Neutral Citation Number: [2008] EWCA Civ 1237

Case No: A2/2007/2911

IN THE SUPREME COURT OF JUDICATURE
COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM QUEEN'S BENCH DIVISION
MR JUSTICE McCOMBE
[2007] EWHC 3421 (QB)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 12/11/2008

Before :

SIR ANTHONY CLARKE MASTER OF THE ROLLS
LORD JUSTICE MAURICE KAY
and
LORD JUSTICE STANLEY BURNTON

- -

Between :

THE COMMISSIONER OF POLICE OF THE METROPOLIS	**Appellant**
- and -	
MOHAMED RAISSI	**Respondent**

- -
- -

Mr Michael Beloff QC and Mr John Beggs (instructed by **Directorate of Legal Services (Metropolitan Police)**) for the **Appellant**
Mr Tim Owen QC and Mr Leslie Thomas (instructed by **Messrs Tuckers Solicitors**) for the **Respondent**

Hearing dates : 6th October 2008

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Approved Judgment

Sir Anthony Clarke MR:

This is the judgment of the court.

Introduction

1. There were initially two claimants in this action, namely Sonia Raissi ('Sonia') and Mohamed Raissi ('Mohamed'), who are respectively the brother and wife of Lotfi Raissi ('Lotfi'). They claimed damages for wrongful arrest and false imprisonment against the Commissioner of Police of the Metropolis, who is the appellant in this appeal. They were both arrested and detained by different police officers on 21 September 2001 on suspicion of involvement in the terrorist attacks in the United States on 9/11, which was of course only 10 days earlier. Each was interviewed and released without charge. Sonia was detained for some 41 hours, whereas Mohamed was detained for 4½ days. Sonia's claim failed but Mohammed's claim succeeded. Sonia does not appeal against the order dismissing her claim, which was made by McCombe J ('the judge') on 30 November 2007. In her case the judge held that the officer had reasonable grounds to suspect that Sonia was a terrorist. By contrast, the Commissioner does appeal against the part of the same order giving judgment for Mohammed with damages to be assessed. The reason why his claim succeeded was that the judge held that Detective Constable Bredo (now Detective Sergeant Bredo) did not reasonably suspect that Mohammed was a terrorist. The judge gave permission to appeal in terms to which we refer below. Mr Beloff QC submits on behalf of the Commissioner that the judge was wrong so to hold.

The Terrorism Act 2000

2. Section 41 of the Terrorism Act 2000 ('the 2000 Act') provides:

> "A constable may arrest without a warrant a person whom he reasonably suspects to be a terrorist."

Section 40 of the 2000 Act defines a terrorist as including a person who

> "is or has been concerned in the commission, preparation or instigation of acts of terrorism."

The legal principles

3. The judge correctly set out the underlying principles at [3] and [4] of his judgment dated 30 November 2007. They may be summarised in this way. The starting point is the classic statement of Lord Atkin in *Liversidge v Anderson* [1942] AC 206 at 245 that:

> "in English law every imprisonment is prima facie unlawful and it is for a person directing an imprisonment to justify his act."

4. The judge correctly observed at [4] that three questions have to be answered. They are those posed by Woolf LJ in *Castorina v Chief Constable of Surrey*, unreported, 10 June 1988, where he said at pages 20 – 21 of the transcript:

> "1. Did the arresting officer suspect that the person who was arrested was guilty of the offence? The answer to this question depends entirely on the findings of fact as to the officer's state of mind.
>
> 2. Assuming the officer had the necessary suspicion, was there reasonable cause for suspicion? This is a purely objective requirement to be determined by the judge if necessary on the facts found by a jury.
>
> 3. If the answer to the two previous questions is in the affirmative, then the officer has a discretion which entitles him to make an arrest and in relation to that discretion has been exercised in accordance with the principles laid down by Lord Greene MR in *Associated Provincial Picture Houses Ltd v Wednesbury Corporation* [1948] 1 KB 223."

5. Of those three questions, both before the judge and before us only question 2 was and is in issue. As the judge said, it was not suggested that the arresting officers did not subjectively suspect that the Claimants were "concerned in the commission, preparation or instigation of acts of terrorism". Question 1 therefore had (and has) to be answered in the affirmative. As to question 3, it was not suggested that, if the officers had reasonable grounds for their suspicions, either of them acted irrationally in exercising the power of arrest. Question 3 therefore also had (and has) to be answered in the affirmative. Question 2 remains, but only in so far as it relates to DC Bredo. It is whether he had reasonable grounds for suspicion.

6. Before the judge it was submitted on behalf of the Commissioner that, even if the officers did not have reasonable grounds for their suspicion, he nevertheless had a defence of necessity arising out of the extreme seriousness of the attacks in America on 9/11 and of the public safety concerns arising out of them. The judge rejected this part of the Commissioner's argument on the basis that neither claimant was informed that he or she was being arrested on any ground other than suspicion of terrorism as defined in the 2000 Act. The Commissioner does not pursue this point in this appeal.

7. There is a dispute between the parties as to the basis on which the judge gave permission to appeal. At the end of the oral argument relating to permission to appeal, Mr Beloff asked the judge for a record of the formulation of the relevant point. The judge said that he "allowed permission to appeal on one ground only, see below". He then quoted what we understand to be his own written formulation of that ground as follows:

> "I think there are good reasons for considering the 'nuance of difference in approach between Lords Steyn and Hope in *O'Hara* in paragraph 32 of my judgment. I do not say there are real prospects of success but it is an important point and I think would be worthy of the Court of Appeal's consideration. I refuse permission to argue the necessity point where I find no real prospects of success, nor a compelling reason for an appeal."

We will consider first the relevant legal principles raised by the ground of appeal for which the judge undoubtedly gave permission. It arises out of a suggested difference of opinion between Lord Steyn and Lord Hope in *O'Hara v Chief Constable of the Royal Ulster Constabulary* [1997] AC 286.

8. We detect no such difference of opinion between them. It would certainly be surprising if there were held to be any such difference given that Lord Mustill and Lord Hoffmann expressly agreed with the speeches of both Lord Steyn and Lord Hope and Lord Goff said that he would dismiss the appeal for the reasons given by them both.

9. The appeal in that case arose out of an arrest under section 12(1) of the Prevention of Terrorism (Temporary Provisions) Act 1984 ('the 1984 Act'), which provided, so far as material, as follows:

> " a constable may arrest without warrant a person whom he has reasonable grounds for suspecting to be … (b) a person who is or has been concerned in the commission, preparation or instigation of acts of terrorism to which this Part of the Act applies; …"

It can immediately be seen that section 12 is in all material respects in the same form as sections 40 and 41 of the 2000 Act with which we are concerned. In that case a constable made the arrest in connection with a murder which was an act of terrorism within the meaning of section 12(1) of the Act. As here, it was common ground that subjectively the constable had the necessary suspicion and the question was whether the constable objectively had reasonable grounds for suspecting that the plaintiff was concerned in the murder. The constable said in evidence that his reasonable grounds for suspecting the plaintiff were based on a briefing by a superior officer. He was told that the plaintiff had been involved in the murder. The constable said that the superior officer ordered him to arrest the plaintiff. He did so. As Lord Steyn observed at page 290A, counsel for the plaintiff took the tactical decision not to cross-examine the constable about the details of the briefing. The trial judge described the evidence as scanty but he inferred that the briefing afforded reasonable grounds for the necessary suspicion. In other words the judge inferred that some further details must have been given in the briefing. The legal burden was on the Chief Constable to prove the existence of reasonable grounds for suspicion. Lord Steyn said that he was nevertheless persuaded that the judge was entitled on the sparse materials before him to infer the existence of reasonable grounds for suspicion. It followed that the Court of Appeal was entitled to dismiss the appeal and that the appeal to the House of Lords failed on what Lord Steyn called narrow and purely factual grounds.

10. The House nevertheless considered the issue of general public importance in respect of which leave to appeal had been given. Lord Steyn identified it as being whether an order by a superior officer to the arresting officer was itself sufficient to afford the constable a reasonable suspicion within the meaning of section 12(1). The House unanimously held that it was not. In support of the proposition that it was, the Chief Constable relied upon the decision of the House in *McKee v Chief Constable for Northern Ireland* [1984] 1 WLR 1358. However, the statutory provision being considered there was section 11(1) of the Northern Ireland (Emergency Provisions) Act 1978, which provided:

> "Any constable may arrest without warrant any person whom he suspects of being terrorist."

Speaking for the appellate committee, Lord Roskill said at page 1361:

> "On the true construction of section 11(1) of the statute, what matters is the state of mind of the arresting officer and of no one else. That state of mind can legitimately be derived from the instruction given to the arresting officer by his superior officer. The arresting officer is not bound and indeed may well not be entitled to question those instructions or to ask upon what information they are founded."

11. At page 291B-C Lord Steyn made it clear that in his opinion Lord Roskill's statement was not relevant to the true construction of section 12(1) of the 1984 Act because the statutory provision under consideration in the *McKee* case did not require that an arresting officer must have reasonable grounds for suspicion. He said that it was a misuse of precedent to transpose Lord Roskill's observations made in the context of the subjective requirement of a genuine belief to the objective requirement of the existence of reasonable grounds. Lord Steyn emphasised the point in this way at 291H to 292A:

> "Section 12(1) authorises an arrest without warrant only where the constable 'has reasonable grounds for' suspicion. An arrest is therefore not lawful if the arresting officer honestly but erroneously believes that he has reasonable grounds for arrest but there are unknown to him in fact in existence reasonable grounds for the necessary suspicion, eg because another officer has information pointing to the guilt of the suspect. It would be difficult without doing violence to the wording of the statute to read it any other way."

12. Lord Steyn then said that a strong argument could be made for a rule that an arrest should be lawful if another police officer had reasonable grounds for the relevant suspicion not communicated to the arresting officer, which he thought might well be compatible with article 5(1) of the European Convention of Human Rights: see his discussion at page 292B-H. Despite that, his clear conclusion was that the only relevant matters are those present to the mind of the arresting officer: see page 293B.

13. Lord Steyn summarised his views at page 294C-D. They were in essence as follows:

    i) In order to have a reasonable suspicion the officer need not have evidence amounting to a prima facie case: *Hussien v Chong Fook Kam* [1970] AC 942, 949.

    ii) Hearsay evidence may therefore afford a constable reasonable grounds to arrest. Such information may come from other officers.

    iii) The information which causes the constable to be suspicious of the individual must be in existence to the knowledge of the police officer at the time he makes the arrest.

iv) The executive "discretion" to arrest or not, as Lord Diplock described it in *Mohammed-Holgate v Duke* [1984] AC 437, 446, vests in the constable, who is engaged on the decision whether to arrest or not, and not in his superior officers.

14. At [25] of his judgment the judge observed that there is at page 295E-H an important passage in Lord Steyn's speech emphasising that the final discretion to arrest or not is that of the arresting officer; " following orders" is not a defence:

> "Given the independent responsibility and accountability of a constable under a provision such as section 12(1) of the Act of 1984 it seems to follow that the mere fact that an arresting officer has been instructed by a superior officer to effect the arrest is not capable of amounting to reasonable grounds for the necessary suspicion within the meaning of section 12(1). It is accepted, and rightly accepted, that a mere request to arrest without any further information by an equal ranking officer, or a junior officer, is incapable of amounting to reasonable grounds for the necessary suspicion. How can the badge of the superior officer, and the fact that he gave an order, make a difference? In respect of a statute vesting an independent discretion in the particular constable, and requiring him personally to have reasonable grounds for suspicion, it would be surprising if seniority made any difference. It would be contrary to the principle underlying section 12(1) which makes a constable individually responsible for the arrest and accountable in law. In *R v Chief Constable of Devon and Cornwall ex p CEGB* 1982] QB 458, 474 Lawton LJ touched on this point. He observed:
>
> > '[chief constables] cannot give an officer under command an order to do acts which can only lawfully be done if the officer himself with reasonable cause suspects that a breach of the peace has occurred or is imminently likely to occur or an arrestable offence has been committed.'
>
> Such an order to arrest cannot without some further information being given to the constable be sufficient to afford the constable reasonable grounds for the necessary suspicion."

15. Those conclusions seem to us to be clear. The question is whether Lord Hope reached any different conclusion. The judge quoted a number of passages from the speech of Lord Hope. In particular, at [26] he quoted a passage at page 298A-E where Lord Hope stated, entirely consistently with the speech of Lord Steyn, that the test is in part subjective and in part objective. He added that the application of the objective test does not require the court to look beyond what was in the mind of the arresting officer. Again consistently with the speech of Lord Steyn, he said that it was the grounds which were in the constable's mind at the time which must be found to be reasonable grounds for the suspicion which he has formed. All that the objective test

requires is that these grounds be examined objectively and that they be judged at the time when the power was exercised.

16. Lord Hope added at page 298C-E:

> "This means that the point does not depend on whether the arresting officer himself thought at that time that they were reasonable. The question is whether a reasonable man would be of that opinion, having regard to the information which was in the mind of the arresting officer. It is the arresting officer's own account of the information which he had which matters, not what was observed by or known to anyone else. The information acted on by the arresting officer need not be based on his own observations, as he is entitled to form suspicion based on what he has been told. His reasonable suspicion may be based on information which has been given to him anonymously or it may be based on information, perhaps in the course of an emergency, which turns out later to be wrong. As it is the information which is in his mind alone which is relevant however, it is not necessary to go on to prove what was known to his informant or that any facts on which he based his suspicion were in fact true. The question whether it provided reasonable grounds for the suspicion depends on the source of his information and its context, seen in the light of the whole surrounding circumstances."

17. However, the judge said at [32] that, as he put it, one notices a nuance of difference of approach between Lord Steyn and Lord Hope. The suggested nuance was based on the approach of Lord Hope to the passage in the speech of Lord Roskill in *McKee* which we quoted at [10] above. Lord Hope said at page 299A that, despite the difference in wording between the two statutes being considered, Lord Roskill's words "when he emphasised that what matters is what is in the mind of the arresting officer, remain relevant". Lord Hope stressed that the matters in the mind of the officer may come from others. He gave a number of examples between pages 299 and 301 and concluded at page 301H to 302B, in a passage quoted by the judge at [26]:

> "Many other examples may be cited of cases where the action of the constable who exercises a statutory power of arrest or of search is a member of a team of police officers, or where his action is the culmination of various steps taken by other police officers, perhaps over a long period and perhaps also involving officers from other police forces. For obvious practical reasons police officers must be able to rely upon each other in taking decisions as to whom to arrest or where to search and in what circumstances. The statutory power does not require that the constable who exercises the power must be in possession of *all* the information which has led to a decision, perhaps taken by others, that the time has come for it to be exercised. What it does require is that the constable who exercises the power must first have equipped himself with *sufficient* information so that

> he has reasonable cause to suspect before the power is exercised."

The italics were added by the judge.

18. The judge concluded that there was no significant difference between the views of Lord Hope and those of Lord Steyn. He expressed his conclusions thus at [36] and [37]:

> "36. Mr. Beloff relied particularly in this context on the passage in Lord Hope's speech (quoted above) at pp 301H to 302B where his lordship deals with the issue of an arresting officer acting as part of a team and the need for such an officer to be able to rely on other officers in taking decisions whether to arrest or not. However, in each case Lord Hope and Lord Steyn came back to the information actually in the *possession* of the arresting officer as being the material upon which the lawfulness of an arrest must be judged: see the words which I have italicised in the passage from Lord Hope's speech quoted in paragraph 26 above. Even in the passage at p 302 of the report, Lord Hope comes back to this, (which I repeat)
>
> > " … What it [the statutory power] does require is that the constable who exercises the power must first have equipped himself with sufficient information so that he has reasonable cause to suspect before the power is exercised."
>
> A little later Lord Hope said,
>
> > "… So it is *the facts known by or the information given to* the officer who effects the arrest to which the mind of the independent observer must be applied. It is this objective test, applying the criterion of what may be regarded as reasonable, which provides the safeguard against arbitrary arrest and detention …" (Emphasis added by the judge)
>
> 37. So if information given to an arresting officer at a briefing by a superior is insufficient to supply to the arresting reasonable grounds for suspicion of the arrested person, it will, in my judgment, avail the arresting officer nothing to say, 'Well, I thought that my superior probably did have other information justifying the arrest but he did not tell me what it was'. … If it were otherwise, I do not see that the safeguard against arbitrary arrest and detention of which Lord Hope spoke would exist. It would be only a short step

> from justifying an arrest on the basis simply of 'obeying orders', which was so emphatically rejected in O'Hara and other cases."

19. The judge was in our opinion right to hold in [36] that there was no difference of principle between Lord Hope and Lord Steyn. In quoting from Lord Roskill in *McKee*, Lord Hope was focusing on the first question in *Castorino*, namely what the arresting officer in fact suspected, and stressing that (as the judge put it) it was the information actually in the possession of the officer upon which the question whether he had reasonable grounds for suspicion must be judged. We also agree with the judge at [37] that it does not avail the officer to say that his superior probably had other information justifying arrest but he did not tell him what it was.

20. On the other hand it is important to have in mind that, as the judge held at [47], the threshold for the existence of reasonable grounds for suspicion is low: see eg *Dumbell v Roberts* [1944] 1 All ER 326 per Scott LJ, where he said at page 329A-B that "the requirement is very limited"; *Hussien* per Lord Devlin at pages 948G to 949A; and *O'Hara* per Lord Steyn at page 293C and per Lord Hope at page 296D-E. Mr Beloff further relies upon the fact that in *O'Hara* a "scanty" briefing and "sparse" materials were sufficient: per Lord Steyn at page 290A-C and per Lord Hope at 296A respectively. He also places some reliance on the decision of this court in *Cummings v Chief Constable of Northumbria Police* [2003] EWCA Civ 1844 per Latham LJ at [41], where several suspects were arrested even though the offence could only have been committed by one of them.

21. We accept those points subject to this. As indicated in [9] above, the basis of the decision in *O'Hara* was that, in circumstances where counsel for the plaintiff took the tactical decision not to cross-examine the arresting officer, the trial judge inferred from the evidence that the briefing afforded reasonable grounds for the necessary suspicion. Mr Beloff correctly submits that it is for the trial judge objectively to determine whether the suspicion held was reasonable and that whether there are such grounds or not is a question of law: *Dallison v Caffery* [1965] QB 348 per Diplock LJ at page 372.

Application of the principles to the facts

22. Mr Beloff submits that the judge failed properly to apply the principles to the facts and that he erred in principle in concluding that DC Bredo did not have reasonable grounds to suspect that Mohamed was a terrorist in the sense defined in section 40 of the 2000 Act. In particular he submits that the judge wrongly discounted or dismissed the fact that DC Bredo took into account Mohamed's familial connections with a prime suspect, DC Bredo's reliance on views of senior officers and his reliance on the greater knowledge of senior officers.

23. Mr Owen QC submits that the judge did not grant permission to appeal on any point other than that which he himself formulated as quoted at [7] above. Mr Beloff submits that the only ground on which the judge refused permission was the necessity ground and that that is clear from an exchange at the end of the argument, when he submitted to the judge that he had put a cross through necessity but that reasonable grounds remained "up for grabs". Mr Beloff further submits that the judge in effect accepted that. In the alternative he submits that we should grant permission to appeal.

Our reading of the transcript is that the judge only gave leave on what may be called the *O'Hara* point. However, since this part of the case was fully argued, and since it is or may be implicit in the judge's decision to grant permission that it would be necessary for the court to consider the application of the correct principles to the facts, it is we think appropriate for us to consider the facts in some detail. Moreover we would not go so far as to say that the Commissioner has no real prospects of success on appeal. We therefore grant permission so as to permit all the points advanced on behalf of the Commissioner to be argued.

24. The judge accurately set out the facts in some detail at [9] to [23]. It is only necessary to refer to some of them for the purposes of this appeal. On 17 and 19 September 2001 the Anti-Terrorist branch of the Metropolitan Police Force (SO13) received information from the Federal Bureau of Investigation ("FBI") in the United States that alleged that Lotfi might have been involved in or have had prior knowledge of the attacks on 9/11. At [10] the judge quoted extensively from the letters, which included information which implicated Lotfi in the attacks. However, none of it implicated Mohamed. At [11] the judge noted that Lotfi and Sonia lived at 7 Cavendish Court, Coleridge Crescent in Colnbrook and that Mohamed was living at 186 Harlech Gardens in Hounslow.

25. At [12] the judge noted that the police carried out certain investigations which led to an "Operational Briefing Order" prepared by DC Albert Wildgoose. The order was prepared for the purposes of searches which were to be carried out at three addresses with which Lotfi was believed to be associated. The judge quoted from the order, which contained no reference to Mohamed. It did however refer to an intention to search certain addresses including 186 Harlech Gardens and, although it did not otherwise refer to arrests, it did include the statement that, should the decision be made to arrest the subject or subjects, they would be informed that they were being arrested under section 41 of the 2000 Act on the basis that they were reasonably suspected of being involved in the commission, preparation or instigation of acts of terrorism.

26. The judge held at [13] that DC Bredo attended a general briefing, which was conducted by DI Sean Wanless, prior to a further briefing specific to the particular premises he was to visit. DC Bredo was to go to 186 Harlech Gardens, where Mr. Mohamed lived. DC Bredo said in his statement that he was informed by DI Wanless that arrests were to be made. As DC Bredo put it, "It was clear that we were going to arrest the occupants". DI Wanless said that the intention was to arrest Lotfi, his wife Sonia and his brother Mohammed under the 2000 Act. Another officer was to go to the address where Lotfi and Sonia lived.

27. At [15] the judge set out parts of DC Bredo's witness statement in some detail. For present purposes the key parts of the statement were these. Lotfi and his brother Mohamed were very close and Lotfi had access to Mohamed's house. This was of paramount importance

> "because Lotfi was implicated with the 9/11 attacks, and thus the fact that he had access to Mohamed's premises was very significant as we would naturally wish to preserve any possible evidence. There would be two reasons for it being imperative to

preserve evidence, namely evidential development and public safety."

The statement included the following:

> 14. "I would also wish to interview Mohamed Raissi. Sometimes one can invite a suspect for interview. But where the offence is within the remit of the Terrorism Act 2000 public safety is paramount and the preservation of evidence is part of achieving public safety, including by 'preserving' the suspect himself, Mohamed. For example, he may have had forensic evidence upon his own person and we would want to place him in a white suit to preserve this. Arrest was the only mechanism realistically by which I could control him.
>
> 15. Mohamed was in my mind a suspect because, at the briefing, DI Wanless had made clear that Mohamed was the close brother to a significant 9/11 suspect. If I had asked Mohamed to attend as a volunteer and he had said no, I would have arrested him. Thus in reality he had to be arrested. There is no bail under the [2000 Act] and I needed some kind of control.
>
> 16. Lotfi Raissi was plainly a serious suspect because of what the FBI had said. Mohamed was closely associated to Lotfi his brother, and apparently a close brother. I noted that they lived near to each other (Berkshire and Middlesex). That would have been enough in my mind to form reasonable grounds. In my experience terrorists only trust very few people and the blood association is very significant. The magnitude of the 9/11 case made me think that those involved would confide in someone. My experience in terrorist cases suggests that terrorists confide in their close family. I have this experience from previous cases including an Irish republican terrorist case where the conspirators included two brothers and their sister who had a child with a third conspirator and a fourth conspirator. I had also picked up the propensity of family links within terrorism in my duties within SO13. …
>
> 18. Sometimes the purpose of confiding in your family is so that you may rely upon a non-participant to conceal or destroy potentially incriminating evidence out of loyalty, or to turn a blind eye to your activities.
>
> 19. Who else would Lotfi confide in but his brother and wife?
>
> 20. The fact that Lotfi had access to 186 Harlech Gardens made those premises evidentially significant; and the occupier(s) of those premises significant. Had there been another male present who for example refused to provide me

> with his details, he might well also have been arrested to prevent him notifying co-conspirators and / or facilitating the destruction or removal of other evidence we did not know about.
>
> 21. I also understood that s 42 was a vehicle for me to get suspects into custody as a means of furthering the investigation.
>
> 22. On that basis, the decision had been made that Mohamed should be arrested for his possible involvement with his brother's suspected terrorist activities, for him to be interviewed and for his house to be searched. As I will come onto, I agreed with that course."

28. At [16] the judge identified five reasons for the arrest of Mohamed: (1) his close relationship with his brother, the physical proximity of their homes and the importance of family links in terrorist cases; (2) his ability to get access to Lotfi's house; (3) the desire to interview him; (4) public safety; and (5) the preservation of evidence. The judge said, in our view correctly, that of those five grounds only (1) and (2) seem to relate to a reasonable suspicion of Mohamed being himself a terrorist within the meaning of the 2000 Act.

29. DC Bredo was not given any further information but at [18] the judge quoted this from paragraph 27 of his statement:

> "Finally I would point out that John MacBrayne was 'developed vetted', I was not and thus it would not surprise me if MacBrayne was privy to further intelligence. I would not want to know what he knew. In fact I had and still have a high regard for MacBrayne who I recognised as an exceptionally good senior officer and thus although I would not hesitate to challenge any instructions from a senior officer, the fact that it was John MacBrayne considerably reassured me."

The reference to John Macbrayne was to DCI Macbrayne. At [19] the judge commented that it could be seen that DC Bredo, in making his judgment whether to arrest or not, relied on the fact that more senior officers might have other additional information to which he was not privy. He trusted the judgment of those officers in the light of the experience that each of them had.

30. At [20] the judge noted that DC Bredo's honesty was not challenged and at [22] he held that what DC Bredo said in his statement truly represented what he had in his mind when he arrested Mohamed. He accepted that DC Bredo thought at that time that close family connections were material in terrorist cases for the reasons he gave, although he added that it might be that later experience might make him think differently. He also accepted that DC Bredo was telling him the truth when he said that this was a matter of significance to him in the light of his (relatively limited) experience as an SO13 officer.

31. At [47] the judge held that in the case of Sonia the arresting officer had reasonable grounds for suspicion. He characterised the evidence in her case as comparable to the

"scanty" evidence based on inference that justified the arrest in *O'Hara's* case. The judge gave his reasons for arriving at a different conclusion in the case of Mohamed. He said this:

> "48. In my judgment, the case of Mr. Mohamed is quite different. He was simply thought to be the close brother of a major suspect and the two lived geographically fairly close to each other; each had access to the home of the other in this country. Mr. Bredo knew that his superiors thought that he was a suspect, but he knew no more about what that view was based upon than the material which I have mentioned. Mr. Bredo says that he was influenced by an opinion that family links played a part in terrorist activity, but he was unable to give any reasons of substance for this opinion. On analysis, Mr. Mohamed was arrested because Mr. Bredo knew he was the brother of a suspect and that their relationship was close. In my judgment, those grounds were not sufficient to justify the arrest. (Again, for the reasons given above, I do not accept that Mr. Bredo was entitled to act on surmise as to additional information that senior officers might have but which was not passed on to him.) I have not the slightest doubt, however, that Mr. Bredo acted in entire good faith and in a professional manner in compliance with his instructions, but that does not provide the Commissioner with a defence to Mr. Mohamed's claim."

32. Mr Beloff submits that the judge has not done justice to the Commissioner's case. He submits that the information provided to DC Bredo was more extensive than the matters to which the judge referred and, indeed, than the five matters summarised by the judge at [16] and referred to at [22] above. They were: (1) as his brother, Mohamed was a close relation of Lotfi, who was a prime suspect; (2) prime suspect status was based on an FBI briefing to DC Bredo's superiors; (3) Mohamed was a close brother of Lotfi; (4) the brothers lived geographically close to each other; (5) the brothers had mutual access to each other's houses; (6) DC Bredo's own views were fortified by the fact that he knew that his superiors, including particular DCI Macbrayne, whom he regarded as an "exceptionally good senior officer" regarded Mohamed as a reasonable suspect; and (7) DC Bredo was entitled to infer that his superiors might well know more than he did.

33. As to (6) and (7), Mr Beloff submits that the information provided to DC Bredo was no more scanty than that provided in *O'Hara*. However, the difficulty with that submission, as we see it, is that in *O'Hara* the trial judge had inferred that the officer had been given relevant information and he had not been cross-examined about it. Here there was no room for inference. There was no suggestion that DC Bredo had been given more information than he said in evidence that he was given. Thus he was not told what his superiors suspected Mohamed to have done. We do not accept Mr

Beloff's submission that it was reasonable for DC Bredo to infer that his superiors must have had good grounds for suspicion. As appears from the analysis in *O'Hara* and the other cases referred to above, all depends upon the information which the arresting officer has. The proposition that it is sufficient for the arresting officer to infer that his superiors must have had reasonable grounds for suspicion before instructing him to arrest a suspect is inconsistent with the reasoning in *O'Hara*. We can well understand that that could be the law and, indeed, that some may think that it should be the law in view of the nature of modern police operations. However, as the law stands, for the reasons given by Lord Steyn at page 295E-H of *O'Hara* and summarised at [14] above, it is not the law. Factors (6) and (7) do not, in our opinion help the Commissioner. Nor, for the same reasons, does factor (2).

34. That leaves factors (1) and (3) to (5), which are essentially those referred to by the judge at [48]. We agree with the judge that they did not afford DC Bredo reasonable grounds for suspicion that Mohamed was a terrorist, as defined. They amount only to the fact that he and Lotfi were close brothers, that they lived not very far apart and that each had access to the other's house. In our judgment, that was not enough. In all these circumstances we dismiss the appeal. We would only add, by way of postscript, that it is not easy to reconcile the way the case was pleaded with the way it is now put on behalf of the Commissioner.