HOUSE OF LORDS SESSION 2006–07

[2006] UKHL 55

on appeal from [2004] EWCA Civ 1639

OPINIONS

OF THE LORDS OF APPEAL

FOR JUDGMENT IN THE CAUSE

R (on the application of Laporte) (FC) (Original Appellant and Cross-respondent) *v.* Chief Constable of Gloucestershire (Original Respondent and Cross-appellant)

Appellate Committee

Lord Bingham of Cornhill
Lord Rodger of Earlsferry
Lord Carswell
Lord Brown of Eaton-under-Heywood
Lord Mance

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Interveners

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David Pannick QC, John Beggs and Amy Street (instructed by Director of Legal Services Metropolitan Police) on behalf of The Commissioner of the Police of the Metropolis
Rabinder Singh QC and Jason Coppel on behalf of Liberty

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LORD BINGHAM OF CORNHILL

My Lords,

1. This appeal by Jane Laporte and cross-appeal by the Chief Constable of Gloucestershire Constabulary (respectively "the claimant" and "the Chief Constable") raise important questions on the right of the private citizen to demonstrate against government policy and the powers of the police to curtail exercise of that right. The contentions of the claimant were supported in argument by Liberty, which was granted leave to intervene. The contentions of the Chief Constable were supported by the Chief Constable of the Thames Valley Police and the Commissioner of the Metropolitan Police, appearing as interested parties.

The facts

2. There has been no oral evidence and no cross-examination in this case, and the claimant has accepted that the Chief Constable's factual evidence must be treated as correct. There are some differences between the accounts of the parties, but the following summary is based on what is either agreed or otherwise appears to be true.

3. The claimant is a peace protester who in early 2003 was very strongly opposed to the waging of war against Iraq. She wished to protest against the policy and conduct of the United Kingdom and United States governments. It is not suggested that her conduct and intentions were at any time other than entirely peaceful.

4. The Chief Constable, as head of the Gloucestershire Constabulary, was the officer with overall responsibility for policing the demonstration with which this case is concerned. Among the officers acting subject to his overall direction and control was Chief Superintendent Lambert, a senior officer whose honesty is accepted and whose integrity and professional competence are not in doubt. Save where express reference is made to Mr Lambert, I shall use the title "Chief Constable" to cover officers of the Gloucestershire Constabulary.

5. Just outside the village of Fairford in Gloucestershire is a Royal Air Force base bearing its name. In early 2003 the base was heavily used by the United States Air Force. On 21 March, American B52 bombers began to fly from it on operational sorties against Iraq. The proposed use of RAF Fairford for hostile operations against Iraq was well known, and the base became a focus for protest against the war. A number of incidents occurred in the period December 2002-March 2003, during which holes were repeatedly made in the perimeter fence, which ran for over 13 miles, some of it through open farmland. In some places the fence was not secure. Acts of mass trespass took place. A peace camp was established. Trespassers entered a munitions storage area, damaged lights on the runway, lurked in the fuel dump area and caused extensive damage to vehicles. A person was found near the base with ingredients for a suspected incendiary device. On one occasion in February an otherwise peaceful protest was attended by a hard core activist anarchist group known as the Wombles (White Overalls Movement Building Libertarian Effective Struggles). This protest began peacefully, but led to serious disorder when the main gate of the base was forced open, and there was a major incursion into the base. During the period (and before 22 March 2003) around 50 arrests were made.

6. A protest group calling themselves Gloucestershire Weapons Inspectors, in conjunction with other anti-war groups, organised a protest demonstration to take place at RAF Fairford on Saturday 22 March 2003. Their theme was civilian weapons inspection and protesters were encouraged to dress up in symbolic white overalls. The demonstration was advertised by Gloucestershire Weapons Inspectors, CND, Bristol Stop the War Coalition, Disobedience Against War, and also the Wombles, who similarly wore white overalls. Various websites, including those of Gloucestershire Weapons Inspectors and the Wombles, advertised coaches available for transport to the base, from London and other places. The Wombles website on 11 March posted a message couched in violent terms. The claimant saw the Gloucestershire Weapons Inspectors' advert and booked a seat on one of

three coaches which, in the event, set off from London to Fairford on 22 March.

7. The Chief Constable's officers were fully alive to the demonstration planned for 22 March and began to plan for it from early in the month. They sought to enable the protest to take place peacefully and to minimise the risk of serious public disorder. They had been advised by senior military authorities that there must be no more incursions into the base, and they appreciated the vulnerability of the long and insecure perimeter fence.

8. The Chief Constable had a power and duty under section 13 of the Public Order Act 1986 (see below, para 22), if certain conditions were fulfilled, to seek an order prohibiting all processions in the Fairford area for a period, but decided after consideration not to do so. Instead, the Chief Constable established a command structure of officers to control the event. On 17 March 2003, as required by section 11 of the 1986 Act, Gloucestershire Weapons Inspectors gave the Chief Constable written notification of their proposed demonstration, procession or march. The purpose was to protest against war in Iraq and the presence of bombers at RAF Fairford. Protesters would assemble at 12.00 in Fairford High Street, Mill Lane and Park Street. At 1.0 the protesters would march along Horcott Road to the main gate of the base. A petition was to be delivered and flowers laid. The rally at the main gate would last from 1.30 – 4.0 pm. There were to be several speakers. Numbers attending were estimated at 1000 – 5000. The Chief Constable in response issued a direction under section 12 of the Act, prescribing (in accordance with the notification) the time, place of assembly and procession route, prescribing where the procession route should end and drawing attention to the criminal offence of failing to comply with the conditions laid down. The Chief Constable promulgated several thousand leaflets, provided to websites advertising the event and (in due course) protesters, describing the arrangements and warning that those who deviated from the conditions (as by leaving the prescribed route) were liable to arrest. Attention was drawn to the danger of entering military premises. There were to be designated drop-off points, policed by officers, where protesters would get out of their vehicles. The Chief Constable formulated a detailed plan

> "to control the march and protest from the initial assembly area directing march along the prescribed route as per the attached plan (highlighted) and allowi ng the protest to take place in the bell-mouth area of the gate, thereby giving

> them a point of focus. The protest will be allowed until a predetermined time when they will be encouraged to disperse. In order to ensure the protesters keep to the prescribed route, certain minor roads will be closed as per attached plan."

Protesters were to be escorted along the procession route by officers. Fencing and barriers were erected along this route and the bell-mouth area of the gate to the base was demarcated by concrete barriers and barbed wire. The Chief Constable's assessment was that the protesters on 22 March would include hard-line activists intent on violence and entry to the base. The policing operation was the largest ever undertaken by the Gloucestershire Constabulary. Police officers were mustered in large numbers, supported by anti-climbing teams, patrols on both sides of the perimeter fence, dog teams, a member of the Metropolitan Police Public Order Intelligence Unit (to recognise those known to be extreme protestors), a facial recognition team, Forward Intelligence Teams, three Police Support Units ("PSUs") and helicopters.

9. At 5.30 pm on 21 March 2003 Mr Lambert issued a statutory stop and search authorisation under section 60 of the Criminal Justice and Public Order Act 1994. It applied to an area around Fairford, including Lechlade, and was extended on the following day. At 1.35 pm on 22 March he issued an authority under section 60AA of the 1994 Act, giving power to require the removal of disguises.

10. On the morning of 22 March the claimant was one of about 120 passengers who boarded 3 "Greens of London" coaches at Euston bound for Fairford. It appears that the passengers were a diverse group of varying ages and affiliations including a legal observer and a longstanding female member of CND aged 76. The progress of the coaches was monitored, and at 10.45 am Mr Lambert made the following record in his log:

> "Based on intelligence received it is understood that 3 coaches and a van are en route from LONDON carrying items and equipment to disrupt the protest today and gain entry to the air base. The protestors are the 'Wombles'. A Section 60 is in place and I have asked for an objective to be made for [senior officers] in charge of the two PSU's on intercept duties to intercept the coaches and van to

search and identify any items that may be used. Items on the vehicles are to be seized if they are offending articles and if that is the case, the coaches and van are to be turned around and sent back towards the Metropolitan area. The Metropolitan Police will be asked to pick them up at the M25. They are not to be arrested to prevent a breach of the peace at that particular time, if that is the only offence apparent, as I do not consider there to be an imminent breach of the peace. However they are to be warned if articles are found on the coaches and they arrive at FAIRFORD then I will consider them to be here intent on causing disruption and a breach of the peace and they may find themselves arrested."

11. Some time before 12.45 pm, the 3 coaches were stopped by the police at a lay-by at Lechlade, less than 5 km by road, 2 km across the fields, from the perimeter fence. Present were Gloucestershire officers, a Metropolitan Police Forward Intelligence Team and three PSUs. There were then thought to be some 3000 people in the assembly area, although this estimate was later halved. The police searched the coaches and found some dust and face masks, 3 crash helmets, hoods, 5 hard hats, overalls, scarves, a can of red spray paint, two pairs of scissors and a safety flare. In the luggage compartment of the first coach the police found 5 polycarbonate home-made shields. All these articles were seized. In some cases the owner of the articles was identified, in others not. It appears that some at least of the passengers were not questioned about their intentions or affiliations, and there is no evidence that any were. Three passengers designated as speakers at the demonstration were allowed to proceed. One passenger was arrested for incitement to cause criminal damage during an earlier incident at Fairford. An officer of the Metropolitan Police identified and recorded the presence of 8 Wombles members.

12. The result of the search was reported to Mr Lambert, who directed at about 2.0 pm that the coaches and passengers be escorted by the police back to London. Having left the coaches during the search, the passengers eventually re-boarded the coaches, under the initial impression (it appears) that they were to proceed to Fairford. The coaches left the lay-by under police escort at 2.30 pm. Officers stood by the doors as the coaches moved off, holding them shut to prevent passengers from disembarking, as some had tried to do on learning that they were to be returned to London. The coaches were driven to the motorway, where police motorcycle outriders prevented them from stopping on the hard shoulder or turning off to motorway services, even

to allow passengers to relieve themselves. Some suffered acute physical discomfort and embarrassment as a result. Officers of the Thames Valley Police and the Metropolitan Police co-operated in this exercise but did so, as it appears, at the instance of the Chief Constable. On arrival in London at 4.55 pm, some passengers jumped out of coaches through the emergency exit and the claimant and others got off her coach when it was held up in a traffic jam.

13. Mr Lambert has explained his decision in this way:

> "My decision not to allow the coaches to proceed to Fairford to protest was based upon:
>
> (i) The history of the Wombles and Disobedience Action Groups – I was satisfied that hardcore members were on the coaches.
>
> (ii) The intelligence sources leading up to, and on the 22nd March 2003.
>
> (iii) The articles seized from passengers on the coach, and those found in communal areas abandoned …
>
> I considered that upon arrival at RAF Fairford a breach of the peace would have occurred. Therefore, had the coaches been permitted to continue to RAF Fairford the protesters on the coaches would have been arrested upon arrival at RAF Fairford, a breach of the peace then being 'imminent' …
>
> I therefore concluded that I faced a choice of either allowing the coaches to proceed and managing a Breach of the Peace at RAF Fairford, arresting the occupants of the coaches in order to prevent a Breach of the Peace, or turning the coaches around and escorting them back away from the area ...
>
> I could not discount the potential risk that some peaceful protesters were caught up in the decision not to allow coaches to proceed, but it was not possible to be certain who had brought the articles onto the coach and who were intent on direct action …"

The proceedings

14. On 20 June 2003 the claimant issued an application for judicial review, seeking to challenge the actions of the Chief Constable in (1) preventing her travelling to the demonstration in Fairford, and forcing

her to leave the area, and (2) forcibly returning her to London, keeping her on the coach and preventing her from leaving it until she had reached London. Richards J granted permission to apply, and the case came before the Queen's Bench Divisional Court (May LJ and Harrison J), which rejected her first complaint but upheld her second: [2004] EWHC 253 (Admin), [2004] 2 All ER 874.

15. In rejecting the claimant's first complaint, the Divisional Court distinguished between arrest and preventive action short of arrest (para 39). Arrest would not have been lawful at Lechlade since, as Mr Lambert recognised, no breach of the peace was then imminent. But *Moss v McLachlan* [1985] IRLR 76, discussed below, was held to support the Chief Constable's case that preventive measures falling short of detention were legitimate. Having referred to articles 10(2) and 11(2) of the European Convention on Human Rights, May LJ (with whom Harrison J agreed) continued:

> "39. It is, in my judgment, a question of fact in each case whether preventive measures of this kind are necessary in this context and thus proportionate. For them to be prescribed by law, it is necessary that the law sufficiently defines the circumstances in which the police may lawfully take preventive measures of this kind. In my view, this requirement is in substance satisfied by the judgment of Skinner J in *Moss'* case. The essential features are that a senior police officer should honestly and reasonably form the opinion that there is a real risk of a breach of the peace in close proximity both in place and time; that the possibility of a breach must be real; that the preventive measures must be reasonable; and that the imminence or immediacy of the threat to the peace determines what action is reasonable. I would add that the police are entitled to have regard to what is practical and that the number of people from whom a breach of the peace is apprehended may be relevant. The question of imminence is thus relevant to the lawfulness of preventive measures of this kind, but the degree of imminence may not be as great as that which would justify arrest.
>
> 40. In the present case, Mr Lambert reasonably and honestly believed that, if the coaches were allowed to proceed to Fairford, there would be breaches of the peace. He was in my judgment in these circumstances lawfully entitled to give instructions for preventive measures. It was his duty to do so. As in *Moss'* case, anyone seeking

> to override the preventive measures would be obstructing a police officer in the execution of his duty. But Mr Lambert himself acknowledged that the circumstances in the lay-by did not justify the arrest of the coach passengers generally.
>
> 41. The principle that the police are, in the circumstances which I have stated, entitled to take preventive measures does not entitle them to take those measures indiscriminately. But there may be circumstances in which individual discrimination among a large number of unco-operative people is impractical. In my judgment, Mr Lambert was entitled to regard the circumstances in the lay-by at Lechlade as such. For these reasons I do not consider that the police action in preventing the coaches from proceeding to Fairford was unlawful. I would reject this part of the claimant's claim."

In upholding the claimant's second claim, May LJ concluded that the claimant had been detained on the coach back to London and that such detention could not be held to be covered by article 5(1)(b) or 5(1)(c) of the Convention. He expressed his conclusion in para 47:

> "Upon this view of the law, in my judgment the claimant's enforced return on the coach to London was not lawful because (a) there was no immediately apprehended breach of the peace by her sufficient to justify even transitory detention, (b) detention on the coach for two-and-a-half hours went far beyond anything which could conceivably constitute transitory detention such as I have described, and (c) even if there had been, the circumstances and length of the detention on the coach were wholly disproportionate to the apprehended breach of the peace."

16. The Court of Appeal (Lord Woolf CJ, Clarke and Rix LJJ) upheld the Divisional Court's decision, dismissing an appeal by the Chief Constable and a cross-appeal by the claimant: [2004] EWCA Civ 1639; [2005] QB 678. It considered the claimant's cross-appeal first and concluded (paras 44-46):

> "44. On this aspect of the case, we would adopt a very similar approach to that of May LJ. We agree with him that it is necessary to distinguish between arrest and

> preventive action short of arrest, including temporary detention. We regard what is sufficiently 'imminent' to justify taking action to prevent a breach of the peace as dependent on all the circumstances. As in *Moss's* case, so here, it is important that the claimant was intending to travel in a vehicle if the preventive action had not taken place. The distance involved did not mean that there was no sufficient imminence. What preventive action was necessary and proportionate, however, would be very much influenced by how close in proximity, both in place and time, the location of the apprehended breach of the peace was. The greater the distance and the greater the time involved, the more important it is to decide whether preventive action is really necessary and, if it is necessary, the more restrained the action taken should usually be as there will be time for further action if the action initially taken does not deter. It may be that as the police thought, arrest at the lay-by would have been a disproportionate level of action, but this does not necessarily mean that no action was appropriate.
>
> 45. We would see the instant case as being very much on all fours with the decision in *Moss's* case which we would endorse. If the police had done no more than direct the passengers to reboard the coach and instructed the driver not to proceed to Fairford, this would have been an appropriate response that was both necessary and proportionate. We will deal with the additional action that the police would have been entitled to take when considering the appeal as opposed to the cross-appeal.
>
> 46. Like May LJ, we would regard the 'real risk' or 'close proximity' test and the 'imminence' test as not being in conflict. Action should not be taken until it is necessary and reasonable to take the action on the facts of the particular circumstances. In the present case, on the evidence before us, the alternatives were either taking the preventive action at the lay-by or waiting until the coaches had arrived at Fairford, the site at which the disturbance was feared. To have delayed taking action until the coach passengers reached the air base could have provoked the very disturbance which the preventive action was intended to avoid."

The court accepted (para 48) that in some situations a breach of the peace could only be prevented if action were taken which would risk affecting wholly innocent individuals. As to the Chief Constable's

appeal, the court considered (para 52) that the passengers were "virtually prisoners" on the returning coaches, that (para 53) the action taken went well beyond anything held to be justified by the existing common law authorities and that (paras 54-55) it was not shown that there were no less intrusive measures that could have been taken. The court did not think it necessary to address article 5 of the Convention.

17. The claimant now appeals, by leave of the House, against the Court of Appeal's rejection of her first complaint and the Chief Constable cross-appeals against its acceptance of her second.

The statutory powers of the police to control public processions and assemblies

18. The Public Order Act 1936 was enacted to give new powers to the police to control public processions and assemblies. It was a response to the violence instigated and provoked by the British Union of Fascists. Thus the Act proscribed (section 1) the wearing of uniforms associated with political organisations and (section 2) the formation of paramilitary organisations. Section 3 empowered a chief officer of police, if he had reasonable grounds for apprehending that a public procession might occasion serious public disorder, to give directions to those organising or taking part in the procession, imposing such conditions as appeared to him necessary for the preservation of public order. Such conditions could prescribe the route to be followed, specify public places not to be entered, and restrict the display of flags, banners and emblems. He was also obliged by section 3(2), outside London (where different rules applied), if of opinion that imposing conditions would not be sufficient to enable him to prevent serious public disorder being occasioned in any particular place, to apply to the local council for an order prohibiting all public processions in that place for a period not exceeding three months. With the consent of the Secretary of State, the council could make such an order. Knowing failure to comply with a direction or condition under the section, or organisation of a prohibited procession, was a criminal offence punishable by imprisonment. Additional offences were also created, punishable by imprisonment: having an offensive weapon at a public meeting or procession without lawful authority (section 4); and using threatening, abusive or insulting words or behaviour in a public place or at a public meeting with intent to provoke a breach of the peace or whereby a breach of the peace was likely to be occasioned (section 5). An additional offence was created under the Public Meeting Act 1908. A constable might arrest without

warrant anyone reasonably suspected by him of committing an offence under sections 1, 4 and 5 of the Act (section 7(3)).

19. The 1970s and 1980s witnessed serious and disturbing outbreaks of public disorder, notable among them the disorder in Red Lion Square in 1974, the Brixton riots of 1981 and the miners' strike of 1984-1985. These prompted a major re-examination of public order law by the Law Commission, the House of Commons Home Affairs Select Committee and the Home Office: see David Feldman, *Civil Liberties and Human Rights in England and Wales*, 2nd ed, 2002, chapter 18, "Protest and Public Order", pp 1038-1039. The outcome of this review was the Public Order Act 1986.

20. The 1986 Act created new statutory offences of riot (section 1), violent disorder (section 2), affray (section 3), causing fear or provocation of violence (section 4) and causing harassment, alarm or distress (section 5). The Act has since been amended.

21. Part II of the 1986 Act revised the 1936 provisions governing the control by the police of public processions and assemblies. In section 11 it requires advance notice to be given to the police, within a specified period and with certain specified particulars, of any proposal to hold a public procession intended (broadly) to publicise a cause or demonstrate support for or opposition to a cause or action. Subject to statutory defences, it is an offence to hold a procession without giving notice or adhering to the notified plan. But by virtue of section 12(1) the chief officer of police or (as the case may be) the senior police officer may, as under the 1936 Act, give directions imposing conditions on those organising or taking part in the procession if he reasonably believes that

> "(a) it may result in serious public disorder, serious damage to property or serious disruption to the life of the community, or
>
> (b) the purpose of the persons organising it is the intimidation of others with a view to compelling them not to do an act they have a right to do, or to do an act they have a right not to do."

Such directions which must be in writing may be given by the chief officer of police in relation to a procession which is intended to be held but has not yet begun to assemble, and by the senior police officer

present at the scene (not necessarily in writing) in relation to a procession which is being held or where people are assembling with a view to taking part in an intended procession. Non-compliance with directions, subject to statutory defences, is a criminal offence. In the present case, as recorded above, Gloucestershire Weapons Inspectors gave due notice under section 11, and the directions given by the Chief Constable substantially embodied the proposal they put forward. It has not been suggested that any further directions were given under section 12.

22. Section 13 of the 1986 Act replaces section 3(2) of the 1936 Act. It provides in (1):

> "If at any time the chief officer of police reasonably believes that, because of particular circumstances existing in any district or part of a district, the powers under section 12 will not be sufficient to prevent the holding of public processions in that district or part from resulting in serious public disorder, he shall apply to the council of the district for an order prohibiting for such period not exceeding 3 months as may be specified in the application the holding of all public processions (or of any class of public procession so specified) in the district or part concerned."

Again the council may make such an order with the consent of the Secretary of State. Again, different provisions apply to London. Again, non-compliance is a criminal offence.

23. Section 14 of the 1986 Act enables the chief officer of police or the senior police officer to impose conditions on the holding of any public assembly if, *mutatis mutandis*, he reasonably believes either of the matters in section 12(1) above. The remainder of section 14 follows section 12. But the Act contains no power, comparable with section 13, to prohibit the holding of a public assembly not involving a trespass.

24. Section 60 of the Criminal Justice and Public Order Act 1994, as amended, provides:

> "(1) If a police officer of or above the rank of inspector reasonably believes—
>
> (a) that incidents involving serious violence may take place in any locality in his police area, and that it is expedient to give an authorisation under this section to prevent their occurrence, or
>
> (b) that persons are carrying dangerous instruments or offensive weapons in any locality in his police area without good reason,
>
> he may give an authorisation that the powers conferred by this section are to be exercisable at any place within that locality for a specified period not exceeding 24 hours."

A more senior officer may extend that period for a further period of 24 hours. "Dangerous instruments" means instruments with a blade or a sharp point. "Offensive weapon" has the meaning defined in section 1(9) of the Police and Criminal Evidence Act 1984. Where, as in this case, an authorisation is given under this section, a constable in uniform may stop and search any pedestrian or anything carried by the pedestrian, and may stop any vehicle and search the vehicle, its driver and any passenger, in each case for offensive weapons or dangerous instruments.

25. Section 60 of the 1994 Act is reinforced by section 60AA of that Act, which provides for a supplementary authorisation to be given where a police officer of or above the rank of inspector reasonably believes that activities may take place in his area which are likely (if they take place) to involve the commission of offences and that it is expedient to give an authorisation under the section to prevent or control such activities. When, as in this case, an authorisation is given under the section, a constable in uniform may require any person to remove any item which the constable reasonably believes that the person is wearing wholly or mainly to conceal his identity and may seize any item which the constable reasonably believes any person intends to wear wholly or mainly for that purpose.

26. Since 1986, as Professor Feldman points out (*ibid*., p 1039), successive governments have introduced legislation to create new public order offences and to extend the powers of the police, local authorities and courts to regulate access to and behaviour in public places. But neither during the consideration which preceded the 1986 Act, nor since,

has any review been undertaken of powers to prevent a breach of the peace. Those powers depend on the common law, which must now be examined.

Breach of the peace

27. The legal concept of a breach of the peace, although much used, was for many years understood as a term of broad but somewhat indeterminate meaning. In *R v Howell (Errol)* [1982] QB 416 the Court of Appeal heard detailed argument on the meaning of the expression, an issue raised by the facts of the case. The court concluded that the essence of the concept was to be found in violence or threatened violence. It ruled (at p 427):

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

28. In *Steel and Others v United Kingdom* (1998) 28 EHRR 603, the five applicants had all been arrested for breach of the peace and contended, as one of the grounds of their applications to the authorities in Strasbourg, that breach of the peace was too ill-defined a concept to meet the requirement that the ground of their arrest be "prescribed by law" within the meaning of article 10(2) of the European Convention. This complaint was successfully repelled by the British Government. The Commission (pp 627-628, paras 146-148) considered that the concept had been defined by the passage in *R v Howell* quoted above. The court, also citing that passage (p 610, para 25), considered that the concept had been clarified by the English courts over the past two decades, and now had a meaning which was sufficiently established (p 637, para 55). The accuracy of this definition has been generally accepted, and was not in issue before the House. A breach of the peace is not, as such, a criminal offence, but founds an application to bind over.

The common law power to prevent a future breach of the peace

29. Every constable, and also every citizen, enjoys the power and is subject to a duty to seek to prevent, by arrest or other action short of arrest, any breach of the peace occurring in his presence, or any breach of the peace which (having occurred) is likely to be renewed, or any breach of the peace which is about to occur. This appeal is only concerned with the third of these situations.

30. The leading authority, from which the House has not been invited to depart and which therefore binds it and all lower courts in England and Wales, is *Albert v Lavin* [1982] AC 546. But that case, decided in December 1981, reflected the trend of existing authority. Thus in *Humphries v Connor* (1864) 17 ICLR 1, 8-9, Fitzgerald J, although doubtful about the outcome of the case, accurately summarised a constable's duty:

> "With respect to a constable, I agree that his primary duty is to preserve the peace; and he may for that purpose interfere, and, in the case of an affray, arrest the wrongdoer; or, if a breach of the peace is imminent, may, if necessary, arrest those who are about to commit it, if it cannot otherwise be prevented."

(This case is one of a number where the conduct restrained is not in itself disorderly but is likely to provoke disorder by others. Such cases are not directly relevant to the present case.) Professor Glanville Williams ("Arrest for Breach of the Peace" [1954] Crim LR 578, 586) observed:

> "It seems clear that there may be an arrest for breach of the peace which is reasonably apprehended in the immediate future, even though the person arrested has not yet committed any breach."

In a summary of *King v Hodges* [1974] Crim LR 424, 425, the police officer's powers were said to be exercisable when he reasonably believed that a breach of the peace was about to take place, and reference was made in the commentary to the existence of numerous

examples of actions other than arrest to prevent a breach of the peace. In his Divisional Court judgment in *Albert v Lavin*, above, Hodgson J (at p 553) ruled:

> "It is however clear law that a police officer, reasonably believing that a breach of the peace is about to take place, is entitled to take such steps as are necessary to prevent it, including the reasonable use of force: *King v Hodges* [1974] Crim LR 424 and *Piddington v Bates* [1961] 1 WLR 162. If those steps include physical restraint of someone then that restraint is not an unlawful detention but a reasonable use of force. It is a question of fact and degree when a restraint has continued for so long that there must be either a release or an arrest, but on the facts found in this case it seems to me to be clear that that point had not been reached. Obviously where a constable is restraining someone to prevent a breach of the peace he must release (or arrest) him as soon as the restrained person no longer presents a danger to the peace. In this case the justices found that the defendant continued in breach of the peace up to the time when he assaulted the constable."

This judgment was given before, and was cited to the court although not referred to in the judgment in, *R v Howell*, above. In that case it was recognised (p 426) that a constable, or an ordinary citizen, has a power of arrest where there is reasonable apprehension of imminent danger of a breach of the peace:

> "We hold that there is power of arrest for breach of the peace where: (1) a breach of the peace is committed in the presence of the person making the arrest or (2) the arrestor reasonably believes that such a breach will be committed in the immediate future by the person arrested although he has not yet committed any breach or (3) … "

31. In *Albert v Lavin*, above, both the defendant (Mr Albert) and the prosecutor (Mr Lavin, a constable who was at the time off duty and in plain clothes) were waiting for a bus. When the bus arrived, the defendant pushed past a number of people ahead of him in the queue, who not surprisingly objected, and the constable tried to obstruct his entry to the bus by standing in his way. The defendant pushed past onto

the step of the bus, turned, grabbed the constable's lapel and made to hit him. The constable, to protect himself, pulled the defendant from the bus and away from the queue. The defendant again tried to hit the constable, who said he would arrest him unless he stopped struggling, but he struck the constable several times and the constable arrested him for assaulting a constable in the execution of his duty. Before the justices, the defendant contended that the constable had not been acting in the execution of his duty. In convicting the defendant (whom they conditionally discharged) the justices found (pp 549, 551) that because of the reactions of the other members of the queue when the defendant pushed past them the constable had reasonably expected a breach of the peace to be about to take place and so he had been entitled to use reasonable force to prevent the breach of the peace. Much of the judgment of Hodgson J in the Divisional Court relied on a supposed principle that only a constable could detain a man against his will without arresting him, and addressed the question whether the defendant knew or should have known that Mr Lavin was a constable. This, as Lord Diplock pointed out at p 565, with the agreement of all other members of the House, was a question that did not arise, since the true principle was

> "that every citizen in whose presence a breach of the peace is being, or reasonably appears to be about to be, committed has the right to take reasonable steps to make the person who is breaking or threatening to break the peace refrain from doing so; and those reasonable steps in appropriate cases will include detaining him against his will. At common law this is not only the right of every citizen, it is also his duty, although, except in the case of a citizen who is a constable, it is a duty of imperfect obligation."

32. It is uncertain whether the Divisional Court was referred to *Albert v Lavin* in *Moss v McLachlan* [1985] IRLR 76, an authority on which the Chief Constable strongly relied and which is discussed in more detail below. But the court in *Moss* was referred to *R v Howell*, above, and cited the ruling that "there is power of arrest for breach of the peace where … (2) the arrestor reasonably believes that such a breach will be committed in the immediate future by the person arrested although he has not yet committed any breach …"

33. In *Foulkes v Chief Constable of the Merseyside Police* [1998] 3 All ER 705 the plaintiff, a husband, father and joint owner of the

matrimonial home, was locked out of it at 9.0 o'clock in the morning following a family argument which began the night before and was resumed in the morning. He wished to re-enter the house, and summoned the police to assist him, but they discouraged him from seeking to re-enter and in the end arrested him, fearing that his actions outside the property would cause a breach of the peace. His claim for wrongful arrest and false imprisonment failed in the county court but succeeded on appeal. Beldam LJ, giving the leading judgment in the Court of Appeal, cited Lord Diplock's ruling in *Albert v Lavin* and continued (at p 711):

> "In my view, the words used by Lord Diplock and in the other authorities show that where no breach of the peace has taken place in his presence but a constable exercises his power of arrest because he fears a [future] breach, such apprehended breach must be about to occur or be imminent. In the present case PC McNamara acted with the best of intentions. He had tried persuasion but the plaintiff refused to be persuaded or to accept the sensible guidance he had been given but in my judgment that was not a sufficient basis to conclude that a breach of the peace was about to occur or was imminent. There must, I consider, be a sufficiently real and present threat to the peace to justify the extreme step of depriving of his liberty a citizen who is not at the time acting unlawfully. The factors identified by the recorder in the present case do not in my judgment measure up to a sufficiently serious or imminent threat to the peace to justify arrest."

The case raised no issue about the lawfulness of coercive action other than arrest. In *Redmond-Bate v Director of Public Prosecutions* (1999) 163 JP 789, 791, the agreed issue was whether it was reasonable for a constable, in the light of what he perceived, to believe that the appellant, a female lay preacher, was "about to cause" a breach of the peace, a test equated with imminence. In other cases, of which *Williamson v Chief Constable of the West Midlands Police* [2003] EWCA Civ 337, [2004] 1 WLR 14, para 19, is an example, Lord Diplock's ruling in *Albert v Lavin* has been cited and applied.

Freedom of expression and assembly

34. The approach of the English common law to freedom of expression and assembly was hesitant and negative, permitting that which was not prohibited. Thus although Dicey in *An Introduction to the Study of the Law of the Constitution*, 10th ed (1959), in Part II on the "Rule of Law", included chapters VI and VII entitled "The Right to Freedom of Discussion" and "The Right of Public Meeting", he wrote of the first (at pp 239-240) that "At no time has there in England been any proclamation of the right to liberty of thought or to freedom of speech" and of the second (at p 271) that "it can hardly be said that our constitution knows of such a thing as any specific right of public meeting". Lord Hewart CJ reflected the then current orthodoxy when he observed in *Duncan v Jones* [1936] 1 KB 218, 222, that "English law does not recognize any special right of public meeting for political or other purposes". The Human Rights Act 1998, giving domestic effect to articles 10 and 11 of the European Convention, represented what Sedley LJ in *Redmond-Bate v Director of Public Prosecutions* (1999) 163 JP 789, 795, aptly called a "constitutional shift".

35. Article 10 confers a right to freedom of expression and article 11 to freedom of peaceful assembly. Neither right is absolute. The exercise of these rights may be restricted if the restriction is prescribed by law, necessary in a democratic society and directed to any one of a number of specified ends.

36. The Strasbourg court has recognised that exercise of the right to freedom of assembly and exercise of the right to free expression are often, in practice, closely associated: see, for example, *Ezelin v France* (1991) 14 EHRR 362, paras 37, 51; *Djavit An v Turkey* (2003) Reports of Judgments and Decisions, 2003-III, p 233, para 39; *Christian Democratic People's Party v Moldova* (App no 28793/02, 14 May 2006, unreported) para 62; *Öllinger v Austria* (App no 76900/01, 29 June 2006, unreported), para 38. The fundamental importance of these rights has been stressed. Thus in *Steel and Others v United Kingdom* (1998) 28 EHRR 603, para 101, freedom of expression was said to constitute

> "an essential foundation of democratic society and one of the basic conditions for its progress and for each individual's self-fulfilment."

In *Ezelin v France*, above, para 53, the court considered

> "that the freedom to take part in a peaceful assembly – in this instance a demonstration that had not been prohibited – is of such importance that it cannot be restricted in any way, even for an *avocat*, so long as the person concerned does not himself commit any reprehensible act on such an occasion."

In *Ziliberberg v Moldova* (App no 61821/00, 4 May 2004, unreported), para 2, the court observed at the outset that

> "the right to freedom of assembly is a fundamental right in a democratic society and, like the right to freedom of expression, is one of the foundations of such a society."

It is the duty of member states to take reasonable and appropriate measures to enable lawful demonstrations to proceed peacefully: *Plattform "Ärzte für das Leben" v Austria* (1988) 13 EHRR 204, para 34; *Steel and Others v United Kingdom* (1998) 28 EHRR 603, 632, para 170 (Commission).

37. Thus the protection of the articles may be denied if the demonstration is unauthorised and unlawful (as in *Ziliberberg*, above) or if conduct is such as actually to disturb public order (as in *Chorherr v Austria* (1993) 17 EHRR 358). But (*Ziliberberg*, above, para 2)

> "an individual does not cease to enjoy the right to peaceful assembly as a result of sporadic violence or other punishable acts committed by others in the course of the demonstration, if the individual in question remains peaceful in his or her own intentions or behaviour."

Any prior restraint on freedom of expression calls for the most careful scrutiny (*The Sunday Times v United Kingdom (No 2)* (1991) 14 EHRR 229, para 51; *Hashman and Harrup v United Kingdom* (1999) 30 EHRR 241, para 32). The Strasbourg court will wish to be satisfied not merely that a state exercised its discretion reasonably, carefully and in good faith, but also that it applied standards in conformity with

Convention standards and based its decisions on an acceptable assessment of the relevant facts (*Christian Democratic People's Party v Moldova*, above, para 70).

The appeal: the argument

38. Reduced to essentials, the argument of Mr Emmerson QC for the claimant rested on four propositions:

> (1) Subject to articles 10(2) and 11(2) of the European Convention, the claimant had a right to attend the lawful assembly at RAF Fairford in order to express her strong opposition to the war against Iraq.
>
> (2) The conduct of the Chief Constable, through Mr Lambert, in stopping the coach on which the claimant was travelling at Lechlade and not allowing it to continue its intended journey to Fairford, was an interference by a public authority with the claimant's exercise of her rights under articles 10 and 11.
>
> (3) The burden of justifying an interference with the exercise of a Convention right such as those protected by articles 10 and 11 lies on the public authority which has interfered with such exercise, in this case the Chief Constable.
>
> (4) The interference by the Chief Constable in this case was for a legitimate purpose but (a) was not prescribed by law, because not warranted under domestic law, and (b) was not necessary in a democratic society, because it was (i) premature and (ii) indiscriminate and was accordingly disproportionate.

Mr Freeland QC, for the Chief Constable, did not contest the correctness of propositions (1), (2) and (3), and it was common ground that the Chief Constable acted in the interests of national security, for the prevention of disorder or crime or for the protection of the rights of others, these being legitimate purposes under articles 10(2) and 11(2). The remainder of what I have called proposition (4) was, however, strongly contested between the parties.

39. Mr Emmerson argued that the Chief Constable's interference was not prescribed by law because not warranted by domestic legal

authority. According to that authority there is a power and duty resting on constable and private citizen alike to prevent a breach of the peace which reasonably appears to be about to be committed. That is the test laid down in *Albert v Lavin*, which means what it says. It refers to an event which is imminent, on the point of happening. The test is the same whether the intervention is by arrest or (as in *Humphries v Connor*, *King v Hodges* and *Albert v Lavin* itself) by action short of arrest. There is nothing in domestic authority to support the proposition that action short of arrest may be taken when a breach of the peace is not so imminent as would be necessary to justify an arrest. Here, Mr Lambert did not think a breach of the peace was so imminent as to justify an arrest. He recorded that judgment at 10.45 am. There is no evidence to suggest that his judgment ever altered. It was, in any event, plainly correct. It did not and could not appear that a breach of the peace was about to be committed at Lechlade. The conduct of Mr Lambert was not governed by some general test of reasonableness but by the *Albert v Lavin* test of whether it reasonably appeared that a breach of the peace was about to be committed. By that standard Mr Lambert's conduct, however well-intentioned, was unlawful in domestic law. If he was entitled to intercept the coaches (otherwise than to search them) at Lechlade, he was duty-bound to do so. If he was duty-bound to do so, private citizens were similarly bound to do so. But it would be extravagant to suggest that a private citizen who failed to intercept the coaches at Lechlade would be acting in breach of his duty, and such a power and duty could not be accommodated within the carefully-balanced regulatory scheme established by Parliament.

40. Mr Freeland took issue with this argument. The true principle of domestic law is, he submitted, that the police may and must do whatever they reasonably judge to be reasonable to prevent a breach of the peace. The only legal restriction on what steps may be taken by the police is one of reasonableness. There is no absolute requirement of imminence before the power to take reasonable steps arises, although questions of imminence will be relevant to what is reasonable. A breach of the peace need not be apprehended to take place in the immediate future for the power and duty to prevent it to arise. Mr Lambert's action was judged by the courts below to be reasonable, and it therefore met the standard prescribed by domestic law. A similar test of reasonableness, he suggested, was to be read into section 24 of the Police and Criminal Evidence Act 1984.

41. Mr Freeland drew attention to *Minto v Police* [1987] 1 NZLR 374, 377, where Cooke P, citing and endorsing Lord Diplock's ruling in *Albert v Lavin*, observed that immediacy is in part a question of degree

and is highly relevant to the reasonableness of the action taken. Mr Freeland also relied, among other authorities, on *Piddington v Bates* [1961] 1 WLR 162. A printers' strike was in progress, and a printing works with two entrances was picketed. A police officer decided that there should be no more than two pickets at each entrance. The defendant wished to join the two pickets at the rear entrance. The officer said two pickets were enough. The defendant pushed gently past and the officer gently arrested him, and charged him with obstructing a constable in the execution of his duty. There was no disorder, and no violence was threatened or offered by any of the pickets or other persons present. The defendant's appeal by case stated was dismissed by the Divisional Court for reasons given, without any discussion of authority, in a brief extempore judgment of Lord Parker CJ. He concluded that the officer had reasonable grounds for anticipating that a breach of the peace was a real not a remote possibility. A police officer charged with the duty of preserving the peace must be left to take such steps as on the evidence before him he thinks are proper.

42. Mr Freeland relied, more strongly, on *Moss v McLachlan* [1985] IRLR 76. The factual background to this case was the violent conflict in the Nottinghamshire coalfields between striking miners who were members of the National Union of Mine Workers, and working miners, many of them members of the Union of Democratic Mine Workers. The latter were determined to continue working, the former equally determined to stop them. The police struggled to keep the peace. There had been some ugly clashes. The appellants were four of about sixty striking miners intent on a mass demonstration at one of several nearby collieries. They were stopped by the police when less than five minutes' journey from the nearest pit, where the police feared a violent episode. The men tried to push on and were arrested. *Albert v Lavin*, if cited, was not referred to in the judgment of the court given by Skinner J, but he accepted (para 20) a test of "close proximity both in place and time" and a breach of the peace was held to be "imminent and immediate". The court cited with approval the observation of Lord Parker CJ in *Piddington v Bates* that the police must anticipate a real, not a remote, possibility of breach, preferring that test, if different, to the "immediate future test" put forward in *R v Howell* [1982] QB 416, 426.

43. Mr Emmerson advanced a further, but linked, reason why Mr Lambert's interference with the claimant's right to demonstrate, by preventing her going beyond Lechlade, was not prescribed by law. It was that domestic law only permitted action to prevent a breach of the peace "by the person arrested" (*R v Howell*, above, p 426) or against "the person who is … threatening to break the peace" (*Albert v Lavin*,

above, per Lord Diplock, p 565). Even if, contrary to his submission, some of those on board the coaches reasonably appeared to be about to breach the peace, there was no reasonable ground to infer that all of them were, or that the claimant was. Mr Freeland answered this "causal nexus" submission by relying on the general test of reasonableness already summarised, and by pointing to the impracticability of differentiating, at Lechlade, between those (if any) who were and those who were not about to breach the peace.

44. Mr Freeland submitted that Mr Lambert could have relied (although he did not) on section 3(1) of the Criminal Law Act 1967, which provides that

> "A person may use such force as is reasonable in the circumstances in the prevention of crime … "

This section provides a ground of justification where force has been used. But it has no application here, since during the period which is the subject of the claimant's appeal Mr Lambert used no force, and his avowed object in acting as he did was to avert a breach of the peace, which (as already pointed out) is not in domestic law a crime.

45. I am persuaded, for very much the reasons advanced by Mr Emmerson (paras 39 and 43 above), that the Chief Constable's interference with the claimant's right to demonstrate at a lawful assembly at RAF Fairford was not prescribed by law. I attach weight to certain considerations in particular.

46. First, in the 1986 Act Parliament conferred carefully defined powers and imposed carefully defined duties on chief officers of police and the senior police officer. Offences were created and defences provided. Parliament plainly appreciated the need for appropriate police powers to control disorderly demonstrations but was also sensitive to the democratic values inherent in recognition of a right to demonstrate. It would, I think, be surprising if, alongside these closely defined powers and duties, there existed a common law power and duty, exercisable and imposed not only by and on any constable but by and on every member of the public, bounded only by an uncertain and undefined condition of reasonableness.

47. Secondly, and subject to the possible exception of *Piddington v Bates*, above, I find little trace of a broad reasonableness test in any of the authorities. It is not a test prescribed by the law as it stands. I respectfully regard *Piddington v Bates* as an aberrant decision: the judgment showed no recognition that the police, in this context, enjoyed no powers not enjoyed by the private citizen, and the test applied was inconsistent both with earlier authority and that later laid down authoritatively in *Albert v Lavin*. It is not enough to justify action that a breach of the peace is anticipated to be a real possibility, and neither constables nor private citizens are empowered or bound to take such steps as on the evidence before them they think proper.

48. Thirdly, I cannot accept that a general test of reasonableness is to be read into section 24 of the Police and Criminal Evidence Act 1984. At the relevant time, section 24(7) of the Act provided:

> "A constable may arrest without a warrant—
>
> (a) anyone who is about to commit an arrestable offence;
>
> (b) anyone whom he has reasonable grounds for suspecting to be about to commit an arrestable offence."

This propounds a simple and readily intelligible test, however difficult the judgment for which it will on occasion call. It plainly reflects the common law rule where a breach of the peace is apprehended. Had Parliament intended to confer a power of anticipatory arrest whenever it was reasonable to make an arrest, it would have laid down that rule. As it is, there is no ground for glossing the statute.

49. I would observe, fourthly, that *Albert v Lavin* laid down a simple and workable test readily applicable to constable and private citizen alike. It recognises the power and duty to act in an emergency to prevent something which is about to happen. There is very unlikely to be doubt about who to take action against, since this will be apparent to the senses of the intervener. Thus the difficulty which confronted the police at Lechlade can scarcely arise.

50. Fifthly, and despite the significance attached to this distinction by the courts below, I find little support in the authorities for the proposition that action short of arrest may be taken to prevent a breach

of the peace which is not sufficiently imminent to justify arrest. As I read the authorities they assimilate the two situations, while of course recognising the desirability of taking action no more intrusive than is reasonably necessary to prevent the apprehended breach of the peace. Mr Lambert did not, quite correctly in my opinion, consider that the claimant could properly be arrested at Lechlade. It followed that he could not lawfully take action short of arrest either.

51. Sixthly, I would respectfully differ from the Court of Appeal's conclusion (para 45 of the judgment) that the present case is "very much on all fours with the decision in [*Moss v McLachlan*, above]". With four members of one belligerent faction within less than five minutes of confronting another belligerent faction, and no designated, police-controlled, assembly point separated from the scene of apprehended disorder, as in the centre of Fairford, it could plausibly be held in *Moss* that a breach of the peace was about to be committed by those whose onward progress the police decided to block. *Albert v Lavin* was not expressly relied on, but a very similar test was applied (although reliance was also placed on what I have described as the aberrant decision in *Piddington v Bates*). The court's judgment was one which, as my noble and learned friend Lord Brown of Eaton-under-Heywood suggests, carried the notion of imminence to extreme limits, but was, I think, open to it. It was a situation very different from the present when 120 passengers, by no means all of whom were or were thought to be Wombles members, were prevented from proceeding to an assembly point which was some distance away from the scene of a lawful demonstration.

52. I would add, lastly, that if (on which I express no opinion) the public interest requires that the power of the police to control demonstrations of this kind should be extended, any such extension should in my opinion be effected by legislative enactment and not judicial decision. As the Strasbourg authorities referred to in paras 35 to 37 above make clear, article 10 and 11 rights are fundamental rights, to be protected as such. Any prior restraint on their exercise must be scrutinised with particular care. The Convention test of necessity does not require that a restriction be indispensable, but nor is it enough that it be useful, reasonable or desirable: *Handyside v United Kingdom* (1976) 1 EHRR 737, para 48; *Silver v United Kingdom* (1983) 5 EHRR 347, para 97. Assessment of whether a new restriction meets the exacting Convention test of necessity calls in the first instance for the wide consultation and inquiry and democratic consideration which should characterise the legislative process, not the more narrowly focused

process of judicial decision. This is not a field in which judicial development of the law is at all appropriate.

53. In contending that the police action at Lechlade failed the Convention test of proportionality because it was premature and indiscriminate, Mr Emmerson relied on many of the matters already referred to. The action was premature because there was no hint of disorder at Lechlade and no reason to apprehend an immediate outburst of disorder by the claimant and her fellow passengers when they left their coaches at the designated drop-off points in Fairford and gathered in the designated assembly area before processing to the base. Because the action was premature it was necessarily indiscriminate because the police could not at that stage identify those (if any) of the passengers who appeared to be about to commit a breach of the peace. By taking action when no breach of the peace was in the offing, the police were obliged to take action against the sheep as well as the goats.

54. Mr Freeland resisted this contention also. He relied on Mr Lambert's belief, held by the courts below to be reasonable, that there would be disorder once the coaches reached Fairford. Given the intelligence known to the police about the Wombles, the items found on the coaches and the unwillingness of the passengers to acknowledge ownership of these items or (in many cases) give their names, Mr Lambert was entitled to find that the 120 passengers had a collective intent to cause a breach of the peace. These considerations justified him in acting when and as he did. Reliance was placed on *Cumming v Chief Constable of Northumbria Police* [2003] EWCA Civ 1844 (17 December 2003, unreported).

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

focus of any disorder was expected to be in the bell-mouth area outside the base, and the police could arrest trouble-makers then and there. Mr Lambert was quite wrong to suppose, as he apparently did (see para 13 above) that there was any question of the coaches proceeding to RAF Fairford. Limited weight can in my opinion be given to one consideration on which Mr Freeland relied, the logistical problems inherent in making multiple arrests, since the Chief Constable, by deciding not to seek an order under section 13 of the 1986 Act, had judged the demonstration to be controllable. There was no reason (other than her refusal to give her name, which however irritating to the police was entirely lawful) to view the claimant as other than a committed, peaceful demonstrator. It was wholly disproportionate to restrict her exercise of her rights under articles 10 and 11 because she was in the company of others some of whom might, at some time in the future, breach the peace. *Cumming*, above, does not justify such restriction. In that case, it was thought that a crime had been committed. The number of possible culprits had been reduced so far as was possible, leaving a pool of six suspects who could have committed the crime. All of these were arrested on suspicion of committing it, although only one of them might have done so. They challenged the lawfulness of their arrest and detention. The challenge failed because, as the Court of Appeal held (para 41), affirming the judge below, each of the six was reasonably suspected of having committed the crime, although this conclusion gravely concerned one member of the court (para 46). There is, I think, no useful analogy with the present case, where no crime had been committed and the claimant was not suspected of having personally committed or of being about to commit any crime, or any breach of the peace.

56. I would accordingly allow the claimant's appeal, set aside the orders of the Court of Appeal and the Divisional Court dismissing the claimant's first complaint, and grant the claimant a declaration that the Chief Constable's actions which are the subject of her first complaint were unlawful because they were not prescribed by law and were disproportionate. I would remit any ancillary claim for relief to the Divisional Court.

57. The Chief Constable accepted that his cross-appeal must fail if the claimant's appeal were to succeed. I would accordingly uphold the Court of Appeal's decision on this matter, and dismiss the cross-appeal on the grounds given by that court. I do not think it useful to explore the cross-appeal further.

58. I would invite the claimant and the Chief Constable to make written submissions on costs within 14 days.

LORD RODGER OF EARLSFERRY

My Lords,

59. I gratefully adopt the account of the facts given by my noble and learned friend, Lord Bingham of Cornhill.

60. When Chief Superintendent Lambert gave the order to stop the three coaches and all but three of their 120 passengers from going on from Lechlade to Fairford, he purported to exercise a common law power to prevent a breach of the peace at Fairford. For my part, I am satisfied that, in the light of the experience of previous events and of the available intelligence and other information, Mr Lambert believed that, if the coaches and their occupants were allowed to reach Fairford, then, despite all the arrangements which had been made to contain the demonstrators, there would be an outbreak of violence. This would constitute a breach of the peace within the definition in *R v Howell (Errol)* [1982] QB 416, 427. In these circumstances, was Mr Lambert entitled to prevent that anticipated breach of the peace by stopping the coaches and the passengers from going beyond Lechlade? The claimant says that, for three reasons, he was not. First, because no breach of the peace was imminent and, secondly, because there was no causal nexus between the peaceful protesters, such as the claimant, and any prospective breach of the peace. In any event, she says, finally, the ban on the coaches and all their passengers from going further constituted a disproportionate restriction on her rights to freedom of expression and freedom of assembly under articles 10 and 11 of the European Convention on Human Rights and Fundamental Freedoms.

61. In giving instructions for the coaches to be stopped from going on to Fairford, Superintendent Lambert was intending to carry out his primary duty as a police officer, to keep the peace. This primary duty carries with it a power and indeed duty to prevent breaches of the peace which are imminent. The basic rule, as conveniently stated by Hodgson J in the Divisional Court in *Albert v Lavin* [1982] AC 546, 553A, is that "a police officer, reasonably believing that a breach of the peace is about to take place, is entitled to take such steps as are necessary to prevent it,

including the use of force." In the past, at least, the same could be said of justices of the peace. Moreover, as Lord Diplock pointed out in the same case, [1982] AC 546, 565B-C, the duty applies to ordinary citizens:

> "every citizen in whose presence a breach of the peace is being, or reasonably appears to be about to be, committed has the right to take reasonable steps to make the person who is breaking or threatening to break the peace refrain from doing so; and those reasonable steps in appropriate cases will include detaining him against his will. At common law this is not only the right of every citizen, it is also his duty, although, except in the case of a citizen who is a constable, it is a duty of imperfect obligation."

62. For the most part, the common law is concerned to punish those who have committed an offence and to deter them and others from doing so in the future. It does not step in beforehand to prevent people from committing offences. The duty to prevent a breach of the peace is therefore exceptional. And, if not kept within proper bounds, it could be a recipe for officious and unjustified intervention in other people's affairs. The common law guards against this danger by insisting that the duty arises only when the police officer apprehends that a breach of the peace is "imminent" (*O'Kelly v Harvey* (1883) 14 LR Ir 105, 109; *Foulkes v Chief Constable of the Merseyside Police* [1998] 3 All ER 705, 711b-c) or is "about to take place" or is "about to be committed" (*Albert v Lavin*) or will take place "in the immediate future" (*R v Howell* [1982] QB 416, 426). His apprehension "must relate to the near future" (*McLeod v Commissioner of Police of the Metropolis* [1994] 4 All ER 553, 560F). If he reasonably apprehends that a breach of the peace is likely to occur in the near future, the officer's duty is to take reasonable steps to prevent it.

63. In *Moss v McLachlan* [1985] IRLR 76, to which I shall return, Skinner J, giving the judgment of the Divisional Court, introduced a significant modification to this aspect of the law. The case involved a challenge to the power of police officers to stop a convoy of cars containing striking miners from travelling on to pits a few miles away where non-striking miners were working. The police officers had every reason to believe that violent clashes would break out, not at the motorway exit where their cordon was positioned, but at the pits. Dealing with the requirement of imminence, Skinner J said, at p 79, para 24, "The imminence or immediacy of the threat to the peace determines

what action is reasonable." A couple of years later, in *Minto v Police* [1987] 1 NZLR 374, 377 Cooke P said that "the degree of immediacy is plainly highly relevant to the reasonableness or otherwise of the action taken by the police officer." On this approach, a police officer would have the power – and duty – to take less drastic action (such as stopping cars) at an earlier stage than he would have the power and duty to take more serious action (such as arresting potential lawbreakers). In the present case the Divisional Court and the Court of Appeal both adopted the approach in *Moss*, which was supported by counsel for the Chief Constable in his submissions before the House.

64. In the Divisional Court, referring to the need for any restrictions on the claimant's article 10 and 11 rights to be prescribed by law, May LJ said, [2004] 2 All ER 874, 887f-h, para 39:

> "For them to be prescribed by law, it is necessary that the law sufficiently defines the circumstances in which the police may lawfully take preventive measures of this kind. In my view, this requirement is in substance satisfied by the judgment of Skinner J in *Moss'* case. The essential features are that a senior police officer should honestly and reasonably form the opinion that there is a real risk of a breach of the peace in close proximity both in place and time; that the possibility of a breach must be real; that the preventive measures must be reasonable; and that the imminence or immediacy of the threat to the peace determines what action is reasonable. I would add that the police are entitled to have regard to what is practical and that the number of people from whom a breach of the peace is apprehended may be relevant. The question of imminence is thus relevant to the lawfulness of preventive measures of this kind, but the degree of imminence may not be as great as that which would justify arrest."

In the Court of Appeal Lord Woolf CJ said, [2005] QB 678, 695, para 44:

> "On this aspect of the case, we would adopt a very similar approach to that of May LJ. We agree with him that it is necessary to distinguish between arrest and preventive action short of arrest, including temporary detention. We regard what is sufficiently 'imminent' to justify taking

> action to prevent a breach of the peace as dependent on all the circumstances. As in *Moss's* case, so here, it is important that the claimant was intending to travel in a vehicle if the preventive action had not taken place. The distance involved did not mean that there was no sufficient imminence. What preventive action was necessary and proportionate, however, would be very much influenced by how close in proximity, both in place and time, the location of the apprehended breach of the peace was. The greater the distance and the greater the time involved, the more important it is to decide whether preventive action is really necessary and, if it is necessary, the more restrained the action taken should usually be as there will be time for further action if the action initially taken does not deter. It may be that as the police thought, arrest at the lay-by would have been a disproportionate level of action, but this does not necessarily mean that no action was appropriate."

65. So the courts below held that, while any breach of the peace at Fairford might not have been sufficiently imminent for Chief Superintendent Lambert to order the arrest of the passengers on the coaches at Lechlade, he was entitled to turn back the coaches. Mr Lambert himself appears to have been of that view: he thought his officers could turn back the coaches at Lechlade, even though he considered that they could not have arrested anyone there since a breach of the peace was not imminent.

66. I would reject this reformulation of the common law since it would weaken the long-standing safeguard against unnecessary and inappropriate interventions by the police – and indeed, in theory at least, by ordinary citizens. On the established authorities, the police officer's duty is always to take whatever steps are reasonably necessary to prevent a breach of the peace but that duty arises only when the officer considers that the breach of the peace is imminent. In broad terms that approach was approved by the legislature in section 24(7)(a) and (b) of the Police and Criminal Evidence Act 1984. When the breach appears to be imminent, but not before, all the various options – arrest and detention, restraint, warning etc - become available and the officer can choose the option or combination of options that best fits the circumstances. It follows that Mr Lambert had no power to halt the coaches at Lechlade unless he reasonably considered that a breach of the peace at Fairford was going to happen in the near future.

67. In these situations a police officer like Mr Lambert is called on to predict what is going to happen in the near future. If he merely thinks that, while a breach of the peace may happen, the chances are that it won't, then he will not regard it as imminent. He will only regard it as imminent if he thinks that it is *likely* to happen. I doubt whether Lord Parker CJ intended to say anything different in *Piddington v Bates* [1961] 1 WLR 162, 170, when he referred to "a real danger" and "a real possibility" of a breach of the peace. The police officer's view of the matter will depend on the information he has and on his assessment of that information. In former times, when a police officer patrolled the streets without any of the modern means of communication, he would often have no more information than any ordinary citizen walking beside him. So, for the most part, he would only apprehend the occurrence of breaches of the peace which were brewing and about to break out in his presence. These would be the ones which he would regard as imminent. But, today, officers on the ground can be supplied by radio with information about what lies round the corner or what people are doing a few miles down the road. Armed with such information, they may have good reason to anticipate that people in front of them are intending to take part in a breach of the peace, or are likely to become involved in one, a short time later or a short car ride away. Intervention to prevent that breach of the peace may therefore be justified. A fortiori, a senior officer at the centre of a police operation, receiving reports from his officers on the ground, plus intelligence and advice on how to interpret the data, may have good reason to appreciate that a breach of the peace is "imminent" or "about to happen", even though that would not be apparent to officers lacking these advantages. The precondition for intervention remains the same but the test has to be applied in the conditions of today.

68. In paragraph 62 above, I gave examples of the kinds of expression which judges have used to describe the stage at which the power and duty to intervene arise. The expressions are not precise and most can be used to refer to very different periods of time, depending on the context. For example, if someone telephones and you say you will ring back because you are "about to" have dinner, you mean that the food is on the table or is just about to be served. But if you say that Janet was injured when she was "about to" go to university, the injury could have occurred days or even weeks before the start of term. In the present context, however, a shorter, rather than a longer period is clearly meant: the event must be going to happen in the near future.

69. This does not mean that the officer must be able to say that the breach is going to happen in the next few seconds or next few minutes.

That would be an impossible standard to meet, since a police officer will rarely be able to predict just when violence will break out. The protagonists may take longer than expected to resort to violence or it may flare up remarkably quickly. Or else, as in *O'Kelly v Harvey* (1883) 14 LR Ir 105, the breach of the peace may be likely to occur when others arrive on the scene and there is no way of knowing exactly when that will happen. There is no need for the police officer to wait until the opposing group hoves in sight before taking action. That would be to turn every intervention into an exercise in crisis management. As Cooke P observed in *Minto v Police* [1987] 1 NZLR 374, 377, "It would be going too far to say as a matter of law that the powers of the police at common law can be exercised only when an instantaneous breach of the peace is apprehended...." In *Steel v United Kingdom* (1998) 28 EHRR 603, after a morning of disruption, the first applicant, a protester against blood sports, was arrested when, in the course of a grouse shoot, she walked in front of a person armed with a gun in order to prevent him from shooting. The second applicant, who was trying to stop the construction of a motorway, was arrested when she stood underneath the bucket of a mechanical digger, towards the end of a day during which protesters had repeatedly obstructed the work of the road-builders. In neither case could the police officers have predicted exactly when the violent reaction provoked by the protests would occur. But I have no doubt that the police officers were entitled to take preventive action on the view that it was likely that a breach of the peace would occur some time in the near future, if the protesters persisted. The European Court held, at p 638, paras 60-61, that arresting the protesters to prevent a violent reaction had been justified and that there had been no breach of article 5(1) of the European Convention.

70. The closest parallel to the present case is *Moss v McLachlan* [1985] IRLR 76, a test case brought by the National Union of Mineworkers to clarify the law on police road blocks. These were in widespread use during the miners' strike which was in progress at the time. In April 1984 the police stopped cars carrying striking miners as they left the motorway at a point near four collieries in the Nottingham coalfield where work was continuing. The miners in the cars were intending to picket one or more of the pits. Two of the pits were between a mile and a half and two miles from the exit, while the two others were between four and five miles away. In the atmosphere of the time, and in view of previous events, it was easy for senior police officers to foresee that, if the striking miners reached the working pits, at some point there would be violent clashes between the striking and working miners. They therefore set up a police cordon at the motorway exit so as to be in a position to avert any clashes by keeping the two forces apart. When the striking miners tried to break through the

cordon, they were arrested and charged with obstructing a police officer in the execution of his duty in contravention of section 51(3) of the Police Act 1964. The miners were convicted and, on appeal, contended that the officers at the cordon had not been acting in the execution of their duty since no breach of the peace was imminent at the motorway exit and therefore the officers had no power to stop them at that point. In a reserved judgment the Divisional Court rejected the argument.

71. In my view they were right to do so, even though, as I have already pointed out, their reasoning was flawed in an important respect. I consider that, as Skinner J held, [1985] IRLR 76, 79, para 27, the magistrates were entitled to hold that in all the circumstances, because of the proximity of the pits and the availability of cars, a breach of the peace was "imminent, immediate and not remote". In the present case, on the basis of the information and advice available to him, Chief Superintendent Lambert considered that a breach of the peace would occur if the coaches and the protesters reached Fairford. It was only just over three miles away - a few minutes by coach. In these circumstances, if Mr Lambert had concluded that a breach of the peace at Fairford was imminent, I might have been disposed to accept that. But it is unnecessary to decide the point since Mr Lambert, who knew all the relevant circumstances, in fact considered that, when the coaches reached Lechlade, a breach of the peace was not imminent. That being so, he had no power, and was under no duty, to take steps to prevent the breach of the peace. It follows that stopping the coaches from proceeding further was unlawful.

72. That is sufficient to dispose of the appeal in the claimant's favour but, since the second and third issues were fully argued, I think it right to consider them. Assuming that Mr Lambert had been entitled to take the steps which were reasonably necessary to prevent the breach of the peace, would those steps have included stopping the coaches and their passengers from travelling on to Fairford? Would that step have been a proportionate restriction on the claimant's article 10 and 11 rights?

73. In many straightforward cases the steps which are reasonably necessary will be obvious. Where the officer believes, for instance, that an individual is about to punch someone else, then it may well be necessary for the officer to restrain and arrest the potential aggressor. But, sometimes, all that may be required is to advise the potential aggressor or the potential victim to leave as quickly as possible.

74. In other cases, perhaps involving rival gangs or rival groups of football supporters, the police officer may see that the members of one gang or group are making offensive remarks with the intention of provoking the other side to a fight. Then the officer may prevent the breach of the peace by ordering the first group to desist and, if they fail to do so, arresting them for obstructing a police officer in the execution of his duty under section 89(2) of the Police Act 1996.

75. Even where someone does not actually intend to provoke others into a violent reaction but behaves in an outrageous way which is liable to produce such a reaction, he can be stopped. That was the position in *Wise v Dunning* [1902] 1 KB 167. When addressing meetings in a public place in Liverpool the appellant used gestures and language which were highly insulting to the Roman Catholic population. His actions had caused, and were liable to cause, breaches of the peace by his opponents and supporters. The Divisional Court held that the magistrate's decision to bind him over to keep the peace had been fully justified. In doing so, the court rejected his argument that he could not be held responsible for any breaches of the peace that occurred since an unlawful act could not be regarded as the natural consequence of his insulting or abusive language or conduct.

76. *Albert v Lavin* [1982] AC 546 was essentially a case of the same kind, though the circumstances were very different. Mr Albert tried to jump the queue and board a bus out of turn. This naturally caused resentment and several people in the queue objected to his conduct. The reaction of the other members of the queue caused Mr Lavin, an off-duty police officer, reasonably to expect that a breach of the peace was liable to take place. He intervened to prevent it by obstructing Mr Albert's access to the bus. Lord Diplock, with whom the other members of the House agreed, held that, both as a constable and as a citizen, Mr Lavin had been entitled, indeed bound, to take this reasonable step to prevent the breach of the peace. When, in the passage quoted in paragraph 61 above, Lord Diplock referred to a citizen having the right and duty to take reasonable steps to make the person who is breaking or threatening to break the peace refrain from doing so, this included taking such steps against a person, like Mr Albert, whose conduct is liable to cause others to do acts which would constitute a breach of the peace. Of course, it would have been wrong for the other people in the queue to resort to violence, but the reality was that this was likely to happen. In the circumstances Mr Lavin was entitled to prevent the breach of the peace by stopping Mr Albert from boarding the bus out of turn.

77. Some forms of protest involve actions which are almost certain eventually to provoke a violent reaction from their targets. That was the case with the two applicants in *Steel v United Kingdom* (1998) 28 EHRR 603 whose protests I described in paragraph 69. The police arrested them because they feared that, after enduring some hours of disruptive protests, the other side would react violently. The applicants complained that their rights under article 10 of the Convention had been violated. The European Court held, however, at pp 645-647, paras 102-109, that, in view of the risks involved if their protests had continued, the measures taken could not be regarded as disproportionate. There was accordingly no breach of article 10.

78. The common law goes further, however. Sometimes, lawful and proper conduct by A may be liable to result in a violent reaction from B, even though it is not directed against B. If B's resort to violence can be regarded as the natural consequence of A's conduct, and there is no other way of preserving the peace, a police officer may order A to desist from his conduct, even though it is lawful. If A refuses, he may be arrested for obstructing a police officer in the execution of his duty.

79. In *O'Kelly v Harvey* (1883) 14 LR Ir 105, the plaintiff, a nationalist Member of Parliament, sued the defendant for assault and battery. The incident arose out of a meeting of the Land League which was to be held at Brookeborough near Enniskillen on 7 December 1880. The previous day a placard appeared summoning local Orangemen to assemble and oppose the meeting. The defendant, who was a justice of the peace for the district, was present at the meeting. According to his pleadings, 10 LR Ir 285, 287-289, he knew of the placard and believed on reasonable and probable grounds that the only way of preventing a breach of the peace when the Orangemen arrived was to order the meeting to separate and disperse. The defendant asked the plaintiff and the other persons who were assembled to disperse and, when they failed to do so, he laid his hand on the plaintiff in order to disperse the meeting. On a demurrer the Court of Appeal held that, if made out, these averments would constitute a sufficient defence to the action. Law C explained the position in this way, 14 LR Ir 105, 109-110:

> "The question then seems to be reduced to this: assuming the plaintiff and others assembled with him to be doing nothing unlawful, but yet that there were reasonable grounds for the defendant believing, as he did, that there would be a breach of the peace if they continued so assembled, and that there was no other way in which the

> breach of the peace could be avoided but by stopping and dispersing the plaintiff's meeting – was the defendant justified in taking the necessary steps to stop and disperse it? In my opinion he was so justified, under the peculiar circumstances stated in the defence, and which for the present must be taken as admitted to be there truly stated. Under such circumstances the defendant was not to defer action until a breach of the peace had actually been committed. His paramount duty was to *preserve the peace unbroken*, and that, by whatever means were available for the purpose. Furthermore, the duty of a justice of the peace being to preserve the peace unbroken he is, of course, entitled and in part bound, to intervene the moment he has reasonable apprehensions of a breach of the peace being imminent; and therefore, he must in such cases necessarily act on his own *reasonable* and *bona fide belief*, as to what is *likely* to occur. Accordingly in the present case, even assuming that the danger to the public peace arose altogether from the threatened attack of another body on the plaintiff and his friends, still if the defendant believed and had just grounds for believing that the peace *could only be preserved* by withdrawing the plaintiff and his friends from the attack with which they were threatened, it was, I think, the duty of the defendant to take that course."

He added, at p 112:

> "I assume here that the plaintiff's meeting was not unlawful. But the question still remains – was not the defendant justified in separating and dispersing it *if he had reasonable ground* for his belief that by no other possible means could he perform his duty of preserving the public peace. For the reasons already given, I think he was so justified, and therefore that the defence in question is good...."

80. I need not examine the fairly extensive later case law in which this topic has been explored since, like Simon Brown LJ in *Nicol and Selvanayagam v Director of Public Prosecutions* (1995) 160 JP 155, 162, I accept that Lord Alverstone CJ put the position correctly when he said in *Wise v Dunning* [1902] 1 KB 167, 175-176:

> "there must be an act of the defendant, the natural consequence of which, if his act be not unlawful in itself, would be to produce an unlawful act by other persons."

It is also unnecessary to try to determine the precise boundaries of the rule, which were discussed both by Simon Brown LJ in *Nicol*, 160 JP 155, 162-163, and by Sedley LJ in *Redmond-Bate v Director of Public Prosecutions* (1999) 163 JP 789, 791-793. What does need to be stressed, however, is that, as Dicey, *An Introduction to the Study of the Law of the Constitution* (10th ed by E C S Wade, 1959), pp 278–279, emphasised, using the familiar example of the Salvationists and the Skeleton Army:

> "the only justification for preventing the Salvationists from exercising their legal rights is the *necessity of the case*. If the peace can be preserved, not by breaking up an otherwise lawful meeting, but by arresting the wrongdoers – in this case the Skeleton Army - the magistrates or constables are bound, it is submitted, to arrest the wrongdoers and to protect the Salvationists in the exercise of their lawful rights".

81. In *Chorherr v Austria* (1993) 17 EHRR 358 the applicant was one of two men who had been arrested when demonstrating against the Austrian armed forces on the occasion of a military parade. They had rucksacks on their backs, with slogans on them. The rucksacks were so large that they blocked other spectators' view of the parade. This caused "a commotion" among the spectators who were protesting loudly at the obstruction. The demonstrators were arrested to prevent disorder. By a majority, the European Court held, at pp 375-377, paras 27-34, that in the circumstances it could not say that the arrests had not been a proportionate way of preventing disorder. There had accordingly been no violation of the applicant's article 10 rights.

82. Here, of course, the claimant and those like her were not going to take any part in any breach of the peace. Nor was their conduct likely to lead to one. But, as *O'Kelly v Harvey* shows, where it is necessary in order to prevent a breach of the peace, at common law police officers can take action (in that case dispersing a meeting) which affects people who are not themselves going to be actively involved in the breach. Similarly, as Mr Pannick QC reminded the House, under section 13(1) of the Public Order Act 1986, where his other powers are inadequate, a

chief constable must ask the district council to prohibit a procession which is liable to lead to serious public disorder - even if many of those taking part would not be involved in the disorder. A prior authorisation procedure for public meetings is in keeping with the requirements of article 11, if only so that the authorities may be in a position to ensure the peaceful nature of the meetings: *Ziliberberg v Moldova*, admissibility decision, European Court, Fourth Section, 4 May 2004, unreported. By contrast, a peaceful protester does not cease to enjoy the right to peaceful assembly as a result of sporadic violence or other punishable acts committed by others in the course of a demonstration: *Ziliberberg v Moldova* and *Ezelin v France* (1991) 14 EHRR 362, 375, para 34 of the Commission's decision.

83. On the same principle, where they need to do so in order, say, to reach the scene of an imminent breach of the peace, police officers must be able to clear a path through a crowd of innocent bystanders. Indeed, where necessary, a police officer is entitled to go further and call on any able-bodied bystanders for their active assistance in suppressing a breach of the peace. If, without any lawful excuse, they refuse to give it, they are guilty of an offence. See Archbold, *Criminal Pleading Evidence and Practice 2006*, para 19-277. The law proceeds on the basis that "it is no unimportant matter that the Queen's subjects should assist the officers of the law, when duly required to do so, in preserving the public peace": *R v Brown* (1841) C & Mar 314, 318 per Alderson B. In the eyes of the law therefore innocent bystanders caught up in a breach of the peace are to be regarded as potential allies of the police officers who are trying to suppress the violence.

84. In the light of these authorities I would reject Mr Emmerson QC's submission that there has to be a causal nexus between the persons affected by any measure taken by the police and the potential breach of the peace. In some circumstances a requirement of that kind would make it impossible for police officers to discharge their primary duty to preserve the peace. In a case like the present, therefore, provided that there was no other way of preventing an imminent breach of the peace, under the common law a police officer could stop a coachload of protesters from proceeding further, even although those on board included entirely peaceful protesters. The proviso is, however, vital.

85. Under the Human Rights Act 1998 the police must have regard to the rights to freedom of expression and freedom of assembly which protesters, such as the claimant, are entitled to assert under articles 10 and 11 of the Convention. Article 10 is the lex generalis, article 11 a lex

specialis. In *Steel v United Kingdom* (1998) 28 EHRR 603, para 101, the European Court described the right to freedom of expression as

> "an essential foundation of democratic society and one of the basic conditions for its progress and for each individual's self-fulfilment."

To be permissible, any restriction on these essential rights in articles 10 and 11 must be necessary in a democratic society. The proportionality principle demands that a balance be struck between the requirements of the purposes listed in articles 10(2) and 11(2) and the freedom to express opinions and to assemble. See *Ezelin v France* (1991) 14 EHRR 362, 389, paras 51-52. Here the police were pursuing the legitimate aim of preventing disorder. So the court has to determine whether the police action was proportionate to that legitimate aim, having regard to the special importance of freedom of peaceful assembly and freedom of expression. In the familiar trinity in *de Freitas v Permanent Secretary of the Ministry of Agriculture, Fisheries, Lands and Housing* [1999] AC 69, 80F-G, assuming that the breach of the peace was imminent, the critical question is whether the means which the police used to impair the claimant's article 10 rights were no more than was necessary to accomplish their objective of preventing the breach of the peace which they anticipated. In this case the Convention standard is basically the same as that set by the common law rule formulated by Dicey. Under the Convention, however, as the Chief Constable accepts, the onus is on the police to show that what was done was no more than was necessary.

86. The affidavits and other documents lodged on behalf of the Chief Constable bear witness to the care which the police devoted to planning the operation on 22 March in order to ensure that those who wished to protest peacefully outside RAF Fairford should be able to do so, while also ensuring that the operations at the base were not disrupted. Therefore, if anything did go wrong in the handling of the three London coaches, it is likely to have been simply due to some error of judgment which occurred on a day when many on-the-spot decisions had to be taken in the course of a complex and fast-moving exercise.

87. From the internet and, presumably, from other information, the police anticipated that the London coaches would bring members of an anarchist organisation known as the Wombles. On the day of the demonstration, both before and after the coaches arrived at Lechlade, Chief Superintendent Lambert and others seem therefore to have used

"the Wombles" as shorthand for the coaches and their passengers. At 10.45 am, long before the coaches arrived, Mr Lambert decided that if any offending articles were found on the coaches – as a few were - the coaches were to be turned round and sent back to London. If all of the passengers on the coaches had been Womble anarchists determined on violence and a breach of the peace by them had been imminent, a decision to stop the coaches from proceeding would have been an appropriate way of preventing the breach of the peace and protecting the rights of those who wanted to protest peacefully at Fairford. In fact, however, only eight known Wombles were identified on the coaches and, it appears, most of the passengers had nothing to do with them and were the reverse of violent by nature. It may be that police thinking about the number of actual Wombles on the coaches was affected by the fact that many of the peaceful protesters were wearing white overalls (to represent themselves as Gloucestershire Weapons Inspectors), which were similar to the uniform of the Wombles. However that may be, the fact that some of those on the coaches declined, lawfully, to give their names to the police was no sufficient basis for concluding that they would be associated with any violence.

88. Despite this, Mr Lambert appears to have thought that his only options were either to stop the coaches at Lechlade or to allow them to go on to Fairford and arrest all 120 or so occupants there. He judged – correctly, I have no doubt - that making so many arrests there would not have been practicable, given the available forces and facilities. Therefore, if his assumption about the number of potential violent troublemakers had been correct and a breach of the peace had been imminent, stopping the coaches rather than letting them go on to Fairford would have been justified. But once his officers had actually seen the passengers at Lechlade, he should not simply have assumed that something like 120 violent troublemakers would have had to be arrested at Fairford. For some reason, however, Mr Lambert persisted in this false assumption which led him to stick to his preconceived plan to turn the coaches back without considering any less drastic alternative.

89. One less drastic step which Mr Lambert might have taken would indeed have been to allow the coaches to go on to Fairford where the forces assembled to deal with an anticipated demonstration of up to 10,000 protesters would surely have been able to prevent any breach of the peace which the eight known Wombles were planning. Another possibility would have been to target the known Wombles on the coaches and to remove them at Lechlade. There is no evidence to show that this would not have been practicable, given the forces and facilities

available to the police there. Action of that kind would have materially reduced the threat of violence at Fairford.

90. While bearing firmly in mind the dangers of hindsight and the advantages enjoyed by judges who can review matters at leisure, I am unable to hold that stopping the coaches and all their passengers, including peaceful demonstrators such as the claimant, from going on to Fairford would have been the only practicable way of preventing an imminent breach of the peace in the circumstances. For this additional reason stopping the coaches from proceeding was not lawful at common law - and so infringed the claimant's article 10 and 11 rights. Nor was the action proportionate, having regard to its impact on the claimant's article 10 and 11 rights. For that reason too, those rights were infringed.

91. I would accordingly allow the appeal. It follows that the cross-appeal must be dismissed.

LORD CARSWELL

My Lords,

92. The policing of demonstrations, undertaken fairly regularly by police forces in different parts of the country, is a difficult task, calling for the exercise of careful judgment and, at times, a flexibility of response, which make heavy demands on the officers upon whom the task falls. History is unhappily replete with instances where things have gone wrong. In some cases the authorities have reacted in a hasty manner or with an excessive use of force, leading at times to tragic consequences. In others the measures taken have proved insufficient to prevent disorder from resulting in breaches of the peace and injury to persons or damage to property. The present case fortunately does not fall into either category, but the appellant suffered a degree of inconvenience and frustration and was prevented from taking part in a lawful demonstration at the Fairford air base. In a country which prides itself on the degree of liberty available to all citizens the law must take this curtailment of her freedom of action seriously.

93. Dicey famously observed that it can hardly be said that our constitution knows of such a thing as any specific right of public

meeting, a statement which engaged the attention of generations of law students. It is no longer necessary in this sphere of the law to debate the extent to which citizens are at liberty to engage in any activity which has not been made unlawful. It has been overtaken by the provisions of the Human Rights Act 1998, under which the rights contained in articles 10 and 11 of the European Convention for the Protection of Human Rights and Fundamental Freedoms are now part of domestic law – termed by Sedley LJ in *Redmond-Bate v Director of Public Prosecutions* (1999) 163 JP 789, 795 a "constitutional shift". As my noble and learned friend Lord Rodger of Earlsferry has pointed out in paragraph 85 of his opinion, article 10 is the lex generalis and article 11 a lex specialis. The right to freedom of peaceful assembly may be regarded as one means whereby the right to freedom of expression is afforded. It is governed to some extent by statutory provisions. The present complex of statutory powers, which have been summarised in the opinion of my noble and learned friend Lord Bingham of Cornhill, represents what Parliament regards as the correct balance, as a workable compromise between the rights and freedoms of individuals protesting against the policy of the state and the requirements of preserving law and order.

94. The common law governing the powers and duties of police officers, and those of ordinary citizens, to prevent breaches of the peace is nevertheless of continuing importance and has been canvassed at length in this appeal and in the opinions given by your Lordships. The decided cases cannot all be readily reconciled with each other, but I venture to suppose that a pattern may be found in those involving demonstrations which enables one to draw some conclusions which may give assistance to courts required to deal with actions taken to prevent breaches of the peace. The variants in the situations which may occur are considerable, but there appear to be three main classes of case.

95. In the first class, which one might regard as the most direct and into which the respondents claim that the present case falls, the person who is arrested, detained or otherwise prevented from continuing with his proposed course of action is himself committing or about to commit a breach of the peace. This class is the most straightforward and common category and examples are hardly required. One case which should be mentioned, as its correctness has been more debated, is *Moss v McLachlan* [1985] IRLR 76. I shall return later to further discussion of this case.

96. The second category can pose difficult problems of judgment for police officers in balancing the need to prevent breaches of the peace

and not to obstruct the actions of people acting lawfully. This class concerns people whose acts are lawful and peaceful in themselves but are likely to provoke others into committing a breach of the peace. It may be represented in modern law by *Albert v Lavin* [1982] AC 546, the modern decision of highest authority, from which it was not suggested that your Lordships should depart. The actions of the appellant Mr Albert, who insisted on jumping a bus queue, gave rise to a hostile reaction from other travellers. The magistrates found that the respondent police officer had reasonable grounds for believing a breach of the peace to be imminent unless he obstructed him from boarding the bus out of turn. This justified him in attempting to restrain the appellant.

97. An early example of this category is the Irish case of *Humphries v Connor* (1864) 17 ICLR 1. In that case the plaintiff elected to walk through the streets of Swanlinbar, Co Cavan, wearing an orange lily, an action which, in that part of the country, "was calculated and tended to provoke animosity between different classes of Her Majesty's subjects", according to the defendant's pleadings. Several of those subjects, according to the defence, followed after the plaintiff "and in consequence thereof caused very great noise and disturbance … and threatened the plaintiff with personal violence for wearing said emblem." The defendant, a sub-inspector of Constabulary, requested the plaintiff to remove the emblem. The defence goes on to plead that when she refused he "*gently and quietly*, and *necessarily and unavoidably*" removed the emblem. The plaintiff sued him for trespass, to which he pleaded in the terms I have indicated. The plaintiff demurred and the Court of Queen's Bench held, Fitzgerald J *dubitante*, that the plea was good. It would therefore go to trial and the jury would have to determine whether the act was necessary. O'Brien and Hayes JJ held that if it was, then the defendant would not be guilty of an assault, since it was the only way of preventing a breach of the peace, even though the plaintiff's act was in itself lawful, since it was not averred that she intended to provoke a breach of the peace (a plea which might well have been made in the circumstances of the case). Hayes J observed:

> "It would seem absurd to hold that a constable may arrest a person whom he finds committing a breach of the peace, but that he must not interfere with the individual who has wantonly provoked him to do so."

Fitzgerald J deferred to the judgment of his brethren, but expressed his reservation on the ground that the decision made, not the law of the land, but the law of the mob supreme. In this category one might also place *Wise v Dunning* [1902] 1 KB 167, the case of the Protestant lecturer in Liverpool, the natural consequence of whose sectarian actions and words was that breaches of the peace would be committed by others.

98. In the third class of case the actions are not necessarily provocative *per se*, but a counter-demonstration is arranged, of such a nature that the confluence of demonstrations is likely to lead to a breach of the peace. This situation not infrequently arises in the context of parades in Northern Ireland. The authorities may find themselves with an invidious choice to make in order to prevent a breach of the peace, whether their preventive efforts should be directed to those taking part in the original demonstration or to the counter-demonstrators. This category may be represented by another 19th century Irish case which is not without modern echoes, *O'Kelly v Harvey* (1883) 14 LR Ir 105. The facts appear most clearly from the report of the case in the Exchequer Division (10 LR Ir 287). At a time of considerable agitation over land tenure, accompanied by widespread rent strikes, the Land League proposed to hold a demonstration at Brookeborough, Co Fermanagh, to be addressed by several notable people, who included Charles Stewart Parnell MP. This led to the production and circulation of a printed notice calling on the Orangemen of Fermanagh to assemble in their thousands at Brookeborough on the day of the proposed meeting and "give Parnell and his associates a warm reception." It was pleaded in the defence of the defendant, a local magistrate, that he had reasonable and probable grounds for believing that if the meeting were held many Orangemen would meet and assemble and the public peace would be broken. The Land League meeting, which included the plaintiff, a nationalist Member of Parliament, did assemble, whereupon the defendant requested the plaintiff and his colleagues to disperse. When they neglected to do so, according to the defence, the defendant laid his hand upon the plaintiff, which constituted the assault and battery complained of in the action. The plaintiff demurred to that part of the defence, on the ground that it did not show any justification in law of the trespass. In the Exchequer Division Palles CB, with whom the other members of the court agreed, held that the Land League meeting was an unlawful assembly, because it was likely to produce danger to the tranquillity and peace of the neighbourhood. Accordingly the defendant was justified in dispersing it and the defence was good. He reserved his opinion, however, on the issue whether he would have so held if the only breach of the peace which could reasonably have been anticipated was an attack by the Orange party upon the Land League party. On

appeal it was held that the Land League meeting was not an unlawful assembly, but that the plea was nevertheless good. The Lord Chancellor, giving the judgment of the court, said that on the facts pleaded the defendant was justified in the circumstances in taking steps to disperse the meeting, since there was no other way in which the breach of the peace could be avoided. He said at pages 109-110:

> "His paramount duty was *to preserve the peace unbroken*, and that, by whatever means were available for the purpose. Furthermore, the duty of a Justice of the Peace being to preserve the peace unbroken he is, of course, entitled, and in fact bound, to intervene the moment he has reasonable apprehensions of a breach of the peace being imminent; and, therefore, he must in such cases necessarily act on his own *reasonable* and *bona fide belief*, as to what is *likely* to occur."

99. There are undoubtedly many variants of the facts of different cases which would make them difficult to fit into any of these categories, if such classification were required. One might point to *Beatty v Gillbanks* (1882) 9 QBD 308, in which the Salvation Army, then in very militant mode, organised a procession, with a band, flags and banners, being well aware that they were likely to be opposed by a group who called themselves the Skeleton Army and with good reason to suppose that a confrontation would lead to disorder and fighting. A Divisional Court held that the Salvation Army members could not be rightly convicted of unlawful assembly, since in the view of the court disturbance of the peace was not on the evidence the natural and probable consequence of their acts. This decision was described as "somewhat unsatisfactory" by Lord Hewart CJ in *Duncan v Jones* [1936] 1 KB 218, but the same criticism has been made of that case. The appellant set up a box in the roadway outside an unemployed training centre and proposed to hold a meeting there. On a previous occasion, when the appellant had addressed a meeting in the same place, a disturbance had occurred in the training centre which was attributed to the meeting. The police expressed concern about the consequences which were likely to ensue if the appellant were permitted to address another meeting in the same place. The respondent, an inspector of police, required her to move to another location some 175 yards away, although matters were at that time entirely peaceful, whereupon the appellant refused to move and attempted to address those present. She was convicted of obstructing the police in the execution of their duty. The deputy-chairman of quarter sessions found that disturbance and possibly a breach of the peace were the natural and probable

consequences of holding the meeting and that the respondent reasonably apprehended a breach of the peace. The Divisional Court, relying on these findings, dismissed the appellant's appeal.

100. It is fortunately not necessary to attempt to reconcile these and other examples to be found in the reports, though they serve to indicate the richness of the tapestry of life and the infinite variety of the modes in which people will attempt to exercise freedom of expression. What is common to all is the necessity of finding that a breach of the peace was either taking place or was about to happen or, to use the convenient term adopted throughout this appeal, was imminent. The extent of the concept of imminence was the subject of much discussion before the House.

101. I agree with the opinion expressed by your Lordships that the test of the lawfulness of the respondents' actions is imminence and not reasonableness. Although it is necessary that those acting to prevent a breach of the peace act reasonably, that concept is not the sole criterion of the lawfulness of their actions. It is also required that the breach should be imminent.

102. The question whether the decision in *Moss v McLachlan* [1985] IRLR 76 can be justified by application of this principle has led to some difference of opinion. The facts have been set out by Lord Bingham (para 42) and Lord Rodger (paras 63 and 70) and I need not rehearse them. The Divisional Court held on the facts of the case stated that a breach of the peace was not only a real possibility but also, because of the proximity of the pits and the availability of cars, imminent, immediate and not remote (para 27 of the judgment). This conclusion has been criticised by Feldman, *Civil Liberties and Human Rights in England and Wales,* 2nd ed, 2002, pp 1021- 1022, but in my opinion the court was quite entitled to take the view that a confrontation between the large group of striking miners in the fleet of cars and the working miners at one of the pits could be only a very few minutes away, with the very real likelihood that it would escalate into disorder and breach of the peace. The decision in *Moss v McLachlan* is not, however, authority for the proposition which counsel for the Chief Constable sought to advance before the House, that the test is not immediacy of the breach of the peace but the reasonableness of the steps taken to prevent it. I agree with your Lordships that the imminence or immediacy of the threat to the peace is an essential condition, which should not be diluted. As Lord Rodger has pointed out (para 67), the test has to be applied in the conditions of today, which may include the availability of better

information to police officers on the ground about the way in which events are unfolding. I do consider, however, that it can properly be applied with a degree of flexibility which recognises the relevance of the circumstances of the case. In particular it seems to me rational and principled to accept that where events are building up inexorably to a breach of the peace it may be possible to regard it as imminent at an earlier stage temporally than in the case of other more spontaneous breaches.

103. The situation which the police faced at Fairford was difficult and delicate. Incursions into the base had taken place in the recent past and it was clear that extreme protesters were ready to commit further damage, quite possibly extending to acts of serious sabotage. With the commencement of the war with Iraq, the risk of damage to the operation of the base and the concomitant likelihood that the US military forces at the base might react strongly to attempts at trespass, there was a real prospect that unless matters were handled with great care very serious consequences could result. The Gloucestershire police very creditably formed an elaborate plan designed to allow considerable opportunity to peaceful protesters to exercise liberty of speech and assembly, while putting in place plans to prevent disruptive and potentially damaging behaviour carrying a threat to the safety of the base.

104. The difficulties which gave rise to the present proceedings arose from the fact that the police had specific intelligence that three coaches and a van containing members of the organisation known as the Wombles were en route from London to Fairford. It was apprehended, not without good reason, that if they reached Fairford they would endanger the peace by making every effort to foment trouble and, if they could, invading the base and causing damage. At 10.45 am on the day of the planned protest, 22 March 2003, Chief Superintendent Lambert of Gloucestershire Constabulary, who was in immediate command of the operation to police the demonstration, made the following entry in his log:

> "Based on intelligence received it is understood that 3 coaches and a van are en route from LONDON carrying items and equipment to disrupt the protest today and gain entry to the air base. The protestors are the 'Wombles'. A Section 60 is in place and I have asked for an objective to be made for [senior officers] in charge of the two PSU's on intercept duties to intercept the coaches and van to search and identify any items that may be used. Items on

> the vehicles are to be seized if they are offending articles and if that is the case, the coaches and van are to be turned around and sent back towards the Metropolitan area. The Metropolitan Police will be asked to pick them up at the M25. They are not to be arrested to prevent a breach of the peace at that particular time, if that is the only offence apparent, as I do not consider there to be an imminent breach of the peace. However they are to be warned if articles are found on the coaches and they arrive at FAIRFORD then I will consider them to be here intent on causing disruption and a breach of the peace and they may find themselves arrested."

It might well be said that when the coaches arrived at Lechlade, only three miles from the base at Fairford, with some members of the Wombles on board and containing a number of items quite inconsistent with peaceful demonstrations, a breach of the peace was imminent. Mr Lambert's opinion on the point is not conclusive, but, like Lord Rodger, I do not find it necessary to pronounce on that issue.

105. The police were obviously justified in regarding the coaches and their occupants with a considerable degree of suspicion, in view of the identity of some at least of the passengers, the items found on the coach and the refusal of many of the passengers to reveal their names and addresses. The problem which faced them was that the actuality did not match up to the intelligence received. If the coaches had been packed with hard-line anarchists, the police might have been fully justified in ensuring that they did not get any nearer to Fairford, even if there had been a few more peaceable passengers on board. When it became apparent at 12.45 pm or thereabouts that there was a very mixed bunch of people on the coaches, many of whom did not present any potential threat to the peace, and the identified Wombles members were a small minority, it was incumbent on the police to review their strategy in relation to these coaches. I have to agree with your Lordships that they should at this stage have given consideration to whether the coaches could have been allowed to proceed to Fairford and any necessary further action taken there in the light of events which were taking place and the conduct of the passengers from the coaches. Before doing so they might have reduced the risk of breach of the peace by removing the known Wombles members and all the suspect items from the coaches at Lechlade.

106. I am very conscious of the difficulty facing police officers in making such decisions in constantly changing conditions, and bearing in mind the very great importance of ensuring that no incursion into the base took place. I would in such a case pay considerable respect to the judgment of the officer making decisions on the ground. I am also fully aware of the distortion of vision which hindsight may cause. The burden rests upon the respondents, however, to establish that the actions which they took were proportionate, in particular that they constituted the least restriction necessary of the rights of freedom of speech and freedom of assembly. In the light of this factor, accordingly, and not without some hesitation, I am impelled to the view that the respondents have not discharged that burden.

107. I would therefore allow the appeal, dismiss the cross-appeal and make the order proposed.

LORD BROWN OF EATON-UNDER-HEYWOOD

My Lords,

108. I have had the advantage of reading in draft the opinions of my noble and learned friends, Lord Bingham of Cornhill, Lord Rodger of Earlsferry and Lord Mance and, like them, would allow Ms Laporte's appeal and dismiss the Chief Constable's cross-appeal. Given the obvious importance of the case, however, and recognising that your Lordships, although agreeing in the result, appear not entirely of the same mind on all points, I must, I think, indicate my own approach to the various issues which arise.

109. The central question for your Lordships is whether the police were entitled to decide that Ms Laporte should not be permitted to continue upon her proposed journey from the Lechlade lay-by to the anti-war demonstration at Fairford. I put it that way because (a) it is not disputed that the police were entitled to stop the three coaches at the lay-by, to search them and their occupants for "dangerous instruments or offensive weapons" and for items enabling the concealment of identity (respectively under sections 60 and 60AA of the Criminal Justice and Public Order Act 1994, as amended), and, under the same provisions, to seize any such object, and (b) it is only if your Lordships were to hold (as did the courts below) that the police *were* so entitled, that other

questions (as to what steps the police could properly take to prevent Ms Laporte continuing on her journey, and more particularly as to the legality of the steps actually taken) would arise on the cross-appeal.

110. Before indicating the precise basis on which I would hold that the police were not entitled to reach the decision they did, it is helpful first to take note of certain principles about which I understand all your Lordships to agree. The first is that set out in para 29 of Lord Bingham's opinion in terms which to my mind cannot be improved upon and warrant repetition:

> "Every constable, and also every citizen, enjoys the power and is subject to the duty to seek to prevent, by arrest or other action short of arrest, any breach of the peace occurring in his presence, or any breach of the peace which (having occurred) is likely to be renewed, or any breach of the peace which is about to occur."

111. This formulation of the power and duty is, I think, to be preferred to that found in *R v Howell (Errol)* [1982] QB 416 (quoted by Lord Bingham at para 27) which seems to me to confuse a breach of the peace with a reasonable apprehension of such a breach (a confusion by no means confined to that judgment). A breach of the peace, as I understand it, involves actual harm done either to a person or to a person's property in his presence or some other form of violent disorder or disturbance and itself necessarily involves a criminal offence. Whilst, therefore, it is accurate for the European Court of Human Rights to say in *Steel v United Kingdom* (1998) 28 EHRR 603 (para 29)

> "A person may be arrested without warrant by exercise of the common law power of arrest, for causing a breach of the peace or where it is reasonably apprehended that he is likely to cause a breach of the peace"

it is at first blush puzzling to find at para 25 of the same judgment (restated at para 48) the suggestion that "Breach of the peace . . . does not constitute a criminal offence", for which the authority of *R v County of London Quarter Sessions Appeal Committee, Ex p Metropolitan Police Commissioner* [1948] 1 KB 670 is cited—an authority perhaps more appropriately cited at footnote 15 (although in both instances with

an inaccurate reference) to para 31 of the judgment for the proposition that "a binding over order is not a criminal conviction". When Lord Bingham says at para 28 of his opinion: "A breach of the peace is not, *as such*, a criminal offence, but founds an application to bind over" (my emphasis), he is there referring to the *concept* of breach of the peace as sometimes the Strasbourg court does (see para 121 below). The Court in *Steel* rejected the complaints of both the first and second applicants, in each case because they had acted in a manner that was likely to provoke others to violence (i.e. that was likely to *cause* a breach of the peace), not because they had themselves in fact *committed* a breach of the peace. The Court held that such conduct warranted a bind-over and, when that was refused, imprisonment.

112. The critical difference between *Steel* and *Hashman and Harrup v United Kingdom* (1999) 30 EHRR 241—the European Court of Human Rights' decision the following year upholding an article 10 complaint by two hunt saboteurs who had been bound over to keep the peace for seeking to disrupt a hunt by distracting the hounds—was that in the later case on the Crown Court's findings, "there had been no violence or threats of violence . . . so that it could not be said that any breach of the peace had been committed or threatened." Paragraph 35 of the Court's judgment reads:

> "The binding-over order in the present case thus had purely prospective effect. It did not require a finding that there had been a breach of the peace. The case is thus different from the case of *Steel*, in which the proceedings brought against the first and second applicants were in respect of breaches of the peace which were later found to have been committed."

As I have explained, that passage has to be read as if the expression "a breach of the peace" included within it, in addition to an actual breach, a reasonably apprehended breach of the peace.

113. I return to Lord Bingham's formulation, which clearly confines the expression "breach of the peace" to the use of actual violence. As Lord Bingham observes, this appeal concerns the third of the situations contemplated in his formulation, a "breach of the peace which is about to occur." The cases speak variously of a breach of the peace being "about to" occur (the language used by Lord Diplock in *Albert v Lavin* [1982] AC 546, 565), of it being "imminent" (the expression earlier

used in *Humphries v Connor* (1864) 17 ICLR 1 and in *Howell*), "in the immediate future" (another expression used in *Howell* and earlier used by Profesor Glanville Williams in his 1954 article [1954] Crim LR 578), and "a sufficiently real and present threat" (Beldam LJ in *Foulkes v Chief Constable of the Merseyside Police* [1998] 3 All ER 705, 711).

114. The second matter about which I understand all your Lordships to agree is that no power (or duty) arises to take any preventive action whatever unless and until the constable (or citizen) reasonably apprehends that an actual breach of the peace is imminent (about to happen). As Lord Mance puts it in para 141 of his opinion, the reasonable apprehension of an imminent breach of the peace is an important threshold requirement which must exist before any form of preventive action is permissible at common law (see too Lord Bingham's opinion at para 50 and Lord Rodger's at para 66). There is no inconsistency between this principle and the further principle that, even when a breach of the peace is reasonably judged imminent, the police must still take no more intrusive action than appears necessary to prevent it. Take the case of *Humphries v Connor*: it would not, I think, have been reasonable for the officer to have arrested the plaintiff without first plucking the orange lily from her lapel. Similarly in *Albert v Lavin*: PC Lavin could not properly have arrested Mr Albert for queue-jumping without first seeking to restrain him. Generally nowadays if an arrest in such cases becomes necessary it is for the offence of obstructing a police officer in the execution of his duty (in *Albert v Lavin* it was in fact for assaulting the officer in the execution of his duty). But it could equally be for conduct likely to cause a breach of the peace—not, of course itself a criminal offence (as in the case of the first two applicants in *Steel*). The point is, however, that unless the person whose conduct threatens the peace (perhaps, as in the various cases I have just mentioned, by provoking others to violence) is cooperative, he is likely to be arrested and, unless the threatened breach is imminent, that involves too great an inroad upon liberty. Civil rights must be jealously guarded and, as Mr Rabinder Singh QC on behalf of Liberty reminds us, prior restraint (pre-emptive action) needs the fullest justification.

115. This critically was where the Divisional Court and the Court of Appeal went wrong. On their approach the police are under a duty to take reasonable steps to prevent a breach of the peace *from becoming* imminent (rather than *which is* imminent). The duty they postulate would allow for reduced imminence for lesser restraint (i.e. for preventive action short of arrest) on some sort of sliding scale.

116. It is at this point helpful to consider the Divisional Court's decision in *Moss v McLachlan* [1985] IRLR 76, the authority upon which both courts below principally relied (which, indeed, the Court of Appeal [2005] QB 678, at paragraph 45 saw as being "very much on all fours" with the present case). The facts of *Moss v McLachlan* are set out at para 42 of Lord Bingham's opinion, para 70 of Lord Rodger's opinion, and need not be rehearsed afresh. It is in the context of this decision that the differences between your Lordships seem to me most apparent: Lord Bingham accepts the decision in *Moss* but (at para 51) finds striking differences between the situation at the police roadblock there and that at the Lechlade lay-by here. Unlike the police at the roadblock, the police at Lechlade could not have regarded a breach of the peace as imminent and, that being so, no preventive action was open to them. Lord Rodger, however, at para 71, would have been disposed to accept that a breach of the peace was already imminent at Lechlade had Mr Lambert himself in fact taken that view. Lord Mance on the other hand (at para 148) questions the correctness not only of the reasoning in *Moss* but also, unlike Lord Bingham and Lord Rodger, the actual decision arrived at there.

117. In his valuable work *Civil Liberties and Human Rights in England and Wales*, 2nd ed (2002), Professor David Feldman (at pp 1033-1034), discussing the requirement of imminence, suggests that the impact of the Human Rights Act 1998 "may lead to cases such as *Moss v McLachlan* . . . being decided differently today." A little earlier (at pp 1021-1022) he had suggested that the degree of flexibility allowed to the police in that case was too wide:

> "The larger the exclusion zone, the greater the level of interference, and the more likely it is that innocent people will be seriously inconvenienced. There were many cases (which were not litigated) in which the police exceeded their powers by stopping people so far away from the scene of trouble that it could not even arguably have been a proper exercise of their power or a reasonable exercise of their discretion. For example, at one stage in March 1984 Kent miners (and all who looked like miners) were stopped at the Dartford Tunnel if the police thought that they were heading towards the Nottinghamshire, Durham, or Yorkshire collieries. This had the effect of confining those people to the southernmost counties of England for the duration of the dispute."

The result of the Human Rights Act 1998, he suggested, was that the police "will need to exercise a great deal more tolerance of protesters' rights of passage than was evident in *Moss v McLachlan* if their efforts to avert disruption are not to be regarded as a disproportionate and, therefore, unlawful exercise of state power."

118. For my part I regard the decision in *Moss v McLachlan* as going to the furthermost limits of any acceptable view of imminence, and then only on the basis that those prevented from attending the demonstration were indeed manifestly intent on violence and were not (as Lord Mance at para 148 envisages may have been the case) quite possibly intent only on peaceful demonstration. In short, I regard the decision in *Moss* as (just) sustainable on what is certainly one possible view of the facts of that case, but the course taken by the police here in preventing Ms Laporte from proceeding further as plainly unsustainable—unsustainable, first, because Mr Lambert did not in fact regard a breach of the peace as then imminent and, secondly, because (for mixed reasons of fact and law) no such view was in any event open to him. Prominent amongst the factual considerations were that (i) the 120 coach passengers had by then been searched and deprived of such objects as were calculated to threaten the peace, (ii) the eight Wombles present had been identified and one other passenger arrested for an earlier offence at Fairford, and (iii) the police had extensive forces and carefully laid plans for guarding against any disorder whether on arrival at Fairford, during the subsequent procession, or at the bell-mouth area opposite the air-base gate.

119. This brings me to the other question which, had your Lordships taken a different view of whether the police at Lechlade could reasonably have regarded a breach of the peace as already then imminent, would have needed to be addressed: the question as to the circumstances in which the police may take preventive action against persons *other than* those committing or reasonably apprehended of being about to commit a breach of the peace. Because it does not arise directly I shall touch on it comparatively briefly. As I shall explain, however, it does seem to me to have some tangential relevance to the situation which arose here.

120. It is clear, as already indicated, that in some circumstances the police can take action against those whose conduct, although not itself breaching the peace, appears likely to provoke others to do so. Indeed, most of the cases I have mentioned are of that sort: *Humphries v Connor* (the provocative lily in the lapel), *Albert v Lavin* (where PC Lavin

initially sought to prevent Mr Albert from queue-jumping because he expected it to provoke a violent reaction in others), and the first and second applicants in *Steel* (for seeking to disrupt respectively a grouse shoot and motorway construction work, in each case because their obstructive conduct was likely to provoke violent reaction against them). That too was the position in *Nicol and Selvanayagam v Director of Public Prosecutions* (1995) 160 JP 155 where the unsuccessful appellants had sought to disrupt an angling competition by throwing sticks into the water, and in the Strasbourg case of *Chorherr v Austria* (1993) 17 EHRR 358 (discussed by Lord Rodger at paragraph 81 of his opinion) where two demonstrators at a military parade provocatively blocked out the view of other spectators. In none of these cases were the defendants in fact acting unlawfully when required to desist from their provocative activities. But it can hardly be doubted that each was behaving unreasonably and that the targets of their various disruptive activities could not reasonably have been expected to put up with them; that would have been, as Channell J put it in *Wise v Dunning* [1902] 1 KB 167, 179, to ignore "the infirmity of human temper".

121. It is noteworthy that the European Court of Human Rights in *Steel*, when sanctioning the concept of breach of the peace in English law, did so on the express basis that the concept had been clarified by the English courts over the previous two decades and is now confined to persons who cause or appear to be likely to cause harm to others or who have acted in a manner "the natural consequence of which would be to provoke others to violence" (paragraph 55 of the Court's judgment, referring back by way of footnote 83 to paragraphs 25-28). The then most recent English decision was that of the Divisional Court in *Nicol and Selvanayagam* and (at para 28) the Court cited from my judgment there at p 163:

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

A little earlier in my judgment (at p 162) I had said this:

> "Before the court can properly find that the natural consequence of lawful conduct by a defendant would, if persisted in, be to provoke another to violence, it should, it seems to me, be satisfied that in all the circumstances it is the defendant who is acting unreasonably rather than the other person."

122. A year after the European Court of Human Rights' judgment in *Steel* (but still before the Human Rights Act took full effect) Sedley LJ in the Divisional Court in *Redmond-Bate v Director of Public Prosecutions* (1999) 163 JP 789, allowing an appeal by a woman arrested for breach of the peace when she had refused to stop preaching to a hostile audience from the steps of Wakefield Cathedral, referred to *Steel*, spoke of "the constitutional shift which is now in progress" and cast doubt on the present day applicability of the decision and approach in *Duncan v Jones* (1936) 1 KB 218 (which had itself described *Beatty v Gillbanks* (1882) 9 QBD 308—the case about the Salvationists and the Skeleton Army discussed anonymously by Lord Rodger at para 80 of his opinion—as a "somewhat unsatisfactory case").

123. What, then, if a citizen's lawful conduct, perhaps in the exercise of his own right of free speech, is adjudged by a constable likely to provoke imminent violence in others, violence which would be "not merely unlawful but wholly unreasonable" (see para 121 above)? Plainly the constable's duty is, if he can, to protect the citizen's rights and to control, and if necessary arrest, those behaving unreasonably—summoning if need be the support of other officers and/or members of the public. But if he cannot, can he instead require the citizen to desist and, if he refuses, arrest him? In my judgment the answer to that question is that—save perhaps in extreme and exceptional circumstances—he cannot. I qualify the answer because I recognise the force of an argument along the following lines. A constable's ultimate duty is to preserve the Queen's peace and, as Lord Rodger points out at para 83 of his opinion, in doing so he can call upon citizens to assist him. It is, indeed, in certain circumstances an offence (at common law) to refuse to assist a constable in the execution of his duty just as it is an offence (under statute) to obstruct him in the execution of his duty. If an innocent bystander is required to assist a constable to preserve the peace (once it has been breached), why should not an innocent protester be required to stop protesting so as to avert the peace being broken in the first place?

124. It is, however, imperative to keep the implications of such an argument within strict bounds. Take Mr Beatty, the Salvation Army captain, or Ms Redmond-Bate, the Wakefield preacher. The Divisional Court was in each case clearly right to have set aside their respective convictions. I repeat, the police's first duty is to protect the rights of the innocent rather than to compel the innocent to cease exercising them. I recognise, of course, that the police do not enjoy unlimited resources. It was largely on this account, and because the rights in question were purely commercial, that this House in *R v Chief Constable of Sussex, Ex p International Trader's Ferry Ltd* [1999] 2 AC 418 rejected the applicant livestock exporter's challenge to the Chief Constable's decision to police only two rather than five sailings a week from Shoreham. That case, however, is strikingly different from any that I am presently considering. Lord Slynn of Hadley, at p 435, noting that on rare occasions the police had told the company's lorry drivers to turn back, said:

> "I do not accept that *Beatty v Gillbanks* lays down that the police can never restrain a lawful activity if that is the only way to prevent violence and a breach of the peace."

Then, having quoted an earlier (1993) edition of Professor Feldman's work which had said that "*Beatty v Gillbanks* tells us nothing about how the very wide discretion to act preventively in apprehension of a breach of the peace should be exercised," Lord Slynn added:

> "It seems to me that in the way the police behaved here, they were acting within their discretion and taking the only steps they could, steps which were necessary to protect the lorry drivers from the violence of some of the demonstrators."

125. Lord Hoffmann too, at p 444, rejected the company's reliance on *Beatty and Gillbanks*:

> "The Chief Constable does not claim that it would have been unlawful to drive to the docks and no one was arrested for doing so. If someone had been, the case might have raised interesting questions of the kind discussed in the controversial decision of the Divisional Court in

Duncan v Jones [1936] 1 KB 218. As it is, the point does not arise."

126. Lord Cooke of Thorndon, at p 454, observed that:

> "If the [Chief Constable's] policy is upheld, the case is a defeat for the rule of law and a victory for mob rule. Emotive though such descriptions may seem, they are no more than the truth. It is not a question of the rights of peaceable protesters against the rights of the lawful trader. It is the lawless elements acting on the side of the protesters who have won the day. That unpalatable fact must be acknowledged. A decision to that effect cannot be justified except for most cogent reasons."

The factors which persuaded him that the Chief Constable had "struck a fair and reasonable balance" were, first, that there was a conflict between "the policing needs of the company and those of all the rest of the public of Sussex", second, "that the company's needs are purely commercial", and third, that other ports, notably Dover, were available for the company's operations.

127. Would the approach taken by Law C in *O'Kelly v Harvey* (1883) 14 LR Ir 105 (fully described at para 79 of Lord Rodger's opinion) be lawful today? I can find little in the Strasbourg jurisprudence—which, as I have explained in para 121 above, sanctions the concept of breach of the peace on the express basis that its scope has been clarified by recent decisions—to support it. On the other hand, both article 10 and article 11 provide in terms in sub-clause 2 for interference with the protective rights if this is "necessary" "for the prevention of disorder or crime". Ultimately, therefore, I am persuaded that the approach adopted in *O'Kelly v Harvey* remains valid today but subject always to two provisos: first, that it is not used as an excuse for the police failing to prepare properly for likely confrontations, and, secondly, that there is absolutely no dilution of Law C's stipulation that the constable has "just grounds for believing that the peace *could only be preserved* by withdrawing the plaintiff and his friends from the attack with which they were threatened [and] that by no other possible means could he perform his duty of preserving the public peace."

128. Remember that the basic common law principle (see para 110 above, repeating para 29 of Lord Bingham's opinion) recognises and requires that if the constable has the power to act, so too he has the duty and so too does the citizen (albeit, as Lord Diplock observed, "it is a duty of imperfect obligation"). It is difficult to say, on the facts of *O'Kelly v Harvey*, that a citizen, similarly aware as was the Justice of the Peace there of the background to the meeting and the risk of violent opposition, was duty-bound to try to disperse it. Similarly it is difficult to postulate such a duty in *Moss* to turn back the belligerent miners. But in each case just possible, particularly if the police had needed and sought the citizen's aid. In my judgment, however, the common law power and duty can be taken no further than it was in those cases. *O'Kelly v Harvey* applies only when absolutely "no other possible means" are available to preserve the public peace; *Moss* as I said before, carries the concept of imminence to its furthermost limits.

129. I said earlier that this question (of what preventive actions can be taken against the innocent) has some tangential relevance to the situation that arose in the present case. Those amongst the 120 coach passengers who were intent only on lawful protest were not, of course, unlike the Land League supporters in *O'Kelly v Harvey*, acting in any way which might occasion violence in others. But that surely makes it the more, not the less, important that the police should take all possible steps to advance rather than thwart their rights. In short, even if Mr Lambert had both regarded, and been entitled to regard, a breach of the peace as imminent (whether at Lechlade or, indeed, at Fairford had the coaches been allowed to proceed there), it is difficult to see how at common law he would have had the power and the duty to take action against those he had no reasonable grounds to apprehend were intent on violence. He could, of course, have taken whatever steps he judged necessary to prevent those identified as Wombles from breaching the peace. But not Ms Laporte, not at common law.

130. I recognise that under section 13 of the Public Order Act 1986 the Chief Constable may in certain circumstances secure the actual prohibition of a public procession. And inevitably in such circumstances the rights of those intent only on peaceful protest are thwarted. Nothing in the Strasbourg jurisprudence prevents this—see, for example, *Ziliberberg v Moldova* (App No. 61821/00, decision of 4 May 2004). Similarly I do not doubt that the police enjoy wide powers, under section 12 of the 1986 Act, to give such directions as appear to them necessary to prevent "serious public disorder, serious damage to property or serious disruption to the life of the community", powers which again I would expect Strasbourg to sanction. It is, indeed,

worth just pausing to consider the extent of these powers: precisely when, by whom and to whom such directions may be given.

131. Section 12 (which I need not set out) contemplates three specific situations: (i) where the procession is actually being held, (ii) where persons are assembling with a view to taking part in an intended procession, and (iii) where a procession is intended but people are not yet assembling with a view to taking part in it. Only in the third of those situations must any directions be given by the Chief Officer of Police and be in writing; otherwise they can be given orally by the most senior officer present. The directions will be given to those "taking part" in any public procession, it being necessarily implicit in the section that that includes those "assembling with a view to taking part in it". The directions, however, can only impose conditions "necessary to prevent [the apprehended disorder], damage, disruption or intimidation." Could those like Ms Laporte assembling with a view to taking part in a procession be directed not to do so if the police reasonably judged that necessary? Does section 12 permit a condition of that nature? In my opinion the section affords no clear answer to that.

132. Whatever may be the position under section 12, however, there has been no suggestion that the police were invoking that section here. Rather they were relying on the concept of breach of the peace. As to that I agree with what Lord Bingham says at para 52 of his opinion. If indeed the police are to enjoy a power to prevent entirely innocent citizens from taking part in demonstrations already afoot, I have no doubt that it can only be a power conferred by primary legislation. It is certainly not to be found in the common law.

LORD MANCE

My Lords,

133. I have had the advantage of reading in draft the opinions of my noble and learned friends, Lord Bingham of Cornhill, Lord Rodger of Earlsferry, Lord Carswell and Lord Brown of Eaton-under-Heywood. I gratefully adopt the account of the facts given by Lord Bingham in his opinion, an opinion with which I am, subject to some observations on the decision in *Moss v McLachlan* [1985] IRLR 76, in full agreement. I add the following observations of my own.

134. There has been, and could be, no challenge to the police's decisions to stop and search the three coaches at Lechlade, and to seize such "dangerous instruments or offensive weapons" as were then found, under section 60, and thereafter to require the removal of hoods and scarves worn by certain passengers under section 60AA of the Criminal Justice and Public Order Act 1994. The challenges made are to two subsequent decisions, the first, to refuse to allow the coaches with most of their passengers to proceed to Fairford and, the second, to escort the coaches all the way back to London in a manner preventing any of the passengers on board from leaving them. The police seek to justify both these decisions as action reasonably taken to prevent a reasonably apprehended breach of the peace. The courts below have accepted that such justification existed with respect to the first but not the second decision.

135. An important starting point for consideration of all issues on this appeal is article 11 of the European Convention on Human Rights, which provides that

> "1. Everyone has the right to freedom of peaceful assembly and to freedom of association with others …..
>
> 2. No restrictions shall be placed on the exercise of such rights other than such as are prescribed by law and are necessary in a democratic society in the interests of national security or public safety, for the prevention of disorder or crime, for the protection of health or morals or for the protection of the rights and freedoms of others. This article shall not prevent the imposition of lawful restrictions on the exercise of these rights by members of the armed forces, of the police or of the administration of the state."

136. The European Court of Human Rights observed in *Djavit An v Turkey* (2003) Reports of Judgments and Decisions 2003-III, p 233 that

> "56. …. the right to freedom of assembly is a fundamental right in a democratic society and, like the right to freedom of expression, is one of the foundations of such a society. Thus, it should not be interpreted restrictively ….
>
> 57. ….. although the essential object of Article 11 is to protect the individual against arbitrary interference by public authorities with the exercise of the rights protected,

> there may in addition be positive obligations to secure the effective enjoyment of these rights (see *Christians against Racism and Fascism v United Kingdom*, [(1980) 21 DR 138] p 148)"

The Court reiterated in *Christian Democratic People's Party v Moldova* (Application No 28793/02; decision of 14 May 2006) that article 11 must be considered in the light of article 10, since the protection of opinions and the freedom to express them is one of the objectives of the freedoms of assembly and association enshrined in article 11 (paragraph 62). The Court stressed the particular importance attached to "pluralism, tolerance and broadmindedness" and the need in a democratic society for the actions or omissions of the Government to be "subject to the close scrutiny not only of the legislative and judicial authorities but also of the press and public opinion" (paragraphs 64 and 65). Interference with the right of freedom of assembly is permissible only if prescribed by law and necessary in a democratic society for a reason mentioned in article 11(2) and then only to an extent "proportionate to the legitimate aim pursued" (paragraph 70).

137. The common law requirement to keep the peace has been held by the European Court of Human Rights to be sufficiently clear to be regarded as "prescribed by law": see *Steel v United Kingdom* (1998) 28 EHRR 603, paragraphs 25-29 and 55. This was on the basis that

> "… the concept of breach of the peace has been clarified by the English courts over the last two decades, to the extent that it is now sufficiently established that a breach of the peace is committed only when an individual causes harm, or appears likely to cause harm, to persons or property or acts in a manner the natural consequence of which would be to provoke others to violence. It is also clear that a person may be arrested for causing a breach of the peace or where it is reasonably apprehended that he or she is likely to cause a breach of the peace."

The first sentence in this citation appears to me to embrace both situations in which a person has committed an actual breach of the peace and situations in which he merely threatens to cause one, in other words to embrace all the situations in which a person may be bound over to keep the peace, and committed to custody if he or she refuses to be so, under the Justices of the Peace Act 1361 and s.115 of the Magistrates'

Courts Act 1980 (cf *R v County of London Quarter Sessions Appeals Committee, Ex p Metropolitan Police Commissioner* [1948] 1 KB 670). An actual, as opposed to an apprehended, breach of the peace connotes some form of violent disturbance or occurrence. It is, at least for present purposes, unnecessary to consider, whether it must involve some identifiable domestic criminal offence, a point not argued before the House. Breach of the peace is not, as such, a domestic criminal offence. (*Steel v United Kingdom* indicates that breach of the peace in the extended sense of the first sentence of the citation, justifying arrest to bring the person concerned before a court and leading potentially to committal to prison if he or she refuses to be bound over, counts itself as an "offence" for the purposes of article 5(1)(c) of the European Convention on Human Rights, but that is a different point.)

138. For present purposes, it is the second sentence of the citation that matters. In relation to this, the European Court referred to *Albert v Lavin* [1982] AC 546, 565, where Lord Diplock's speech states the principle as being that:

> "Every citizen in whose presence a breach of the peace is being, or reasonably appears to be about to be, committed has the right to take reasonable steps to make the person who is breaking or threatening to break the peace refrain from doing so; and those reasonable steps in appropriate cases will include detaining him against his will."

139. Other authorities refer to preventive action being permitted where no actual breach of the peace has yet occurred, if there is a reasonable apprehension that a breach of the peace is going to occur "in the immediate future" or is "imminent" (*R v Howell (Errol)* [1982] QB 416, 426C-D and E-F) or is "about to occur or … imminent" (*Foulkes v Chief Constable of the Merseyside Police* [1998] 3 All ER 705, 711e-f). In *Redmond-Bate v Director of Public Prosecutions* (1999) 163 JP 789, 791, the Divisional Court equated a breach of the peace which is "about to occur" with an "imminent" breach of the peace, noting also that it was common ground between counsel that the question for the court was not whether a constable's fear of such a breach "fell within the broad band of rational decisions but whether in the light of what he knew and perceived at the time the court is satisfied that it was reasonable to fear an imminent breach of the peace".

140. However, there are statements in some authorities which might suggest that all that is necessary to justify reasonable preventive action by a constable (or any other citizen) is that he or she should reasonably apprehend a "real possibility" of a breach of the peace (*Piddington v Bates* [1961] 1 WLR 162, 169, *Moss v McLachlan* [1985] IRLR 76, paragraph 24) and that immediacy or imminence should be understood in a flexible sense, according to which the degree of immediacy or imminence "determines what action is reasonable" (*Moss v McLachlan*, paragraph 24, *Minto v Police* [1987] 1 NZLR 374, 377). Mr Freeland QC for the respondent sought to develop from them a general proposition according to which the true test is whether the police officer (or other citizen) taking the preventive action reasonably apprehended a real risk of a future breach of the peace and acted reasonably.

141. In my opinion, that proposition and the statements on which it relies are to be rejected. So too the suggestion that imminence is a flexible concept, different degrees of which may justify different forms of preventive action. I regard the reasonable apprehension of an imminent breach of the peace as an important threshold requirement, which must exist before any form of preventive action is permissible at common law. Where a reasonable apprehension of an imminent breach of the peace exists, then the preventive action taken must be reasonable or proportionate. But the threshold for preventive action is neither a broad test of reasonableness nor flexible. The proposition advanced by Mr Freeland would give the police (and theoretically any citizen) very extensive power - indeed in the case of the police an active duty - to regulate the behaviour of other citizens in advance in a way which would duplicate a number of statutory powers in this field, would be uncertain in its practical impact and could have a potentially chilling effect on freedom of assembly and expression. The requirement of imminence is relatively clear-cut and appropriately identifies the common law power (or duty) of any citizen including the police to take preventive action as a power of last resort catering for situations about to descend into violence. That is not to suggest that imminence falls to be judged in absolute and purely temporal terms, according to some measure of minutes. What is imminent has to be judged in the context under consideration, and the absence of any further opportunity to take preventive action may thus have relevance.

142. In the present case, I agree with Lord Bingham that no breach of the peace was or could reasonably be apprehended to be "imminent" at Lechlade where the three coaches were stopped and searched. Nor is this a case where a breach of the peace by anyone could be said to be reasonably apprehended as imminent on the ground that one would be

likely to occur at Fairford if the coaches were permitted to proceed from the layby at Lechlade. Very extensive precautions were in place at Fairford to meet and park vehicles and to channel and control, and counter any threat of disorderly conduct by, protesters arriving on them. Indeed, the plans catered for the possibility that as many as 10,000 protesters would arrive at Fairford. In the event, the latest estimate of the numbers present was 3,000 at 13.05 on 22 March 2003, dropping to 1,200 by 1.27 p.m. and rising to 1,500 by 1.55 p.m. There was and is no reason to think that the plans were inadequate to meet any likely eventualities. If the coaches had been allowed to continue to Fairford, any disturbance (if any) would only have been likely some time after their arrival and then only in circumstances and at a time which could not be predicted at Lechlade. If and when any occurred or was about to occur, the actual or likely trouble-makers would be likely to be identifiable at that time. The respondent's submission that indiscriminate action had to be taken against all 120 passengers at Lechlade faces the justified objection that the suggested difficulty in identifying particular trouble-makers and the suggested need for indiscriminate action only arose because the action taken was premature - taken at a time when a breach of the peace was not imminent. (In fact, for reasons which will appear in paragraphs 152-154, I would not anyway accept that the suggested difficulty and need existed.)

143. I would therefore allow this appeal and, since it is accepted that this must then follow, dismiss the cross-appeal. However, I add some observations on two further points. The first is whether and to what extent the police may take preventive action against anyone other than persons committing or reasonably apprehended as being about to commit a breach of the peace. The second is whether, assuming that there was any justification for taking preventive action against anyone at Lechlade, the action taken was justified so far as it concerned the appellant, Ms Laporte.

144. As to the first point, preventive action may on any view be taken by a policeman or other citizen against the person reasonably apprehended to be committing or about to commit the breach of peace: see paragraph 138 above. As to action against others, in *Ezelin v France* (1991) 14 EHRR 362 the Commission considered that

> "generally speaking, an individual does not cease to enjoy the right to freedom of peaceful assembly simply because sporadic violence or other punishable acts take place in the

course of the assembly, if he himself remains peaceful in his intentions and behaviour" (paragraph 34).

The Court said :

> "The Court considers, however, that the freedom to take part in a peaceful assembly – in this instance a demonstration that had not been prohibited – is of such importance that it cannot be restricted in any way, even for an *avocat*, so long as the person concerned does not himself commit any reprehensible act on such an occasion" (paragraph 53).

In *Nicol and Selvanayagam v Director of Public Prosecutions* (1995) 160 JP 155, Simon Brown LJ, as my noble and learned friend then was, considered that a complaint made seeking under section 115 of the Magistrates' Courts Act 1980 to have the magistrates' court "adjudge any other person to enter into a recognisance …. to keep the peace or to be of good behaviour towards the complainant" would "surely not" be found proved

> "if any violence likely to have been provoked on the part of others would be not merely unlawful but wholly unreasonable – as of course it would be if the defendant's conduct was not merely lawful but such as in no material way interfered with the other's rights."

In *Redmond-Bate v Director of Public Prosecutions* (1999) 163 JP 789, 796-797, Sedley LJ rejected a proposition of law advanced in the case stated before him to the effect that "Lawful conduct can, if persisted in, lead to conviction for wilful obstruction of a police officer", saying:

> "This proposition has, in my judgment, no basis in law. A police officer has no right to call upon a citizen to desist from lawful conduct. It is only if otherwise lawful conduct gives rise to a reasonable apprehension that it will, by interfering with the rights or liberties of others, provoke violence which, though unlawful, would not be entirely

> unreasonable that a constable is empowered to take steps to prevent it."

145. The last two authorities indicate that a policeman or other citizen may take preventive action against a person who by interference with the rights or liberties of others is likely to provoke violence. Examples are provided by *Albert v Lavin* (queue-barging causing angry reactions from other queue members), *Nicol and Selvanayagam v Director of Public Prosecutions* (1995) 160 JP 155 (disruption of angling), *Steel v United Kingdom* (disruption of a shoot and invasion of a motorway construction site) and *Chorherr v Austria* (1993) 17 EHRR 358 (two demonstrators, with large placards affixed to their rucksacks proclaiming "Austria needs no fighter planes", blocking the view of, and arousing increasingly loud protests from, spectators of a march past).

146. There are however also situations in which a person deliberately engages in provocative conduct which it might be difficult to describe as interfering with the rights or liberties of others, and causes in reaction a breach of the peace or an imminent likelihood of a breach of the peace by some other person(s). In these situations, it has also been recognised that the police or presumably any citizen has a right (and in the case of the police a positive duty) to take preventive action against the person committing the provocation: see eg *Wise v Dunning* [1902] 1 KB 167 (gestures highly insulting to Roman Catholic Liverpudlians entitling the magistrates to bind over). Another example may be *Humphries v Connor* (1864) 17 I CLR 1, where the Court of Queen's Bench in Ireland (Fitzgerald J *dubitante*) held it to be a valid defence to an action for assault against a constable for removing from the plaintiff a party emblem consisting of an Orange lily that her "wearing [t]hereof was calculated and tended to cause animosity" on the part of others, who were in fact provoked and were following her in a threatening manner. Hayes J spoke (at p 8) of the wearer as "wantonly provoking" a breach of the peace, but Fitzgerald J was troubled by the absence of any positive averment about the wearer's state of mind. (The fact that the constable had, very properly, first requested and the wearer had refused to remove the emblem means that the case may be better viewed in the context of a principle such as that discussed in the next three paragraphs of this judgment, if such removal was the only possible way of avoiding a breach of the peace.)

147. The situations which I have identified in the last three paragraphs seem to me the only situations in which a bind over to keep the peace can be required or any other preventive step taken against a person on

the ground that it can, sensibly or properly, be said that s/he was about to *cause*, or actually *causing*, a breach of the peace. But are these the only situations in which freedom of assembly may be restricted? Some authorities suggest a principle whereby, if it is the only way to prevent a third party (A) causing a breach of the peace, a police officer (or justice of the peace) may request another person (B) to desist from entirely lawful and innocent conduct, and, if B refuses to desist, may physically restrain B or charge B with wilfully obstructing the police officer (or justice of the peace) in the execution of her or his duty. Obstruction may consist in persisting in conduct of a positive nature which is, taken by itself, entirely lawful: cf eg *Dibble v Ingleton* [1972] 1 QB 480. Perhaps the requisite duty may be found in the general duty of the police and justices to prevent a breach of the peace, and, in the consideration that, if the *only way* that a police officer has of avoiding a breach of the peace by A is to enlist the assistance of B by asking B to desist from otherwise entirely lawful and innocent conduct, then B as a citizen comes under a duty to afford that assistance when sought. There is practical attraction in such a principle.

148. In the event, it is unnecessary on this appeal to reach a concluded opinion as to whether and how far such a principle exists or survives, at common law or now under the European Convention. Assuming, as I shall for present purposes, that it does, its application must, as I have indicated, be confined to rare situations where the only way to avoid a reasonably apprehended and imminent breach of the peace being caused by others is to restrict the freedom of assembly and expression of entirely innocent persons – that is, persons not apprehended to be about to start a breach of the peace themselves or to cause one by interfering with the rights or liberties of, or provoking, others. The Court of Appeal in Ireland held in *O'Kelly v Harvey* (1883) 14 LR Ir 104 that it was legitimate for a justice of the peace to request the dispersal of a meeting and, upon those present failing to disperse, to lay hands on one of them to achieve such dispersal, if the justice of the peace "*had reasonable ground* for his belief that by no other possible means could he perform his duty of preserving the public peace" (per Law C at p112, and cf p110 – my underlining).

149. As to the European Convention on Human Rights, Mr Pannick QC pointed out that the European Commission and Court have accepted the legitimacy of general statutory restrictions on demonstrations in the form of a public procession, where necessary to avoid a breach of the peace: see *Christians against Racism and Fascism v United Kingdom* (1980) 21 DR 138 and *Ziliberberg v Moldova* (Application No 61821/00, decision of 4 May 2004). So the general statements in *Ezelin*

(cf paragraph 144 above) may by parity of reasoning be subject to a similar qualification which would permit preventive action against an innocent person where it was reasonably apprehended that there was no other possible means of avoiding an imminent breach of the peace. On that assumption, a principle permitting such action in such a case would also appear to be sufficiently clear and certain to be considered as "prescribed by law". But the European Court has at all times also stressed the importance of the rights of freedom of assembly and expression and that states have positive obligations to take steps to facilitate their exercise (cf paragraph 136 above). So, wherever possible, the focus of preventive action should, on any view, be on those about to act disruptively, not on innocent third parties.

150. In domestic law, the closest English cases to the present are two cases where convictions were upheld for wilfully obstructing the police in the execution of their duty after refusals to obey police directions to desist from lawful conduct which it was found that the police reasonably apprehended would be followed by a breach of the peace. One is *Moss v McLachlan* (where striking miners intent on a mass picket or demonstration at one of several pits were directed not to proceed to their destination). The other is *Duncan v Jones* [1936] 1 KB 218 (where Mrs Duncan was directed to address a public meeting in another location). Both decisions are readily distinguishable on their facts from the present appeal. But I have concerns about the actual approach and reasoning in each. In relation to *Moss v. McLachlan* I am left unclear into which of the different categories mentioned in paragraphs 144/146 and 147/149 above the case should on the facts be regarded as falling. The result is more easily justified if the miners' conduct was of a character described in paragraphs 1445/146 above, but there appears to have been no clear finding on this. Secondly and in any event, I am concerned that the Divisional Court may have materially misdirected itself. True, it did at the end of its judgment express an overall conclusion that a breach of the peace was "not only a real possibility, but also, because of the proximity of the pits and the availability of the cars, imminent, immediate and not remote" (paragraph 27). But in earlier paragraphs the court stressed its view that preventive action was justified by the "real" possibility of a breach and that "the imminence or immediacy of the threat determines what action is reasonable" (paragraph 24). It also indicated approval of Lord Parker CJ's statement in *Piddington v Bates* [1960 3 All ER 660, 663 that "a police officer charged with the duty of preserving the Queen's Peace must be left to take such steps as, on the evidence before him, he thinks proper" (paragraph 26). There exists in my view the possibility that the views expressed in paragraphs 24 and 26 shaped the conclusions about imminence in paragraph 27. The magistrates in *Moss v McLachlan*

found that "the police honestly and on reasonable grounds feared that there would be a breach of the peace if there was a mass demonstration" at whichever colliery the miners proceeded to (paragraph 13), although they apparently also spoke of "police suspicions that the gathering of a large picket would lead to a breach of the peace" (paragraph 16). The effect of the police action in *Moss v McLachlan* was to preclude any mass demonstration or picket at any of the four neighbouring colleries, on the basis of a general apprehension of a breach of the peace there because there had been breaches of the peace at colleries in the Nottinghamshire area in the previous days or weeks. I believe that, both at common law and certainly since the Human Rights Act, the court's scrutiny of such factual and legal issues should now be closer than is suggested in *Moss v McLachlan*.

151. In *Duncan v Jones*, the facts are either reported or were investigated in so limited a way that the merits or demerits of the result are difficult to address. There is a suggestion in Lord Hewart CJ's judgment that the previous disturbance had been on account of ("*propter*") and not merely *post* the previous meeting held over a year before by the appellant, but what precisely was meant thereby, what Mrs Duncan had said during the prior meeting, why the previous year's disturbance had resulted and so on what basis it could reasonably be apprehended that a breach of the peace would recur a year later and whether there was any preventive action that could have been taken in relation to those who it was feared would create a disturbance are less than clear.

152. The second point assumes (contrary to my view) that a reasonable apprehension of an imminent breach of the peace could be said to exist while the coaches and their remaining passengers were at Lechlade, so that some form of preventive action was permissible against someone. The question then is whether the preventive action actually taken was justified so far as it concerned the appellant, Ms Laporte. In my opinion, it was not, because it has not been shown to have been either reasonable or proportionate.

153. The action taken was general and indiscriminate. The police redirected and returned to London all the 120 passengers who arrived on the three coaches at Lechlade. The only exceptions were, apparently, three passengers who were due to speak at Fairford and persuaded the police to allow them to proceed there and a few others who were able to leave the layby on foot during the halt at Lechlade. The police direction and the return took place pursuant to a pre-set plan, recorded in Chief

Superintendent Lambert's log at 10.45 a.m., whereby the three coaches were to be sent back, if any offending articles were found. In the event, the number and nature of offending articles found was very limited (cf paragraph 11 of Lord Bingham's opinion), and those that were found were seized. But the plan was nevertheless implemented in relation to all remaining passengers at Lechlade.

154. Throughout the relevant period, the log consistently refers to the occupants of the coaches generically as "the 'Wombles'". It does so on seven occasions in all, the first at 10.45 when the plan was recorded, and five times during the period at Lechlade before the direction for return given at 13.55 and implemented at 14.30. The recorded explanation of the direction was simply that, in view of the articles found, the passengers were "making their way here to create a breach of the peace" or "intent on causing a BOP at airbase". But, after the coaches had been stopped in the layby and their passengers had been observed there for a long period (nearly an hour and a half by 13.55), there was or should have been no longer a basis for categorising them all indiscriminately as potentially violent "Wombles". The police intelligence officers present at Lechlade identified no more than eight of the coach passengers as known Wombles (with one other passenger being arrested for an earlier offence at Fairford), a number which could on the face of it have been easily managed at Fairford. The demonstration was organised by the Gloucestershire Weapons Inspectors, an organisation which there was no reason to suspect of any plan to breach the peace and which had duly notified the demonstration to the police. White suits found on the coaches were the uniform of the Gloucestershire Weapons Inspectors as well as worn by Wombles. There was nothing about most of the passengers, and in particular nothing about Ms Laporte, which could suggest any violent intentions. Further, no attempt was made to ascertain affiliations or intentions. On the contrary, individual protesters were given neither the opportunity nor any incentive to explain their positions. Until the coaches were again underway, they were on the contrary allowed to think that they were going to be able to continue to Fairford, and, once the coaches were under way and the contrary became clear, the coach doors were held shut by police outside to prevent passengers disembarking.

155. In those circumstances, even if any preventive action had been justified against anyone at Lechlade, I would have regarded the action taken as unreasonable and disproportionate, in particular as regards the appellant, Ms Laporte.

156. For the reasons I have given, I would allow the appeal and dismiss the cross-appeal.