so the five people killed in the course of combat operations, military patrols and searches had not enjoyed Convention rights. On the other hand, they (like the Divisional Court) regarded the detention unit in a UK military base, in which Mr. Mousa had been killed, as analogous to an embassy, and being under UK control so as to bring Mr. Mousa within the protection of the ECHR (see Lord Rodger at [56]–[61]; Baroness Hale at [88]–[90]; Lord Carswell at [97]; Lord Brown at [132]).

This is, on the facts, a well balanced approach to an increasingly common problem in national and international law. However, it will need continuous review, both to take account of the developing case-law of the Strasbourg Court and to work out the impact of other factors potentially affecting the government's legal liability for its forces overseas, such as UN Security Council resolutions made under Chapter VII of the UN Charter (see *R. (Al-Jedda) v. Secretary of State for Defence* [2007] UKHL 58).

DAVID FELDMAN

MAY DAY, MAY DAY - POLICING PROTEST

ON May Day 2001, huge throngs of demonstrators began to converge on London's Oxford Circus, from various points of the compass. The police were aware (from publicity material and other sources) that something was afoot. But their intelligence lacked detail, since the instigators of the event had (probably unlawfully) decided not to co-operate with the police in any way. There had been outbreaks of serious violence at previous May Day demonstrations, and before the 2001 event the Special Branch had concluded that the risks of serious public disorder were among the worst ever seen in London. As a result, some 6000 police were deployed. When the crowd in Oxford Circus had reached something over 1000, the police acted to cordon it off, allowing nobody else to enter and preventing those already in place from leaving without express police permission, as part of a planned controlled dispersal (involving searches and evidence gathering). It took some seven hours to clear the Circus, and the already chaotic conditions in which the participants were held became increasingly squalid throughout that period.

The appellants Austin and Saxby, who were respectively a participant in the demonstration and an "innocent bystander", claimed damages for false imprisonment and for breach of their rights under section 7 of the Human Rights Act 1998. The trial judge Tugendhat J. dismissed all claims [2005] EWHC (QB) 480 (in a

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judgment described by Clarke M.R. as a "tour de force") and the Court of Appeal unanimously dismissed the appeal; *Austin and Saxby* v. *The Commissioner of Police of the Metropolis* [2007] EWCA Civ 989. It was accepted on all sides that there was an interference with the liberty of the appellants which amounted to false imprisonment unless that could be justified as lawful. Three possible sources of legal authority were identified in argument: the power of the police to prevent breaches of the peace, the defence of necessity and the Public Order Act 1986. As the argument developed, the second of these was eliminated as a separate defence, since a test of necessity was part and parcel of the proper use of the breach of the peace powers.

The difficulty about any reliance upon the breach of the peace was that it was quite clear that the appellants (whom the judge said he did not find to be entirely satisfactory witnesses) had behaved lawfully throughout. That fact is not necessarily determinative. It is clearly the law that the police are entitled to take action against persons who are not themselves threatening a breach of the peace if such a course is necessary to prevent a breach either happening or about to do so. Clearing a path through a group of bystanders to get to the scene of an affray is an example. Authority as recent as the decision of the House of Lords in *R.* (*on the application of Laporte*) v. *Chief Constable of Gloucestershire* [2006] UKHL, [2007] 2 A.C. 105 also confirms that the breach of the peace must be "imminent" and that once that test is passed, the action taken must be both reasonably necessary and proportionate.

But how to apply those principles in this context? Must the police suspect that the appellants were persons who might themselves cause breaches of the peace? The trial judge (whose judgment was delivered before the decision of the House in *Laporte*) and the Court of Appeal answered this question rather differently. The trial judge thought that the question must be answered affirmatively if it was to succeed as a defence. The Court of Appeal took a broader view based essentially upon the necessity principle. The police knew at the time when the cordon was imposed that some of the people within the cordon would not be likely to act unlawfully – the officer in command issued instructions that individual police officers could release people who "obviously and clearly had nothing to do with the demonstration". But they had no easy way of differentiating one group from the other. In the exceptional circumstances with which the police were confronted, what they did was necessary in order to avoid an imminent breach of the peace and there was no other way in which the risks of serious injury could have been avoided. Since this was implicit in the judge's findings, the outcome was the same and the appeals were dismissed.

So far as the claim for damages under section 7 of the 1998 Act and Article 5 (deprivation of liberty) were concerned, the Court held that,

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in the light of the Strasbourg jurisprudence, there was no deprivation of liberty sufficient to trigger the provisions of Article 5. This is perhaps surprising (and it is contrary to the finding of the judge), but whichever way the point is analysed the result would have been the same, since the judge had held that the police had no real alternative to doing what they did (necessity) and that would have been an answer to the claim under Article 5.

The role of the Public Order Act 1986 in the proceedings was somewhat marginal, because the police in their planning and operational tactics did not seek to rely on it. Having regard to the findings on the breach of the peace point, it was not strictly necessary for the Court of Appeal to consider the legislation, but the judge had taken the view that the Act might be applicable even if not explicitly relied upon by the police, and the court felt obliged to address the issues raised. The problem with the Act (although the Court does not quite say so) is that it constructs a regime that is applicable to persons seeking genuinely to exercise their freedoms of assembly and public expression in a reasonably orderly fashion, and in collaboration with the authorities. If the instigators in their promotional literature advocate "multiple protests to evade the police and the encouragement of secrecy", at [51, iii], the framework of the Act collapses. Whether, as the Court suggests, this gives rise to "the desirability of a thorough consideration of this area of the law", at [84] is a matter for debate. The role of the police in the preservation of public safety (as opposed to order) in such circumstances needs to be more explicitly addressed than it is under the current law. Here, the risks were from "crushing, trampling and missile throwing" in a situation which was "dynamic, chaotic and confusing", at [51]. "Crushing and trampling" are not really properly described as breaches of the peace. Any person who wishes to participate in such a debate must read the judgment of Tugendhat J. for the insights that it offers into the policing of demonstrations and processions in London. The evidence before him (which included 21 DVDs recording the event) shows plainly that the police there take very seriously their legal obligation "to ensure that people have the opportunity to express their views" [51, ii].

A.T.H. SMITH

JUDICIAL REVIEW OF PREROGATIVE ORDERS IN COUNCIL: RECOGNISING THE CONSTITUTIONAL REALITY OF EXECUTIVE LEGISLATION

ENGLISH law recognises two types of Order in Council: first, Orders in Council made under statutory powers (such as those made pursuant to

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