Case Number: UKSC 2022/1609

IN THE SUPREME COURT

DIRECTOR OF PUBLIC PROSECUTIONS

Appellant

and

(1) HECTOR LITRE

(2) MILLIE LITRE

Respondents

INSTRUCTIONS TO COUNSEL

Leading and Junior counsel are instructed by Gill & Co LLP to appear at the hearing of the above-numbered appeal to the Supreme Court on 4 July 2022.

This appeal is a "leap-frog" appeal from the judgment of the Divisional Court (neutral citation [2022] EWHC 1829 (Admin)) appended to these Instructions at pages 2ff.

The Supreme Court have ordered that each party file a single skeleton argument dealing with both grounds of appeal no later than 4pm on Monday 27 June 2022 by email to kingslandcup@ftbchambers.co.uk.

Further procedural requirements for the skeleton arguments and hearing are set out at rules 34-36 and 38-39 of the Moot Rules.

Gill & Co LLP
6 June 2022

Neutral Citation Number: [2022] EWHC 1829 (Admin)

Case Number: CO/1609/2022

IN THE HIGH COURT OF JUSTICE
KINSGLAND MOOT DIVISION
DIVISIONAL COURT

Before:

THE HON. LORD JUSTICE LEASE and
THE HON. MRS JUSTICE PECK

Between:

DIRECTOR OF PUBLIC PROSECUTIONS

Appellant

and

(1) HECTOR LITRE
(2) MILLIE LITRE

Respondents

JUDGMENT

LORD JUSTICE LEASE:

1. This is the judgment of the Court to which we have both contributed. For the reasons set out below, the appeal by way of case stated is dismissed.

Factual background

2. Section 8(1)(a) Weights and Measures Act 1985 provides that no unit of measurement may be used for trade unless it is included in Schedule 1 Parts I–V of the 1985 Act. On 6 April 2022, the UK Government brought into force the Weights and Measures (Traditional Units) Act 2021. This had the effect of amending the Weights and Measures Act 1985 to delete all references to metric units and replace the metric units set out in Parts I-V of Schedule 1 with imperial units of measurement only. Part VI of Schedule 1, which permitted some imperial units to be used as "supplementary indicators" was repealed, along with all retained EU law relating to weights and measures. The effect of these amendments is that it is now mandatory to trade only in imperial units, and the use of metric units is subject to criminal sanction.

3. The Respondents, Mr Hector Litre and Mrs Millie Litre, are academics (a mathematician and a logician respectively), and live in the village of Cubit Regis in the rural county of Ferlingshire. They have long opposed the UK's exit from the EU on political grounds. On the passage of the 2021 Act, they joined the Militant Movement for Continuing Metricity, an organisation which campaigns against the wholesale imposition of imperial units on shop owners and customers. A witness statement before the Court explains that such an imposition offends both their political beliefs, which include that the use of metrical units is a unifying force between nations which encourages peace, and their professional judgement.

4. Each year since 1478, during the week after Easter, a market has been held in Cubit Regis on the village green, known as Lower Furlong. Lower Furlong comprises an elongated rectangle of land approximately two acres in size, bounded to the south by the Ferling River and to the north by the rears of a number of historic properties along the High Street. Pedestrian access is gained at relatively narrow points at the far east and west ends of the green, whilst vehicular access can only be obtained via the gate at the east end.

5. Once the property of the nearby Lorgh Priory, dissolved during the Reformation, the freehold title to the land is held by William Charles Baron Mendenhall. In addition to the annual market, the green is used for a variety of events throughout the year,

including village fetes, sports matches, and the traditional village activity of rod cranning.

6. On 18 November 1969, an application using Form 8 was made to register Lower Furlong as a town and village green under the provisions of the Commons Act 1965. There was no objection to the provisional registration, which became final by section 7(1) of the 1965 Act. Notwithstanding the registration, the Mendenhall Estate continues to oversee the upkeep of the land, maintaining the riverbanks, grass, gates and fences, and coordinating the various events which occur.

7. From the material we have been provided with, we note that the Easter market, from its origin as a spring market and match-making festival for local farmers, has now become a notable food and drink event, drawing large numbers of visitors from across Ferlingshire and further afield.

8. On the night of 18 April 2022, with the Easter market due to open the following day at 12 noon, Mr and Mrs Litre arrived at Lower Furlong. Mr Litre glued his hands and face to the vehicular gate in such a way as to prevent it opening, whilst Mrs Litre chained herself across the pedestrian access point at the west end. Nearby were displayed large banners denouncing “Neo-colonial units of measurement” and announcing “We are the Metric Martyrs”.

9. As a result of their actions, traders were unable to access Lower Furlong the following day to set up the market. Moreover, members of the public who would normally walk their dogs or practice rod cranning were unable to use the green.

10. After their removal from their positions late in the evening on 19 April 2022, Mr and Mrs Litre were arrested and charged with offences under section 12 of the Inclosure Act 1857.

11. After a short trial in front of District Judge Perch sitting at Ferlingside Magistrates’ Court on 25 April 2022, both were acquitted. DJ Perch found that, whilst Mr and Mrs Litre had wilfully committed acts “to the interruption of the use or enjoyment” of Lower Furlong, on a proper construction, the statutory wording allowed a defence of “lawful

authority". She found that, even though their conduct could be characterised as trespassory, Mr and Mrs Litre were protesting. Their Article 10 rights to freedom of expression were therefore engaged by the prosecution. Applying the principles set out by the Supreme Court in DPP v Ziegler [2021] UKSC 23; [2022] AC 408, she concluded that to convict would be a disproportionate interference with the exercise of those rights. She therefore found that a defence of "lawful authority" to the section 12 offence has been made out, and acquitted.

Grounds of appeal

12. The prosecution now appeals the acquittal by way of case stated. The questions set out in the case stated by DJ Perch are as follows:

    (i) Did I err in finding that the statutory wording of section 12 permits of a defence of lawful authority to a charge under that section?

    (ii) If so, was I correct that exercise of Convention rights is capable of amounting to such a defence?

    (iii) Did I err in finding that the Defendants' right to freedom of expression under Article 10 was engaged?

    (iv) If not, was I correct to apply to Ziegler proportionality assessment?

Discussion

Availability of defence of "lawful authority"

13. Whether or not the defence of "lawful authority" is available for an offence under section 12 of the 1857 Act is a matter of plain statutory construction. The 1857 Act is not as clearly drafted as is now customary with primary legislation, and significantly predates the improvements in drafting that arose from the establishment of the Office

of Parliamentary Counsel later in the 19th century. Nevertheless, the fundamental principles are no different, namely, that statutory interpretation involves an objective assessment of the meaning which a reasonable legislature would be seeking to convey when using the statutory words which are being considered.

14. We start by noting that in Oxfordshire County Council v Oxfordshire City Council [2006] UKHL 25; [2006] 2 AC 674 Lord Hoffman commented at paragraph 57 on the paucity of authority on offences under section 12. Counsel were not able to provide us with any authority on the question of whether a defence of lawful authority applies to the section as a whole, or only to the clause in which it appears, namely to "wilfully and without lawful authority lead or drive any cattle or animal thereon". It is therefore incumbent on us to go the extra mile and determine whether such a defence applies in the circumstances of this case.

15. We have not found this an easy task. On the one hand, a plain reading of the statute suggests an intention on the part of the draughtsman to include a defence of lawful authority only in relation to the leading and driving of cattle and other animals. On the other¸ we can envisage certain activities such as the "low-level agricultural activities" mentioned in the Oxfordshire case which we consider it unlikely that the Victorian law-makers intended to criminalise notwithstanding the fact that they might interfere with "the use or enjoyment" of a town and village green. In our view, the better interpretation is that the defence of lawful authority extends to all elements of section 12.

16. We also agree with the judge that such a defence is of a similar character and nature to that considered by the Supreme Court in Ziegler, where the offence under consideration (obstructing the highway) required the prosecution to prove that the defendant in question did not have a "lawful excuse". In the light of the ratio of that decision, it is clear that, if Article 10 is engaged, then a court must undertake a proportionality assessment and only convict if to do so would be proportionate in a Convention sense.

Whether Article 10 is engaged

17. The Appellant argues that, indeed, the Respondents' Article 10 rights to freedom of expression were not engaged, inasmuch as their protest against de-decimalisation took

place on private land and was trespassory. The protest was trespassory inasmuch as it went beyond the rights that the Respondents as members of the public had to use Lower Furlong for "lawful sports and pastimes". We have found this argument difficult to fathom, and reject it for the following reasons.

18. We have been asked to adopt the approach taken by this Court in DPP v Cuciurean [2022] EWHC 736 (Admin), in particular at paragraphs 26 to 50, which concludes as follows:

> "45. We conclude that there is no basis in the Strasbourg jurisprudence to support the respondent's proposition that the freedom of expression linked to the freedom of assembly and association includes a right to protest on privately owned land or upon publicly owned land from which the public are generally excluded. The Strasbourg Court has not made any statement to that effect. Instead, it has consistently said that articles 10 and 11 do not "bestow any freedom of forum" in the specific context of interference with property rights (see Appleby at [47] and [52]). There is no right of entry to private property or to any publicly owned property. The furthest that the Strasbourg Court has been prepared to go is that where a bar on access to property has the effect of preventing any effective exercise of rights under articles 10 and 11, or of destroying the essence of those rights, then it would not exclude the possibility of a State being obliged to protect them by regulating property rights.
>
> 46. The approach taken by the Strasbourg Court should not come as any surprise. Articles 10, 11 and A1P1 are all qualified rights. The Convention does not give priority to any one of those provisions. We would expect the Convention to be read as a whole and harmoniously. Articles 10 and 11 are subject to limitations or restrictions which are prescribed by law and necessary in a democratic society. Those limitations and restrictions include the law of trespass, the object of which is to protect property rights in accordance with A1P1. On the other hand, property rights might have to yield to articles 10 and 11 if, for example, a law governing the exercise of those rights and use of land were to destroy the essence of the freedom to protest. That would be an extreme situation. It has never been suggested that it arises in the circumstances of the present case, nor

> more generally in relation to section 68 of the 1994 Act. It would be fallacious to suggest that, unless a person is free to enter upon private land to stop or impede the carrying on of a lawful activity on that land by the landowner or occupier, the essence of the freedoms of expression and assembly would be destroyed. Legitimate protest can take many other forms. […]
>
> 50. For the reasons we gave in para. [8] above, we do not determine Ground 1 advanced by the prosecution in this appeal. It is sufficient to note that in light of the jurisprudence of the Strasbourg Court it is highly arguable that articles 10 and 11 are not engaged at all on the facts of this case."

19. However, these comments of the Court were obiter and, in any event in our view, confined to the particular facts of that case, namely where protestors had occupied farmland which was fenced off, not accessible to the public.

20. In this case, it is a matter of common sense that the Respondents' Article 10 rights are engaged. The Respondents were protesting, that is, expressing publicly their view about recent political events about which they felt strongly. Although the freehold of Lower Furlong is not owned by a public authority, the public has rights to use and access the land pursuant to its status as a town and village green. The situation is therefore in many ways materially similar to one in which protestors occupy a highway. The courts have repeatedly held that in such circumstances, Article 10 (and Article 11) is engaged – see e.g. City of London v Samede [2012] EWCA Civ 160; [2012] P.T.S.R 1624.

21. Moreover, although we leave open the question, it seems to us entirely possible that acts of protest could constitute "lawful sports and pastimes" so as to fall within the scope of the rights of the public to use Lower Furlong as a town and village green and thus would not be trespassory at all.

Conclusion and permission to appeal

22. For these reasons we would dismiss the appeal and uphold the decision of DJ Perch.

23. We nevertheless grant the Appellant's application for permission to appeal, limited to the following grounds, which we consider to raise arguable points of law of general importance:

    a. Ground 1: Whether a defence of lawful authority was available to the Respondents in the circumstances of this case, and if so, whether Article 10 is in principle capable of providing such lawful authority;

    b. Ground 2: Whether the Article 10 right to freedom of expression is engaged in relation to protest on land comprising registered town and village green, and whether or not that protest is properly to be considered trespassory.

24. These questions are certified under section 1(2) Administration of Justice Act 1960 and leave to appeal granted to the Supreme Court.