***Case Title: Director of Public Prosecutions v Ziegler and others***

**Case Analysis**

***Meta-Data*:**

* **Case Number**: UKSC 2019/0106
* **Date of decision**: 25 June, 2021
* **Featured case**: N/A
* **Region**: Central Europe and Asia
* **Country**: United Kingdom
* **Type of expression**: Public Assembly
* **Judicial Body**:Supreme (court of final appeal)
* **Type of law**: Criminal Law, International/Regional Human Rights Law
* **Main Themes**: Freedom of Association and Assembly / Protests
* **Outcome**: Overturned Divisional Court´s decision/ Confiremed District Court's ruling
* **Status**: Closed
* **Tags**: Freedom of Assembly/Protest

***Analysis:***

* **Summary and Outcome**:

The Supreme Court of the United Kingdom confirmed the District Court's decision that the arrest and prosecution of a group of protesters infringed their rights to free speech and assembly under Article 10 and 11 of the European Convention on Human Rights. The case concerned a group of demonstrators apprehended for lying down in the middle of a road on one side of the carriageway, blocking traffic towards an arms fair venue. The District Judge found the applicants not guilty because he considered they were exercising their rights to free speech and assembly, hence they had a lawful excuse. However, the prosecution appealed on a point of law, and the Divisional Court reversed the acquittals. The Supreme Court overturned that decision, and the convictions were revoked.

* **Facts**:

 In September 2017, the biennial Defence and Security International (DSEI) arms fair was held at the Excel Centre in East London. In the days before the fair's opening, Nora Ziegler, Chris Cole, Jo Frew, and Henrietta Cullinan (the appellants),who were strongly opposed to the event, laid down in the middle of one side of an approach road leading to the Excel Centre. They attached themselves to two lockboxes with pipes sticking out from each side. During the demonstration, Police officers approached the appellants and went through the "5 stage process" to try and persuade them to remove themselves voluntarily from the road. When the appellants failed to respond, they were arrested. However, it took approximately 90 minutes to successfully remove the demostrators all of them from the road since the lockboxes were intentionally designed to make them hard to disassemble. The demonstrators were charged with wilful obstruction of a highway per section 137 of the Highways Act 1980.

On 1 and 2 February 2018, the applicants were tried before District Judge Hamilton at Stratford Magistrates' Court, who dismissed the charges. Taking into consideration the appellants' right to freedom of expression and freedom of peaceful assembly under Articles 10 and 11 of the ECHR, the District Court found that the prosecution "had failed to prove the requisite the defendants' limited, targeted, and peaceful action, which involved obstruction of the highway, was unreasonable" [para. 4]. As a result, the Director of Public Prosecutions appealed the decision before the Divisional Court by way of case state, a type of appeal that deals with a question of law, not fact.

On 22 January 2019, the Divisional Court allowed the appeal and sentenced the applicants to conditional discharges of 12 months. The Court suggested that the assessment of proportionality in the instant case should have been that set out in *In re B (a Child) (Care Proceedings: Threshold Criteria)*. The Court held that the District Judge's assessment of proportionality was erroneous because "there was no "fair balance" struck in these cases between the rights of the individuals to protest and the general interest of the community, including the rights of other members of the public to pass along the highway. Rather the ability of other members of the public to go about their lawful business was *completely prevented* by the physical conduct of these defendants for *a significant period of time*. That did not strike a fair balance between the different rights and interests at stake." [para. 28]

On 8 March 2019, the Divisional Court dismissed the appellants' application for permission to appeal to the Supreme Court; however, it certified two points of law of general public importance for the Supreme Court to analyze. On 3 December 2019, a panel of the Supreme Court composed of Lord Kerr, Lord Hodge, and Lady Arden granted permission to appeal.

* **Decision Overview**:

The main issues before the Supreme Court were: "(1) What is the test to be applied by an appellate court to an assessment of the decision of the trial court in respect of a statutory defen[s]e of "lawful excuse" when Convention rights are engaged in a criminal matter? (2) Is deliberate physically obstructive conduct by protesters 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*, and prevents them, or is capable of preventing them, from passing along the highway?" [para.7]

To answer the first certified question, the Supreme Court held that section 137(1) of the 1980 Act must comply with the ECHR. This implies that the trial court should have considered whether the police's interference with the appellants' article 10 and 11 rights by arresting them was proportionate. The appellant would have a defense of lawful excuse to the underlying criminal offense if found disproportionate. The Court referred primarily to its case of *Edwards v Bairstow* to establish that the test that an appellate court should have applied the same to appeals on questions of law in a case stated under section 111 of the Magistrates' Courts Act 1980. Said Act establishes that "...Any person who was a party to any proceeding before a magistrates' court or is aggrieved by the conviction, order, determination or other proceedings of the court may question the proceeding on the ground that it is *wrong in law* or is in excess of jurisdiction by applying to the justices composing the court to state a case for the opinion of the High Court on *the question of law* or jurisdiction involved” [par.36].

The Supreme Court held that the appellate test for the Divisional Court to apply in appeals by way of case stated was whether the Court’s conclusion was one which was reasonably open to it. By using this approach, a determination of fact could only be challenged if it is one that no reasonable court could have reached on the facts or if there was an error of law that was essential to the decision. Thus the Court considered that the Divisional Court decision that there was a different appellate test where the appeal raises an assessment of proportionality was incorrect and did it without regard to any relevant authorities. However, the Court highlighted that although "the Divisional Court applied the wrong appellate test, it may therefore have reached a conclusion that was justifiable on the basis that there was an error of law on the face of the case" [para. 54].

To answer the second certified question, the Court analyzed if the protesters' deliberate physical obstructive conduct was capable of constituting a lawful excuse for section 137 of the Highways Act 1980, even where the impact of the intentional obstruction on other highway users is more than *de minimis*. The Court remarked that the issue before the District Judge did not involve the proportionality of the police in arresting the appellants but rather proportionality in the context of the alleged commission of an offense under section 137 of the 1980 Act.

The Court referred to the ECtHR cases of *Hashman v United Kingdom*, *Steel v the United Kingdom*, *Kudrevičius v Lithuania* and *Primov v Russia* to highlight that there should be a certain degree of tolerance to disruption to ordinary life, including disruption of traffic caused by the exercise of the right to freedom of expression or freedom of peaceful assembly. However, the Court stressed that the extent of the disruption and whether it is intentional are relevant factors in assessing proportionality.

According to the Court, the factors relevant to such assessment must include that the plaintiffs' action was intended to be a peaceful gathering and gave rise to no form of disorder; did not involve the commission of any offense other than the alleged section 137 offense; was carefully targeted at vehicles heading to the fair and did not obstruct completely the highway; and, was of limited duration since the obstruction lasted 90-100 minutes. Additionally, since there were alternative routes available for vehicles making deliveries to the Excel Centre during the demonstration, there was no evidence of any significant disruption caused by the obstruction. Hence, the Court deemed that the proportionality assessment applied by the District Court in favor of the appellants was correct since he considered the relevant facts, and there was no error or flaw in his reasoning to undermine his conclusion.

Finally, the Court deemed the lawful exercise of Convention Rights in Articles 10 and 11 meant that the prosecution failed to prove that the defendant's use of the highway was unreasonable. For that reason, the defendants had a "lawful excuse" for the obstruction of the highway, and therefore, could not be considered as a criminal offense. Thus, the Supreme Court overturned the order directing convictions and ordered the dismissal of the charges against the appellants to be restored.

Dissenting Opinions of Judges …:

Lord Sales presented a dissenting opinion. Regarding the first certified question, he stated that it was "not coherent to say that an appellate court should apply a different approach in the context of an appeal by way of case stated as compared with other situations. The legal rule to be applied is the same in each case, so it is difficult to see why the test for error of law on appeal should vary. The fact that an appeal happens to proceed by one procedural route rather than another cannot (...)change the substantive law or the appellate approach to ensuring that the substantive law has been correctly applied" [para. 154].

Concerning the second question, Lord Sales considered that "the Divisional Court was wrong to simply conclude that the police action was, in all the circumstances of the case, proportionate" [para.150]. Therefore, he considered that the proper course for the Divisional Court should have been to allow the appeal but to remit the matter to the magistrates' court for further examination of the facts.

***Direction:***

* **Outcome**: Expands Expression

The Supreme Court's decision expands the scope of freedom of expression. Through a thorough examination of ECtHR case law, the Supreme Court held that there must be a certain degree of tolerance to disruption to ordinary life, including disruption of traffic, caused by the exercise of the right to freedom of expression or freedom of peaceful assembly.

***Perspective***:

* **Related International and/or regional laws**:

**Example:**

* [ECHR, art. 10](https://www.echr.coe.int/Documents/Convention_ENG.pdf)
* [ECHR, art. 11](https://www.echr.coe.int/Documents/Convention_ENG.pdf)
* [ECtHR, Primov v. Russia, App. No. 17391/06 (2014)](https://globalfreedomofexpression.columbia.edu/cases/primov-v-russia/)
* [ECtHR, Kudrevičius and others v. Lithuania, App. No. 37553/05 (2015)](https://globalfreedomofexpression.columbia.edu/cases/kudrevicius-others-v-lithuania/)
* [ECtHR, Steel v. United Kingdom, App. No. 67/1997/851/1058 (1998)](https://hudoc.echr.coe.int/rus?i=001-58240)
* [ECtHR, Lashmankin v Russia, App. No. 57818/09 (2017)](https://globalfreedomofexpression.columbia.edu/cases/lashmankin-v-russia/)
* [ECtHR, Hashman v United Kingdom, App. No. 25594/94 (1999)](https://globalfreedomofexpression.columbia.edu/cases/hashman-v-the-united-kingdom/)
* [ECtHR, Sáska v. Hungary, App. No. 58050/08 (2012)](http://hudoc.echr.coe.int/app/conversion/pdf/?library=ECHR&id=001-114769&filename=001-114769.pdf)
* [ECtHR, Balçık v. Turkey, App. No. 25/02 (2007)](https://hudoc.echr.coe.int/eng#%7B%22itemid%22:%5B%22001-83580%22%5D%7D)
* [ECtHR, Molnar v Hungary, App. No. 10346/05 (2008)](https://hudoc.echr.coe.int/rus#%7B%22itemid%22:%5B%22001-88775%22%5D%7D)
* **National law or jurisprudence**:
* [U.K, Human Rights Act 1998, Section 3](https://www.legislation.gov.uk/ukpga/1998/42/contents)
* [U.K, Human Rights Act 1998, Section 6](https://www.legislation.gov.uk/ukpga/1998/42/contents)
* [U.K.,Highways Act 1980, Section 137](https://www.legislation.gov.uk/ukpga/1980/66/section/137#:~:text=137%20Penalty%20for%20wilful%20obstruction.&text=(1)If%20a%20person%2C,3%20on%20the%20standard%20scale%5D.)
* [U.K. Magistrates’ Courts Act 1980, Section 111(1)](https://www.legislation.gov.uk/ukpga/1980/43/contents)
* [U.K.Supreme Court of Justice, In the matter of B (a child) [2013] UKSC 33](https://www.supremecourt.uk/cases/docs/uksc-2013-0022-press-summary.pdf)
* [U.K.Supreme Court of Justice,Love v Government of the United States [2018] EWHC 172](https://www.judiciary.uk/wp-content/uploads/2018/02/lauri-love-v-usa.pdf)
* [U.K., Supreme Court of Justice, R (R) v Chief Constable of Greater Manchester Police [2018] UKSC 47; [2018] 1 WLR 4079](https://www.supremecourt.uk/cases/uksc-2016-0144.html)
* [UK. Supreme Court of Justice, R (Z) v Hackney London Borough Council [2019]](https://www.supremecourt.uk/cases/uksc-2019-0162.html)
* [EWCA Civ 1099; [2019] PTSR 2272](https://www.supremecourt.uk/cases/uksc-2019-0162.html)
* [U.K. Supreme Court of Justice,DB v Chief Constable of the Police Service of Northern Ireland [2017] UKSC 7; [2017] 3 LRC](https://www.supremecourt.uk/cases/uksc-2014-0231.html)
* U.K., Queen's Bench Division (Administrative Court),Oladimeji v Director of Public Prosecutions [2006] EWHC 1199
* U.K.Queen's Bench Division (Administrative Court), H v Director of Public Prosecutions [2007] EWHC 2191
* U.K.,Queen's Bench Division (Administrative Court), Garry v Crown Prosecution Service [2019] EWHC 636
* U.K.Queen's Bench Division (Administrative Court),Norwood v Director of Public Prosecutions [2003] EWHC 1564
* U.K.Queen's Bench Division, Hammond v Director of Public Prosecutions [2004] EWHC 69
* U.K, Queen's Bench Division (Administrative Court), Gough v Director of Public Prosecutions [2013] EWHC 3267
* U.K, Queen's Bench Division (Administrative Court), Abdul v Director of Public Prosecutions [2011] EWHC 247
* U.K. House of Lords, Edwards v Bairstow [1956] AC 14
* U.K., House of Lords, Pioneer Shipping Ltd v BTP Tioxide Ltd (The Nema) [1982] AC 724
* U.K., House of Lords, D’Souza v Director of Public Prosecutions [1992] 1 WLR 1073 t
* U.K. Divisional Court, *Nagy v Weston* [1965] 1 WLR 280
* U.K. Court of Appeal, City of London Corpn v Samede [2012] EWCA Civ 160
* U.K. Court of Appeal (Civil Division), New Windsor Corpn v Mellor [1974] 1 WLR 1504
* U.K.,King's Bench Division, Bracegirdle v Oxley and Cobley [1947] KB 349, 353
* U.K. R v North West Suffolk Magistrates’ Court [1998] Env LR 9, 18-19

**Other national law or jurisprudence**:

* **N/A**

***Significance***:

* The decision establishes a binding or persuasive precedent within its jurisdiction.
* **Related Cases**: Self-generated
* **Date updated**: N/A

***Docs***:

* **Official Case Documents**:

**Examples:**

Judgment (in English): <https://www.supremecourt.uk/cases/uksc-2019-0106.html>

Press release: <https://www.supremecourt.uk/press-summary/uksc-2019-0106.html>

* **Reports, Analysis, and News Articles**:
	+ Raj Chada, [DIRECTOR OF PUBLIC PROSECUTIONS V ZIEGLER AND OTHERS [2021] – AN OVERVIEW](https://www.hja.net/expert-comments/opinion/falsely-accused-of-crime/director-of-public-prosecutions-v-ziegler-and-others-2021-an-overview/). Hodge Jones & Allen, June 25, 2021
	+ Chris Brain, [England and Wales: Supreme Court Clarifies Relationship Between Criminal Law and European Convention](https://www.loc.gov/item/global-legal-monitor/2021-07-14/england-and-wales-supreme-court-clarifies-relationship-between-criminal-law-and-european-convention-rights-to-freedom-of-expression-and-peaceful-assembly/), Library of Congress US, 2021
	+ Peter Cruickshank, [What about the merits? – Ziegler and defences to protest action](https://www.gcnchambers.co.uk/what-about-the-merits-ziegler-and-defences-to-protest-action/),Garden Court North Chambers. October 11, 2021
	+ Max McGiffen, [Kieron Spoors: A Case Note and Analysis – Director of Public Prosecutions v Ziegler and others [2021] UKSC 23,](https://ukpubliclawblog.com/2022/01/18/kieron-spoors-a-case-note-and-analysis-director-of-public-prosecutions-v-ziegler-and-others-2021-uksc-23/) UK Public Law Blog. January 28, 2022.