual motivation was the belief that they were required to remove the clothing where the detainee had not answered risk assessment questions simply because that itself would suggest a risk of self-harm, although this was also combined with a fear that the claimant had threatened to attack officers already. I have come to a conclusion that neither the decision to forcibly remove the clothing, nor the method of that being affected by an instant transport and immediate forcible removing by stripping and cutting off the claimant's clothes, was either reasonable or proportionate. I also have concluded that the fear that there was a real likelihood or possibility that the claimant, if given time to reflect, would self-harm or be violent to police officers was not a reasonable belief for the Police Sergeant Bailey and the police officers to hold."

69. In paragraphs 183 to 191 of his judgment the recorder set out his reasons for holding that the decision to direct the removal of Mr Carter's clothes was not based on a reasonable belief that he may use them to cause physical injury to himself. I agree with the judgment given by the Lady Chief Justice on this question: the recorder asked himself the wrong question. PS Bailey did hold that belief, as the recorder found, and was accordingly acting lawfully in directing the removal of his clothes. The recorder then continued:

> "192. I consider that the beliefs that the purpose of removal of clothing was to prevent the claimant using it to harm himself or police officers both lacked any reasonable basis and also were potentially irrational. It also does not seem to me the police officers can rely on the Essex Police policy as justifying what they did. This is in the light of my conclusions expressed above and also because: firstly, it was only a police policy; and, secondly, if the policy was that if risk assessment questions are not answered then clothing ought to [be] forcibly removed, it seems to me that that would be something of an irrational policy. It does seem to me that it is necessary to consider all of this in the context of Annex A, in particular, paragraph 11D, and the College of Policing guidelines, both of which, it seems to me, go entirely the opposite direction to what happened. They make clear that it is necessary to consider: that the fact of removal of clothing is humiliating; the importance of the dignity of the detainee; and the fact that removal carries its own risk of potential damage to mental health and increased risk of harm, and that observation is an alternative course which ought to be carefully considered.
>
> 193. However, even if there was any rational basis for the beliefs and reason to consider that there was risk of self-harm or of violence to police officers, I do not consider that this removal of clothing was either reasonable or proportionate. Firstly, it seems to me that there was no need to take an instant decision to remove the clothing. The claimant could simply have been left under observation and, if appropriate, restrained. I do not consider that Mr Stagg's account as to that point sufficient. It is true that the keeping of leg restraints could carry with it a risk of positional asphyxia but that could be dealt with by close observation and/or by removal and close observation. The hands could have been left handcuffed by the back at least in the short-term and the claimant could be observed as he was observed in the holding cell. Secondly, as far as threat of violence to the police is concerned and whether that would make it impracticable to observe with an open door, if the claimant had been left with his hands handcuffed behind his back, it is

> difficult to see as to what the claimant could have done and, in any event, if the door was closed, the claimant could be constantly observed through the hatch.
>
> 194. It is also, it seems to me, quite clear the police officers did not give the claimant any warning or opportunity to consider any of the potential options. The claimant was restrained, and the police officers had plenty of time to give the claimant warning and inform him as to options. It would have been easy for them to have waited some minutes for the claimant to calm down. It would have been easy for them to tell the claimant such matters as: if he did not answer the questions they were going to remove his clothes forcibly; if he did not relax and calm down they would remove his clothes forcibly; and that he had a choice between removing his own clothes voluntarily himself or going through the procedure of being laid face down and having them forcibly removed and, indeed, cut off him."

70. Later, the recorder said:

> "201. Mr Wand has added in his submissions that he contends that inappropriate force was used, and that Police Constable Chapman knelt on the claimant's head and neck. I do not find that proved on the balance of probabilities. It is disputed by the police, and I simply do not see it on the closed-circuit television. Mr Wand also said it was inappropriate for the police to use punches to force the claimant to cooperate. If I had found that the forceful removal was reasonable and proportionate then I would have found that the limited number of punches were appropriate force in the circumstances. However, it seems to me that that point simply does not arise in the light of my other conclusions. I have also already found, as I have said, that the asserted words about, "This is what we do to women beaters" were not actually said."

71. The appellate judge said:

> "53. In addition to the decision to remove the Claimant's clothing, there is also the decision to use force to do so. By Section 117 of PACE , where any provision of the Act confers a power on a constable, 'the officer may use reasonable force, if necessary, in the exercise of the power'. The first question is whether the use of force was necessary and the second question is whether, if it was, the amount of force used was reasonable. In his Judgment, the learned Recorder concluded that force was unnecessary because the Claimant could and should have been given time to calm down, he should have had explained to him that a decision had been made to put him into anti-self-harm clothing and he should have been given the opportunity to consent and co-operate in this. Again, I agree with Mr Stagg's submissions in relation to this aspect. This was a detainee who had refused to answer questions in relation to risk assessment, who had been drinking, who was being uncooperative and whom the officers had reasonably believed needed to be immobilised with rear-stacked handcuffs and leg restraints. In addition, the Claimant had bitten the hand of one of the officers. In my judgment it was wholly unrealistic to leave such a detainee trussed up in a cell in the hope that he might calm down and see reason. Furthermore, Sgt Bailey and the other officers had every reason to believe that there was some urgency in getting the Claimant into an anti-self-harm suit. Although officers had been available for the purpose of restraining the Claimant, it did not at all follow, as the Recorder suggested, that there were therefore sufficient officers to observe the Claimant in his cell whilst he decided

> what to do and hopefully calmed himself down. In my judgment, the custody sergeant and the officers were justified and had a reasonable belief that the use of force was necessary. Given that the use of force was necessary, I consider that the amount of force used was reasonable and it was not suggested otherwise by the learned Recorder."

The proper approach on appeal

72. The restraint which is required of any appellate court when considering primary factual findings made by trial judges, or decisions based on an evaluation of those facts is well known. In *Prescott v Potamianos (also known as Re Sprintroom)* [2019] EWCA Civ 932, the Court of Appeal acknowledged that the Supreme Court in *R (on the application of AR) v Chief Constable of Greater Manchester Police & Anor* [2018] UKSC 47 had proposed a rather less rigid test than one which required a "significant error of principle" by the trial judge before an appellate court could intervene. They summarised the correct approach in this way:

> "76. So, on a challenge to an evaluative decision of a first instance judge, the appeal court does not carry out a balancing task afresh but must ask whether the decision of the judge was wrong by reason of some identifiable flaw in the judge's treatment of the question to be decided, 'such as a gap in logic, a lack of consistency, or a failure to take account of some material factor, which undermines the cogency of the conclusion'".

73. In *Afriyie v. Commissioner of the City of London Police* [2024] EWCA Civ 1269 this court considered the issue in a factual context somewhat closer to the present. Having stated the principle to be followed by appellate courts, the Lady Chief Justice said:

> "38. This principle applies to cases such as the present where the critical evidence was in the real time recordings of the relevant events. Having said that, the existence of those recordings places the appellate court in a different position to the ordinary case. Although oral evidence was given by PC Pringle, nothing he said could contradict what was recorded on the BWV footage. The observation of Hallett LJ in *McCarthy [v. Chief Constable of Merseyside Police* [2016] EWCA Civ 1257] at [17] is apposite:
>
> > "… the general principle is that an appellate court should not interfere too readily with a trial judge's factual conclusions. The trial judge has the significant advantage of seeing and hearing the witnesses give their evidence. However, in this case very little evidence was disputed. Most of the Recorder's findings of fact came from the CCTV footage and we are not being asked to overturn them. It is the conclusions he drew from those findings of fact that are subject to challenge. To my mind, as an appellate court we are in an unusually good position to determine whether those conclusions were justified."

74. The present case is one where almost everything which happened was captured on CCTV. Often there is both audio and video recording of events. As is clear from, for example, paragraph 201 of his judgment, the recorder inevitably preferred the evidence of that recording to any witness evidence, where the two clearly conflicted. In reality, there were very few factual disputes in this case, in the sense that the recorder was not

required to reach conclusions simply based on which witnesses he considered were reliable and which were not. We have had a very extensive opportunity to view the footage in its entirety, as did the appellate judge. It is also clear from his judgment that the appellate judge had reviewed transcripts of the evidence given at trial. At his paragraphs 48 and 49 the appellate judge set out and analysed a passage of the cross examination of PS Bailey about why she had ordered the strip search and concluded that the recorder had done a "significant disservice" to that evidence in his judgment. We have also been supplied with that transcript. This is a case where the advantage of the trial judge over the appellate judge and over this court is rather less weighty than is generally the case.

Discussion of Ground 3

75. The recorder's judgment was delivered orally, in two long sections. The trial took place over 5 days in February 2022. It did not conclude in that time, and the recorder directed that some submissions should be made in writing. He considered those and began to deliver his judgment at a hearing on 25 April 2022. He did not conclude his judgment on liability on that occasion, and resumed on 15 July. In the meantime, he had received some further submissions and answers to Part 35 questions from the expert psychologist. He had found that the police were liable in respect of what had happened in Cell 28, but not in respect of anything which happened in the holding cell (in relation to which there was no claim), at the custody sergeant's desk, or after the events in Cell 28 when Mr Carter was moved to Cell 26. The expert was asked for her opinion about what psychological harm may be attributable to the single episode where liability had been established. On 15 July, the recorder concluded giving reasons for his findings on liability and gave his ruling with reasons on the quantum of damages. This judgment was also delivered orally. The judgment delivered in April runs to 208 paragraphs. The July judgment is somewhat shorter. The findings which are the subject of ground 3 were made by the recorder in the April judgment.

76. It is not altogether easy to identify the key findings made by the recorder and the reasons for them. This is because the judgment is quite repetitive and unstructured. I have quoted four key paragraphs which may illustrate this point, but could have quoted many more. The judgment contained discussion of issues that were irrelevant; and failed to make findings on matters which were material. It was also self-contradictory in parts.

77. I agree with the Lady Chief Justice that the appellate judge was right to find that PS Bailey's decision that Mr Carter's clothing should be removed to prevent it from being used for self-harm was lawful. Mr Carter did not consent to that being done, and it could only be done by the use of force, which was, therefore, "necessary" for the purposes of s.117 of PACE and so lawful. In so far as he considered the proportionality of the level of force used, at his paragraph 201, the recorder found that it was lawful. That was a finding which was plainly correct. Having removed his clothes, the officers moved him to Cell 26 where he was freed from handcuffs and leg restraints and locked in a cell with an "anti self-harm suit" to put on if he chose. He chose not to.

78. In my judgment the judgment of the recorder contained a number of flaws such that the appellate judge was entitled to interfere with what are evaluative decisions based on factual findings.

79. First, the recorder's decision on ground 3 was heavily influenced by his legal error in misconstruing s.54(4)(a). He had held that clothing could only be seized if PS Bailey reasonably believed that this was necessary in order to prevent Mr Carter using his clothes to create a ligature in order to self-harm. He held that although PS Bailey did in fact believe this, it was not a reasonable belief and therefore the decision to remove Mr Carter's clothing was unlawful. That finding having been correctly reversed by the appellate judge, ground 3 loses much of its cogency.

80. In summary the recorder's decision was that, having made the decision at the custody desk that Mr Carter should be overpowered by force and carried to a cell where his clothes should be removed, the police were then required by law to pause when they got to the cell before carrying out the decision to allow Mr Carter the opportunity to calm down and become compliant. The failure to pause and attempt to de-escalate the situation inside Cell 28 was, he held, a free-standing unlawful act which rendered the application of force unlawful.

81. In my judgment, this decision arose from a number of errors, in addition to the influential legal error identified under ground 1 above. A principal legal error was to accept submissions of the kind described by this court in *Goodenough v. Chief Constable of Thames Valley Police* [2021] EWCA Civ 1422. At [73] I said of the submissions in that case:

> "The real answer to them was identified by the judge when he explained that they involve a minute "frame by frame" analysis of a very short, fast moving incident which does not lend itself to illumination by this kind of wholly artificial exercise. This was a simple case in which the judge had to decide whether to accept the uncontradicted evidence of the relevant police officers. A simple case of this kind lends itself to a relatively short judgment and its succinctness does not evidence any lack of care in its development."

82. The recorder in this case engaged in just such a "wholly artificial exercise", freezing the action immediately after the entry into Cell 28, and ignoring everything which happened before and after it. He might have avoided this if he had delivered a "relatively short judgment" of the kind described. It would then have been more difficult to overlook important context and other highly relevant findings about other parts of the incident.

83. The actions of the police which are criticised by the recorder occurred in a context which he was required to take into account when considering whether what occurred in Cell 28 was unlawful. In summary, the context was as follows:

i) Mr Carter had been arrested on suspicion of offences of violence at a pub in which he had evidently sustained some facial injuries which caused him to bleed. The recorder found that he smelt of alcohol and was "somewhat" or "mildly" drunk;

ii) He was argumentative and non-compliant for about 35 minutes in the holding cell when first taken into the police station. He was under observation by officers during that time who were obviously concerned by his behaviour;

iii) He was then taken to the custody desk at about 5.20pm. There is sound and video footage of the several minutes he spent there. For most of that time he is arguing and refusing to respond to the custody sergeant who is trying to persuade him to do so. From time to time officers standing near him intervene physically to restrain him. The parties have attempted to set out what can be heard, and I set out below an extract from their chronology of part of the exchange at the custody desk before substantial force was used. Not everything can be heard. The underlined parts are agreed, and the bold parts are contended for by the Chief Constable, and not agreed on behalf of Mr Carter. I have carefully listened to this extract and I consider that the bold parts are broadly accurate:

PS Bailey: **"I just want to look at your face, because you've got a few bits of blood on there."**

C: "**No I won't** [....] you're here to beat me up".

PS Bailey: "**Excuse me? Matthew? Matthew. [….] I need to look [....]**"

C: "**I'm sorry, I can't [....] and I don't like** .... I don't know what to say [....]"

PS Bailey: "[....] I'm just gonna book you in, yeah, right? [....]"

C: "**What's the point,** I've been fucking treated like scum."

C begins to shout.

PS Bailey: "**Listen, just talk to me**"

C: "[....] fuck off you cunt"

PS Bailey: "**Put your arms down, ok.**"

C continues to shout.

PS Bailey (raising voice): "**Listen**, I need to hear why you're here. **Now just** please calm down. **Let's get through this [....] so we can get you to your cell.**"

C: "Get off me. Get off me. **Don't let them** touch me. [....]"

PS Bailey trying to talk to C.

C: "Can you tell him to stop touching me?"

C: "[....] You fucking mugs".

PS Bailey: "**Matthew**, just stay calm and they won't have to touch your back, **all right? [....] Just let me hear what you're here for, all right? ....**".

Male officer: "**He's been arrested for [....]**."

C begins to interrupt again.

C: "Don't touch me [....]"

iv) At the end of the period at the custody desk, Mr Carter behaves (as the recorder found) in such a way that it was lawful for the police to use substantial force to take him to the ground and carry him, under leg restraints and handcuffs, to Cell 28. As they were doing this, Mr Carter bit a police officer. This is a key finding when considering whether, a second later in Cell 28, there was a legal obligation to attempt some further alternative steps to the immediate removal of his clothing. Persuasion and reason had failed and substantial force had been required;

v) In Cell 28, the officers were concerned to deal with two risks to Mr Carter's life. One was from self-harm using clothing as a ligature and the other was from positional asphyxia caused by being restrained in the prone position. His dignity was an important consideration, but his life was much more so. We were shown materials expressing concern that the removal of clothes may occur inappropriately on some occasions, being used as a punishment for recalcitrant detainees, rather than to protect them. That would indeed be a cause for concern if it happened, but it did not. There is no finding that the decision to remove Mr Carter's clothes was taken for any improper reason. The finding was that PS Bailey's belief that it was necessary was unreasonable;

vi) The officers then began to carry out the instruction of PS Bailey. This began with the removal of Mr Carter's shoes and socks, the leg restraints and his belt. During that part of the process he was bellowing "prick", "you cunt" and "you slag". As they then cut his coat, feathers can be seen in Cell 28 and so they removed him to Cell 26 once his clothes had been taken off;

vii) In Cell 26 the officers left him without handcuffs and he was able to move freely in his cell. He remained naked and did not put on the anti-self harm suit. The officers realised that they had left a plastic glove in the cell, which might be swallowed to obstruct Mr Carter's airway and decided that they needed to re-enter the cell to take it from him. This was done to prevent him harming himself, and the judge, perhaps inconsistently with what he decided about events in Cell 28, held that the use of force to achieve it was lawful presumably because there was a real risk of self-harm. Mr Carter had refused to pass the glove through the wicket in the cell door when asked to do so, and challenged them to come into the cell. He assumed the stance of a boxer when doing that. They used significant force on him to take the glove from him as he resisted them. In doing this, the recorder found they were acting lawfully.

84. The appellate judge's description in his paragraph 53 of the conduct of Mr Carter at the material time when the decision to remove his clothing was taken is accurate:

> "[He] …had refused to answer questions in relation to risk assessment, who had been drinking, who was being uncooperative and whom the officers had reasonably believed needed to be immobilised with rear-stacked handcuffs and leg restraints. In addition, the Claimant had bitten the hand of one of the officers."

85. One difficulty with the recorder's reasoning is that he does not mention any of these facts in his paragraphs 193 and 194.

86. The recorder also made some further errors in approaching this question. First, he relied selectively on the College of Policing Guidelines. At paragraph 192 he referred to them as authority for the proposition that the suggested policy of Essex Police was unlawful. However, the recorder did not deal with another, highly relevant, part of the guidance. This deals with the risk of positional asphyxia to people who are left immobile. That was the reason given by the police for not wanting to leave him, in the appellate judge's words, "trussed up in a cell" while he calmed down. The risk referred to in this Guidance is a risk that the detainee might die if not properly treated. It says this:

> "The prone position and positional asphyxia
>
> There is an increased risk of causing positional asphyxia when restraining those of particularly small or large build or those who have taken drugs, medications (anti-psychotics) or alcohol. People restrained in the prone position should be placed on their side or in a sitting, kneeling or standing position as soon as practicable……
>
> …..
>
> Staff should also be trained in techniques for moving detainees and repositioning them from the prone position in accordance with the Personal Safety Manual of Guidance.
>
> Officers and staff should avoid using the prone restraint position unless it is proportionate to the threat and necessary in the circumstances. Officers should keep the period for which it is used to a minimum.
>
> When a detainee is restrained in a prone position, a safety officer should be responsible for monitoring the detainee's conditions, particularly the airway and response, protecting and supporting the head and neck. That person should lead the team through the physical intervention process and monitor the detainee's airway and breathing continuously. Care should also be taken not to place pressure on a detainee's chest or obstruct the airways.
>
> Prolonged restraint and struggling can result in exhaustion, reduced breathing leading to build up of toxic metabolites. This, with underlying medical conditions such as cardiac conditions, drugs use or use of certain antipsychotics, can result in sudden death with little warning. The best management is de-escalation, avoiding prone restraint, restraining for the minimum amount of time, lying the detainee on their side and constant monitoring of vital signs.
>
> Usually there are no outward signs or symptoms of positional asphyxia. An individual may be overtaken so quickly and completely that there are no indications of distress or time to communicate a need for help."

87. Next, as appears from paragraph 192 of the judgment, the recorder attached significance to paragraph 11(d) of Annex A which says this:

> "(d) The search shall be conducted with proper regard to the sensitivity and vulnerability of the detainee in the circumstances and every reasonable effort shall be made to secure the detainee's cooperation and minimise embarrassment. Detainees who are searched shall not normally be required to remove all their

> clothes at the same time, e.g. a person should be allowed to remove clothing above the waist and redress before removing further clothing, "

88. As already identified in the discussion of ground 1, the second sentence of this sub-paragraph refers to searches for concealed articles, not seizures of clothing to prevent it from being used to cause self-harm. It would be preposterous to allow the detainee to "redress" in such circumstances. The recorder's reliance on this paragraph was misplaced. He referred to the decision in *PD,* with which the Lady Chief Justice deals in her judgment, but failed to appreciate that Pitchford LJ held at [35] that paragraph 11 of Annex A only applies to seizures of clothing to avoid a risk of self-harm under s. 54(4) of PACE "as far as the context allowed". The recorder applied a part of it which the context does not allow, and misdirected himself in law. He simply said at his paragraph 172:

> "And as set out in paragraphs 35, 39 and 40, paragraph 11 of Annex A applies including what is set out in 11D."

89. Further, the recorder's key finding is wholly unclear. The first sentence of his paragraph 182 which is cited above, is repeated here for ease of reference:

> "I have held that Police Sergeant Bailey and the police officers' primary actual motivation was the belief that they were required to remove the clothing where the detainee had not answered risk assessment questions simply because that itself would suggest a risk of self-harm, although this was also combined with a fear that the claimant had threatened to attack officers already."

90. The first part of the sentence says that PS Bailey decided to remove Mr Carter's clothes "simply" because he had not answered the risk assessment questions and she was "required" to do this. Here the recorder had in mind a "force policy" which he had held to have existed elsewhere in the judgment. The last part suggests that the fear of violence from him was a relevant factor, but does not say why. The sentence therefore contradicts itself. It also seriously misrepresents the factual position. PS Bailey was not actually dealing merely with a "fear" that there had been "threats", but with a man who had just been lawfully subdued by the application of significant force and who had actually bitten an officer in the process.

91. The supportive reasoning for this conclusion is set out, it seems, at paragraphs 172 to 178 of the recorder's judgment. Paragraph 178 says:

> "178. Next I note and bear in mind the following where the claimant ended up in what was a profoundly humiliating and degrading experience without being given any warning that that would or might occur. Firstly, he refused to answer the risk assessment questions; but which I note any detainee is entirely entitled to refuse to answer - there is no legal compulsion for the claimant to say anything, let alone answer those particular questions. Secondly, this arose from circumstances where the claimant had made a movement which might in very fast moving circumstances suggest an attempt to attack or a preparatory step to attempt to attack police officers; but which were actually circumstances where, in fact as I have held, it was a mere innocent attempt to stand up and clear space, and where any reasonable observer given a real opportunity to consider the matter with time would, in my view, come to a conclusion that that was all that the claimant was seeking to do.

> Thirdly, these are circumstances where the claimant has the benefit of a presumption of innocence, although, obviously, the police officers were faced with what they had been told by the various informants."

92. This paragraph makes three points. All are without substance:

    i) First, the "right to silence" is wholly irrelevant. PS Bailey was not investigating an offence, but trying to assess Mr Carter's level of risk to himself and to process him into custody. It is true that he was under no legal compulsion to speak, but that is simply irrelevant;

    ii) The second point is falsified by the recorder's finding that the officers acted lawfully in using substantial force in response to Mr Carter's "movement";

    iii) The "presumption of innocence" is obviously and entirely irrelevant.

93. Finally, the appellate judge identified a further flaw in the recorder's judgment. It relates to PS Bailey's evidence. There was no other evidence of the police "Policy" which the recorder found to exist and which he then criticised. The appellate judge set out the transcript of what she had said on this subject at his paragraph 48 and his conclusions about that at his paragraph 49. In my judgment he was right to say that the recorder had done a significant disservice to her evidence. The recorder's own conclusions emphasise this. The decision to use force to subdue Mr Carter at the custody desk which led to the removal of his clothes was not taken only because he did not answer the risk assessment questions. It was taken because his behaviour was such that the use of force was lawful.

94. For all these reasons, I conclude that the finding of the recorder that the use of force in Cell 28 was unlawful was wrong, and so flawed that the appellate judge was right to overturn it. I agree with the appellate judge's conclusions on this issue.

95. I would dismiss this ground.

Ground 4: quantum

96. The appellate judge did not determine the appeal by the Chief Constable against the assessment of quantum on the basis that the events in Cell 28 (Phase 2) were unlawful. He said:

> "I can indicate that, had I needed to consider the quantum of damages, I would have been of the view that the learned Recorder also erred in awarding a sum of this magnitude arising out of the events of Phase 2 alone but I would prefer to leave it to the Court of Appeal to determine whether that is right and, if so, what the level of damages should have been, should they ever be seized of this matter."

97. The award of damages made by the recorder was in the sum of £23,035 under four heads of damage:

Injury to feelings	£10,000
Psychiatric injury	£ 7,125

Aggravated damages	£ 5,000
Special damages	£ 910

98. There is no challenge to the awards for aggravated and special damages. Mr Messling, junior counsel for the Chief Constable, argued this issue succinctly and with skill. He submits that the award of damages under the other two heads are simply too high, and that the making of three separate awards for connected heads of damage has resulted in this case in substantial over-compensation.

99. The assessment of damages in this case was not straightforward. As set out above, there was a single expert, Dr Jenny McGillion, a chartered psychologist. She prepared a report in 2020 in advance of the trial, and answered some Part 35 questions after the recorder had delivered his initial decision finding that the only unlawfulness was the events in Cell 28. The significant use of force by the police on Mr Carter in Phases 1 and 3 was not unlawful, and therefore an attempt had to be made to assess damages for part only of a sequence of connected events.

100. The position was complicated by Mr Carter's medical history. Although he had told Dr McGillion that he had been "right as rain" before the incidents in Southend Police Station, this was not true. His GP records show that he had sought significant help for depression and other psychiatric symptoms in the 12 months prior to the relevant night. He saw his GP far less frequently (twice) over the subsequent 12 months. At the end of that period he attended his criminal trial at which he saw the CCTV footage which he found traumatic and which, Dr McGillion said, gave rise to an adjustment disorder. This involved "mild to moderate symptoms of traumatic stress". She did not attribute any particular significance to watching the events in Cell 28, and said it was Mr Carter's feeling of having been unjustly treated in the whole incident which had caused the adjustment disorder. She referred to the events in Cell 28 as "Phase 3" and answered the following question as follows:

> "b) if the Claimant would have developed a psychiatric disorder without phase (3) having occurred, what effect did phase (3) have on the nature and extent of the psychiatric disorder that arose such as its presentation, severity, and/or prognosis?
>
> In my opinion, it was all of phases 2-4, in addition to the court case that followed and witnessing the CCTV footage that led to the development of Mr Carter's Adjustment Disorder. If phase 3 had not occurred but he had encountered these other experiences, on balance, he still would have developed traumatic stress symptoms; albeit these may have been somewhat milder. On balance however, there probably would not have been a significant difference in terms of presentation, severity or prognosis."

101. Both parties agree that the judge's approach in law to the question of causation was correct. He was required to determine whether the events in Cell 28 had made a material contribution to the adjustment disorder, and to assess general damages for that psychiatric injury having regard to the extent of that contribution and its severity. He concluded that the events in Cell 28 did make a material contribution to the psychiatric harm. That finding is challenged.

102. The level of psychiatric symptoms was not such as to justify a diagnosis of post-traumatic stress disorder. The adjustment disorder which was diagnosed is a less serious condition, and it is part of the diagnostic criteria for it that "Once the stressor or its consequences have terminated, the symptoms do not persist for more than an additional 6 months." Dr McGillion felt that the symptoms of heightened stress would resolve with treatment but probably not until the litigation has resolved.

103. The recorder referred to the fact that the humiliation involved in the stripping of Mr Carter's clothes was a factor which drove the assessment of damages for injury to feelings and the psychiatric injury, and which was also involved in the award of aggravated damages. The desirability of making separate awards for these heads of damage has been a contested area in decisions of this court, see *Choudhary v Martins* [2008] 1 WLR 617 at [18] per Smith LJ. It is certainly open to a court to do so, but care must be taken to ensure that the overall sum is appropriate and does not involve double recovery.

104. Given that the result of this appeal is that Mr Carter's claim fails, the question of quantum is academic. I do not think it is necessary or desirable to say more than that I agree with the appellate judge that the total award under the three connected heads of damage of £22,125 is far too high, given the opinion of Dr McGillion cited above. The events in Cell 28 made a material, but very small, contribution to a condition involving "mild to moderate symptoms of stress" which are expected to resolve and which would have been very similar even if the events in Cell 28 had not happened.

Dame Victoria Sharp, P:

105. I have had the advantage of reading the judgments of my Lady, the Chief Justice and my Lord in draft. I agree with both judgments.