



25 June 2021

PRESS SUMMARY

Director of Public Prosecutions (Respondent) v Ziegler & others (Appellants)

[2021] UKSC 23

On appeal from: [2019] EWHC 71 (Admin)

JUSTICES: Lord Hodge (Deputy President), Lady Arden, Lord Sales, Lord Hamblen, Lord Stephens

BACKGROUND TO THE APPEAL

This appeal concerns the relationship of the criminal law with the rights to freedom of expression and freedom of peaceful assembly guaranteed by articles 10 and 11 of the European Convention of Human Rights (the “**ECHR**”).

In September 2017, the Defence and Security International arms fair was held at the Excel Centre in East London. The appellants are strongly opposed to the arms trade. They took action to protest the fair and disrupt deliveries to the Excel Centre. The action consisted of lying down in the middle of one side of an approach road leading to the Excel Centre, and locking themselves to lock boxes, which are hollow boxes containing bars to which the appellants attached their arms. The police were present at the scene in anticipation of demonstrations. Officers tried to persuade the appellants to remove themselves from the road. When this failed, the appellants were arrested. It took roughly 90 minutes to remove them from the road, however, as the lock boxes were constructed in a way which made them hard to disassemble.

The appellants were charged with wilful obstruction of a highway without lawful authority or excuse, contrary to section 137(1) of the Highways Act 1980 (the “**1980 Act**”). They were acquitted following a trial at Stratford Magistrates’ Court. The district judge had regard to the appellants’ article 10 and 11 ECHR rights, and concluded that the prosecution had not proved that the appellants’ obstruction of the highway, which it found to be limited, targeted, and peaceful, was unreasonable. The appellants therefore had a defence of lawful excuse for the purposes of section 137. The respondent appealed by way of case stated to the Divisional Court, which allowed the appeal and directed that convictions be entered. The Divisional Court considered that the assessment of the proportionality of the interference with the appellants’ ECHR rights was wrong, essentially because the district judge failed to strike a fair balance between the interests of the protestors and those of other members of the public. The parties agreed that the issues in the appeal, as certified by the Divisional Court as points of law of general public importance, are as follows:

1. What is the test to be applied by an appellate court to an assessment of the trial court in respect of a statutory defence of lawful excuse when Convention rights are engaged in a criminal matter?
2. Is deliberate physically obstructive conduct capable of constituting a lawful excuse for the purposes of section 137 of the 1980 Act, where the impact of the deliberate obstruction on other highway users is more than de minimis (i.e. minimal), and prevents them, or is capable of preventing them, from passing along the highway?

JUDGMENT

The Supreme Court allows the appeal by a majority. The order directing convictions is set aside. The dismissal of the charges against the appellants is restored. Lord Hamblen and Lord Stephens give the main judgment, and Lady Arden gives a separate concurring judgment. Lord Sales, with whom Lord Hodge agrees, gives a judgment dissenting in part.

REASONS FOR THE JUDGMENT

The appellate test

Section 137(1) of the 1980 Act must be read compatibly with the ECHR. In this context, that involves considering whether the public authority's interference with the protestors' rights was proportionate. If it was not proportionate, such that the interference was unlawful, the protestor will have a statutory defence of lawful excuse. [10]-[16]. The appellate test conventionally applied by the Divisional Court in appeals by way of case stated in criminal proceedings, including in cases involving issues of proportionality, is whether the court's conclusion was one which was reasonably open to it – i.e., it is not *Wednesbury* irrational or perverse (see *Associated Provincial Picture Houses Ltd v Wednesbury Corpn* [1948] 1 KB 223) [29]. This strict test of irrationality or perversity reflects the fact that an appeal by way of case stated is an appeal from a tribunal of fact which is only permissible on a question of law [36] and the general approach to such appeals set out in the House of Lords decision in *Edwards v Bairstow* [1956] AC 14. On this approach, a conclusion of fact will only be open to challenge if it is one which no reasonable court, properly directed as to the law, could have reached on the facts found or there was no evidence to support it. An appeal will also be allowed where there is an error of law on the face of the case stated [39]-[40].

The Divisional Court held that a different test applied in appeals, such as this, which involve an assessment of proportionality. Under that test, following the Supreme Court's decision in *In re B (A Child) (Care Proceedings: Threshold Criteria)* [2013] UKSC 33, an appeal will be allowed where the decision of the lower court was “wrong”, whether in law or in fact. The majority consider that this was not the correct test. *In re B* was a family law case involving the appellate test under the Civil Procedure Rules (which do not apply in criminal proceedings such as these). It would be unsatisfactory for the appellate test in appeals by way of case stated to fluctuate depending on whether the case turns on an assessment of proportionality [42]-[45]. However, the test in *In re B*, as subsequently refined, may be very relevant to appeals by way of case stated which turn on an assessment of proportionality. If there is an error or flaw in the judge's reasoning which undermines the cogency of the conclusion on proportionality, that is likely to be apparent on the case stated, and therefore an error of law on the face of the case, such that the decision will be open to challenge on the correct appellate test. Any challenge, as Lady Arden observes at [104]-[107], would have to be made on the basis of the trial judge's primary and secondary findings, unless there was no evidence for them or they were findings which no reasonable tribunal could have reached: the review is of the judgment and its findings, not the evidence on which the judge relied [49]-[54].

The minority would uphold the decision of the Divisional Court. They consider that the same appellate test in relation to an assessment of proportionality should be applied regardless of the procedural route by which the appeal happens to proceed.

Is deliberately obstructive conduct capable of constituting a lawful excuse for the purposes of section 137?

A review of the case law of the European Court of Human Rights shows that the protection of articles 10 and 11 ECHR extends to a protest which takes the form of intentional disruption obstructing others. However, the extent of the disruption and whether it is intentional are relevant factors in the assessment of proportionality [62]-[70]. The factors relevant to this assessment [71]-[78], include in particular, and so far as relevant here, that the appellants' action was, and was intended to be, a peaceful gathering, which gave rise to no form of disorder, did not involve the commission of any offence other than the

alleged section 137 offence, was carefully targeted at vehicles heading to the fair, involved no complete obstruction of the highway, and, insofar as the obstruction lasted 90-100 minutes, was of limited duration. The district judge was entitled to take these factors into account in determining the issue of proportionality in favour of the appellants. There was no error or flaw in his reasoning on the face of the case such as to undermine the cogency of his conclusion on proportionality [80]-[87].

The minority agreed with the Divisional Court that the district judge's assessment of proportionality was flawed, but considered that the limited facts set out in the case stated did not allow the Divisional Court to conclude that the police action was proportionate. The Divisional Court's own assessment of proportionality was also flawed. The minority would therefore have ordered remittal to the magistrates' court for further examination of the facts [140]-[153].

References in square brackets are to paragraphs in the judgment

NOTE

This summary is provided to assist in understanding the Court's decision. It does not form part of the reasons for the decision. The full judgment of the Court is the only authoritative document. Judgments are public documents and are available at:

<http://supremecourt.uk/decided-cases/index.html>