Neutral Citation Number: [2017] EWHC 1794 (Admin)

Case No: CO/3570/2016

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
ADMINISTRATIVE COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 14/07/2017

Before:

Lord Justice Simon
and
Sir Kenneth Parker
(Sitting as a Judge of the High Court)

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Between:

The Queen on the application of the Director of Public Prosecutions	**Claimant**
and	
Stratford Magistrates Court	**Defendant**
and	
Angela Ditchfield, Isa Alaali, Thomas Franklin, Lisa Butler, Susannah Mengesha, Bram Vranken, Luis Torrejon and **Javier Neidhart**	**Interested Parties**

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David Perry QC and Caoimhe Daly for the Claimant
Edward Fitzgerald QC and Owen Greenhall (instructed by Kellys solicitors) for Susannah Mengesha
Adam Payter for Angela Ditchfield
Thomas Franklin in person

Hearing date: 13 June 2017

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Approved Judgment

Lord Justice Simon:

Introduction

1. In 2015, the biennial Defence and Security Equipment International ('DSEI') exhibition took place at the Excel Centre, London E.16 between 14 and 18 September. Between 9 and 12 September, while the exhibition was being set up, the Interested Parties obstructed the passage of vehicles making their way to the exhibition centre. They were arrested and charged with offences of wilfully obstructing the highway, contrary to s.137 of the Highways Act 1980 (the 'HA 1980').

2. On 11 April 2016, they were tried before District Judge Hamilton at Stratford Magistrates Court. Their defence was that they had been using reasonable force to prevent the commission of crimes at what they characterised as an 'arms fair', within the meaning of s.3(1) of the Criminal Law Act 1967 (the 'CLA 1967'). On 15 April 2016, following a 5-day trial, during which factual and expert evidence was called, they were acquitted of all charges.

3. In the present claim, the Director of Public Prosecutions ('the DPP') seeks an order compelling the Magistrates' Court to state a case for the opinion of the High Court, following the District Judge's refusal to do so in a ruling made on 5 May 2016, or alternatively, an order quashing the District Judge's decision with a direction that the case be remitted to the Magistrates' Court for a retrial.

The trial before the District Judge

4. In summary, the prosecution case was that the 8 Interested Parties had engaged in protests against the sale of arms and security equipment at the DSEI by obstructing the highway. In particular, Angela Ditchfield 'locked on' to a vehicle; Isa Alaali and Thomas Franklin lay in the path of a heavy goods vehicle which was carrying a military vehicle, Lisa Butler and Susannah Mengesha chained themselves to a temporary gate leading to the DSEI exhibition; and Bram Vranken, Luis Torrejon and Javier Neidhart lay, locked together, on the road and in the path of a heavy goods vehicle driving towards the DSEI exhibition. It is not necessary to elaborate on the form and the nature of the protests since (at least for present purposes) it was accepted that the Interested Parties were obstructing the highway, contrary to s.139 of the Highways Act 1980.

5. The defence case at trial was that they had been acting to prevent crime. Section 3(1) of the CLA 1967 provides:

> A person may use such force as is reasonable in the circumstances in the prevention of crime, or in effecting or assisting the lawful arrest of offenders or suspected offenders or of persons unlawfully at large.

6. Although their evidence varied as to the crime they were preventing, it is convenient to proceed on the basis that their intention was to prevent: (1) the sale or advertising of weapons or equipment that is illegal by reasons of ss.21 and 25 of the Export Control Order 2008 (S1 2008/3231), and (2) crimes committed in Yemen, Bahrain, Kurdistan and Turkey, contrary to ss.52 and 55(1)(a) of the International Criminal Court Act 2001.

7. Although some of the Interested Parties gave evidence as to their belief that such crimes were being committed, they also applied and were permitted to call evidence of three expert witnesses: Oliver Sprague (Amnesty International's UK Programme Director on arms control and policing), Sayed Alwadaei (Director of Advocacy at the Bahrain Institute for Rights and Democracy); and Kathryn Hobbs (Local Outreach Coordinator for Campaign Against the Arms Trade).

8. Oliver Sprague provided details of what he said were historic breaches of UK arms export controls at the DSEI exhibitions in 2005, 2007, 2009, 2011 and 2013. He said that these infractions of the law had not been identified by compliance teams, but by third party researchers, including Mr Sprague himself. He had not been permitted to enter the DSEI exhibition in 2015 and was therefore unable to say whether there was any current illegal activity. He also identified particular countries which were subject to a UN arms embargo or as to which there were acute concerns about human rights, but which had nevertheless been invited to attend.

9. Sayed Alwadaei's report focussed on Bahrain and, for reasons which I will come to, contained evidence that was almost entirely inadmissible.

10. Kathryn Hobbs gave evidence about the importance of DSEI exhibitions in the sale of arms and security equipment. She also described breaches of domestic law by companies in each of the 2005, 2007, 2009, 2011 and 2013 DSEI exhibitions most of which resulted in the companies being 'ejected' from the exhibitions. Thus, for example, a Chinese company was 'ejected' from the DSEI exhibition in 2013 following the discovery of literature advertising leg cuffs and electric shock batons.

11. The experts accepted that there was no evidence of any illegal arms trading at DSEI 2015, but Mr Sprague and Ms Hobbs regarded it as reasonable to assume that the level of illegal arms trading was similar to what had occurred at earlier DSEI exhibitions.

12. Mr Fitzgerald QC accepted that most of the lorries that were obstructed were not transporting anything unlawful (and there were plainly other vehicles that were obstructed which had nothing to do with the DSEI exhibition); but he submitted that there was 'a real likelihood' that some people at the exhibition were 'aiding and abetting war crimes.'

The ruling and the acquittals

13. It was common ground that there were two questions which had to be answered in relation to the defence under s.3(1) CLA 1967. First, did the defendants honestly (even if mistakenly), believe that they were acting to prevent a crime? Second, if so, was the force that was used reasonable, in the circumstances that they believed them to be? It was also common ground that first question involved a subjective test and that the second question involved an objective test.

14. In reaching his decision to acquit the Interested Parties, the District Judge concluded that there had been repeated failures by law enforcement agencies to take action against illegal arms sales at previous DSEI exhibitions; that each of the Interested Parties had acted with the intention of preventing unlawful arms sales or the sale of arms for unlawful purposes against civilian populations by obstructing access to the DSEI exhibition; that the prosecution had failed to prove that they did not honestly

believe that the force used was necessary for the prevention of crime; and that it had also failed to prove that the force used was not reasonable in the circumstances.

The defence under s.3(1) of the CLA 1967

15. Although it is not the earliest of the cases to which we were referred, it is useful to start with the decision of the House of Lords in *R v. Jones (Margaret) and others* [2007] 1 AC 136.

16. The case involved conjoined appeals in relation to the prosecution of offences (aggravated trespass and criminal damage) committed by the appellants in the course of protests against the Iraq war in 2003. The first issue for determination was whether the defence under s.3(1) of the CLA 1967 was available where force was used in prevention of the international law crime of aggression. On that issue all members of the House of Lords agreed that the defence under s.3(1) was confined to offences contrary to domestic criminal law. However, members of the House of Lords also considered the general ambit of s.3(1) in the context of protests. Since they are lengthy, I have set out the relevant passages from the speech of Lord Hoffmann as an appendix rather than in the body of this judgment.

17. These passages show a clear and focussed review of the issues which arise in this type of case and arose specifically in the present case. The other members of the House of Lords (Lord Rodger of Earlsferry, Lord Carswell and Lord Mance) agreed with the speech of Lord Hoffmann; and, in the case of Lord Mance, explicitly agreed with the parts of the speech set out in the appendix:

> 106. I also agree with Lord Hoffmann's remarks in paragraphs 70 to 94 on the limits of self-help in the context of section 3 of the 1967 Act.

18. Although it is undesirable to attempt a synthesis of Lord Hoffmann's speech and thereby dilute subtle articulations of principle, certain points are clear. First, ordinary citizens who apprehend a breach of the law are normally expected to call the police and not take the law into their own hands. In general, the use of force by individuals in the prevention of crime must be confined so as to avoid anarchy, see [77] and [78]. Secondly, the use of force to prevent crime may be legitimate and give rise to the defence 'in a moment of emergency, when individual action is necessary to prevent some imminent crime', see [81]. Thirdly, the right of a citizen to use force is even more circumscribed when not in defence of his own person or property, but deployed to enforce the law in the interest of the community at large, see [83] and [84]. Fourthly, while the law recognises conscientious protests and civil disobedience, the honestly held beliefs of protestors as to the legality of certain activities cannot be allowed to subvert the forensic process, see [89], [90] and [93]. Fifthly, in the light of these points, a Court should be prepared to conclude that the defence under s.3(1) is not available to a defendant and, in such circumstances, the issue of justification should be withdrawn from a jury, see [94].

19. We were also referred to a number of other cases decided both before and after the decision in *R v. Jones (Margaret) and others*. The first of these was *Birch v. DPP* (1999) Divisional Court, unreported. The facts were similar to those in the present case. The appellant was one of a number of demonstrators who sat down in the road and prevented vehicles proceeding along the highway towards a building occupied by

a company which was the object of their disfavour. He was warned by the police that he was obstructing the highway and was asked to move. He declined to do so, was arrested, charged and prosecuted. At his trial, he applied to adduce evidence that the activities of the company, and of those who were trying to enter the building, were unlawful. The Stipendiary Magistrate refused to admit the evidence and stated a case which included a question relating his refusal to allow evidence to be called about the allegedly unlawful activities of the company. In his judgment, Rose LJ said this:

> 32. Whether or not preventing crime affords a defence to a particular charge must depend on the circumstance.
>
> 33. There may be circumstances in which preventing an actual, or imminently apprehended, breach of the peace or other serious offence, on or near the highway, will afford a lawful excuse for obstructing the passage along the highway of one or more vehicles.
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> 34. But that is not the present case. An honest and reasonable belief that the progress of a vehicle may contribute to criminal activity not amounting to an imminent breach of the peace or other serious offence is not, in my judgment, capable of affording lawful excuse for obstructing passage along the highway of that vehicle, still less other vehicles unconnected with it.
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> 35. A demonstration involving lying down in the road, as it seems to me, may possibly draw attention to crime but it cannot, in my judgment, give rise to the prevention of crime within … section 3 of the [CLA 1967].

Smith J gave a judgment to similar effect.

20. The importance of a link between the use of force and an imminently apprehended crime, and to the lack of any 'immediate and instant need to act' being fatal to the defence under s.3 of the CLA 1967, was also highlighted in the judgment of Buxton LJ in *Hutchinson v. Newbury Magistrates' Court* (2000) referred to in the speech of Lord Hoffmann at [91].

21. In the present case, the Interested Parties relied on a ruling, after the decision in *R v. Jones (Margaret) and others*, of Flaux J at Leicester Crown Court in *R v. Barkshire* (unreported, 21 May 2010). The defendants were climate change protestors who were charged with conspiracy to commit aggravated trespass at a power station. They admitted that they had acted as the prosecution alleged, but their defence statement contended that they intended to use reasonable force in prevention of crime (preventing death caused by carbon dioxide poisoning and various offences under the Wildlife and Countryside Act 1981). The prosecution submitted that the Judge should withdraw the defence from the jury on the basis that the defences were not capable of amounting to a defence in law, relying on what I have identified as fifth point in the speech of Lord Hoffmann (see above at [18]). The Judge summarised the basis on which a court could rule that a defence was not available as a matter of law; and then considered the passages in Lord Hoffmann's speech dealing with the limits of self-help. The Judge referred to the case of *R v. Bard and others* where such a course had

been adopted by a trial judge in similar circumstances, but concluded that what had been said by Lord Hoffmann and Lord Mance as to the limits of self-help was not essential to the decision in the case and was contrary to principle, since withdrawing the defence usurped the function of the jury.

22. In the event the defendants were convicted. Although the Court of Appeal Criminal Division in *R v. Barkshire and others* [2011] EWCA Crim 1885 (Lord Judge LCJ, Treacy and Calvert-Smith JJ) subsequently quashed the convictions on the grounds of the prosecution's failures to disclose material matters, in the course of its judgment, the Court said this:

> 8. The Crown did not appeal Flaux J's ruling. The trial proceeded on the basis that it was correct, and the judge (His Honour Judge Teare) rightly directed the jury accordingly. Given the particular and unusual circumstances in which these appeals are brought, it would not be appropriate for this court to start an examination into the safety of the convictions by going behind Flaux J's ruling. Nevertheless, we entertain reservations about it. The circumstances in which what would otherwise amount to criminal conduct may be justified on the basis of honestly held, political beliefs by the perpetrators, will need consideration in this court on another occasion.

23. The point was considered further, and in similar circumstances, in *R v. Bard and others* [2014] EWCA Crim 463 when the Court of Appeal Criminal Division (Lord Thomas of Cwmgiedd, Simon and Irwin JJ) quashed the convictions for similar reasons to those on the appeal of *R v. Barkshire and others*. As Flaux J had noted in *R v. Barkshire*, the trial judge *in R v. Bard* had ruled that the defence under s.3(1) of the CLA 1967 was not available; and the Court of Appeal in *R v. Bard* observed shortly:

> 3. On 7 October 2008 [the defendants] were committed for trial to the Crown Court. The case was then transferred to Leeds. In their Defence Statements the applicants accepted that they had occupied the train and took defences of necessity (an allowed offence) on the basis that they were trying to prevent a crime being committed. The crime related to the effect of coal on the climate.
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> 4. Unsurprisingly, an application was made to a judge to consider whether that amounted to a defence in law. On 1 June 2009, the judge ruled that no such defence was available and that no evidence relating to the effect of burning fossil fuels and global warning could be called. Thereafter, some of the applicants pleaded guilty. The others who did not were convicted on 3 July 2009.

24. Neither of these decisions of the Court of Appeal Criminal Division can be said to support the views of Flaux J expressed in his ruling in *R v. Barkshire*.

25. Although it is not possible to set out all-embracing principles which can be derived from these cases, certain themes emerge. First, the defence under s.3(1) of the CLA 1967 operates as a justification for the use of force rather than an excuse to use force,

and is linked to the concept of necessity. There must be an apprehension of a need to use force (or, I would accept for reasons that I will come to, in an appropriate case something less than force) to prevent an imminent or immediate crime; or as expressed in Hale, *Pleas of the Crown* (1778) volume 1 (p.52) 'an actual and inevitable danger'. There must be a clear nexus between the use of force and the prevention of crime; and there is a clear difference between a protest against what is regarded as objectionable and even illegal conduct on the one hand, and the use of force to prevent an imminent and immediate crime on the other. Second, the court should not countenance the demand for disclosure or the calling of evidence (expert or otherwise) which relates to what cannot properly be characterised as an imminent or immediate crime. If the commission of such crimes are not within the direct knowledge of a defendant, they are unlikely to fall into that category. Third, on an application to consider the ambit of a defence under s.3(1) of the CLA 1967, a court should consider whether, on the most favourable view of the facts, such a defence is available. In doing so, it should keep firmly in mind the points raised in the speech of Lord Hoffmann in *R v. Jones (Margaret) and others* which I have sought to identify above. If there is no proper evidential basis on which the defence can be said to be available, it should be withdrawn from consideration. Fourth, where a case comes before a magistrate, who is both the judge of the law and the finder of fact, it is particularly important to consider carefully: (1) the proper ambit of the defence and (2) when making findings, the questions which need to be posed and how they should be answered. Fifth, I am very doubtful whether the ruling in the Crown Court in *R v. Barkshire* provides guidance as to the proper approach either in the Crown Court or in the Magistrates' Court. I do not accept that the speech of Lord Hoffmann in *R v. Jones (Margaret) and others* at [73]-[94] can be dismissed as *obiter dicta*. Whether or not they were strictly speaking necessary for the decision can be debated. What is plain is that they provide a clear and cogent exposition of the legal issues that will arise in this type of case, with which the other members of the House of Lords agreed.

The DPP's challenge

26. On 29 April, the DPP applied to the District Judge to state a case for the opinion of the High Court. He refused to do so, and the DPP then sent a Letter before Claim inviting him to reconsider this refusal; and following his further refusal to state a case on 22 June, the DPP filed the claim form in the present proceeding on 12 July 2016. On 25 October Jefford J granted permission to bring the proceedings; but on 23 November 2016 they were struck out for failure to pay the post-permission continuation fee. On 7 February 2017, the DPP became aware that the claim had been struck out. The fee was then paid and, on 22 March 2017 the claim was reinstated. The circumstances in which the claim came to be struck out and reinstated gives rise to an argument on behalf of the Interested Parties which I address below.

Preliminary matters

27. Before addressing the substance of the case, it is convenient to deal with two preliminary points: first, the procedure that was adopted, and second the deployment of expert evidence.

(1) Procedure

28. As noted above the DPP initially sought to challenge the decision to acquit the Interested Parties by inviting the District Judge to state a case.

29. Section 111(1) of the Magistrates Court Act 1980 provides for a party aggrieved by a determination to question the proceeding by an application to state a case on the ground that it is wrong in law or in excess of jurisdiction. Section 111(5) contains a proviso that a court may refuse to state a case where it considers the application is 'frivolous'. It was on this basis that District Judge Hamilton refused to state a case. The meaning of s.111(5) was considered in *R v. North West Suffolk (Mildenhall) Magistrates Court* [1998] Env.L.R 9 and it is important to bear in mind what Lord Bingham LCJ, giving the leading judgment in the Court of Appeal, said about it:

> I think it very unfortunate that the expression 'frivolous' ever entered the lexicon of procedural jargon … what the expression means in this context is, in my view, that the court considers the application to be futile, misconceived, hopeless or academic. That is not a conclusion to which justices to whom an application to state a case is made will often or lightly come. It is not a conclusion to which they can properly come simply because they consider their decision to be right or immune from challenge. Still less is it a conclusion to which they can properly come out of a desire to obstruct a challenge to their decision or out of a misplaced *amour proper*.

30. The issues that arise in the present case plainly give rise to issues of law. The District Judge had already ruled that the law as to the ambit of the defence under s.3(1) was 'in a state of flux' and that there was a serious issue of law to be determined. There was nothing futile, misconceived, hopeless or academic about the application. In these circumstances, he should have agreed to state a case.

31. In *Sunworld Ltd v. Hammersmith & Fulham London Borough Council* [2000] 1 WLR 2102, at 2106F-H, Simon Brown LJ set out the approach that should be adopted where the Magistrates Court refuses to state a case. Section 111(6) provided that in such a case the High Court might make an order of mandamus requiring the court to state a case.

> Although it is impossible to lay down principles which will apply in every case, and this court should retain the flexibility to deal with unusual situations as they arise, I would suggest the following approach. (1) Where a court, be it a Magistrate's court or the Crown Court, refuses to state a case, then the party aggrieved should without delay apply for permission to bring judicial review, either (a) to mandamus it to state a case and/or (b) to quash the order sought to be appealed. (2) If the court below has already (a) given a reasoned judgment containing all the necessary findings of fact and/or (b) explained its refusal to state a case in terms which clearly raise the true point of law in issue, then the correct course would be for the single judge, assuming he thinks the point properly arguable, to grant permission for judicial review which directly challenges the order complained of, thereby avoiding the need for a case to be stated at all. (3) If the court below has stated a case but in respect of some questions only, as here, the better course may be to apply for the case stated to be amended unless again, as

> here, there already exists sufficient material to enable the Divisional Court to deal with all the properly arguable issues in the case. (4) This court for its part will adopt whatever course involves the fewest additional steps and the least expense, delay and duplication of proceedings.

32. In the present case, there was little factual dispute between the parties and the District Judge gave a written ruling containing his findings of fact. In these circumstances, it was right to proceed with hearing the claim for judicial review, as all parties agreed.

(2) Expert evidence

33. There appears to have been no proper consideration of the materiality of the expert evidence. CPR Part 19 (expert evidence) requires that a party wishing to adduce expert evidence must serve a summary of the conclusions as soon as practicable after the defendant whom it affects pleads not guilty. One of the Court's tasks is then to decide whether it is relevant evidence. If it is not relevant, it is inadmissible. As I have already indicated, the evidence of Mr Sayed Alwadaei was largely if not entirely irrelevant.

34. CPR Part 19.2 sets out the expert's duty to the court. In the present case the witness statement of Oliver Sprague stated that he understood his duties to the court as contained in CPR Part 19. In my view the better practice is to set out (at least in summary) an express acknowledgment of the witness's duty to the court and the important obligation to provide objective and unbiased evidence: not least because the failure to do so invites a line of cross-examination.

35. Mr Sprague's witness statement also contained assertions that particular conduct, which he deduced would be taking place at the DSEI exhibition, constituted a criminal offence. However, while he was entitled to give evidence of past events and the defence was entitled to invite the court to draw the conclusion that what had happened in the past was likely to be repeated, whether or not the conduct constituted a criminal offence was a matter for the court and not expert evidence.

36. Finally, where the defence wishes to adduce evidence of this sort in this type of case, it is important for the court to have in mind the observations of Lord Hoffmann in *R v. Jones (Margaret) and others* at [94] to the effect that expert evidence to support the opinions of the protesters as to the legality of the acts in question is irrelevant and inadmissible. As I have already noted, if evidence of the crime, which force is used to prevent, does not come from the defendant, the defence under s.3(1) will be unlikely to succeed.

Discussion

37. The first question is whether the District Judge was right to conclude that the defence under s.3(1) of the CLA 1967 was available to the defendants. In my view, he was wrong in his conclusion.

38. As set out above there is clear authority that this defence should not be left to the jury in circumstances where the use of force is not directed to the prevention of an imminent or immediate crime. No crime could be said to have been committed on the

highway. If any crimes were being committed at all, they were being committed at the DSEI exhibition.

39. Following the acquittal on 5 April 2016, the District Judge delivered a written judgment on 18 April 2016.

40. Having considered that the s.3(1) defence was open to the defendants, the District Judge addressed the second question identified in [13] above: in the circumstances that they believed them to be, was the force used by the defendants reasonable (judging this question according to an objective standard)?

> … I have taken into account in particular, the nature and duration of the actions taken by the defendants. As I have already indicated, their acts were non-violent, targeted (in the sense that the defendants sought to target either a vehicle clearly destined for the DSEI fair or the immediate access to the Excel site) and limited in duration (although arguably duration was more a function of the police decision-making rather than anything the defendants did). The actions taken by the defendants were relatively minimal without being ineffective. As the preceding paragraphs indicate I believe that the defendants were perfectly sincere in their conclusions first that the unlawful sale of arms would almost certainly be occurring at DSEI and, secondly, that their intervention was necessary [to seek] to prevent this.
>
> It follows that I cannot be sure that the force used by any of these defendants was not reasonable in the circumstances as they believed them to be.

41. There are two unsatisfactory features in these reasons. First, there is no finding that an apprehended crime was imminent and immediate, and no proper basis in the evidence for such a finding.

42. There was also a lack of clarity as to what crime was being committed and how force (to the extent that it was used) was preventing it. It was effectively common ground that the DSEI exhibition was large and that most of the trade was entirely legal. Importantly in this context, there was no evidence that the vehicles that were being obstructed were involved in anything other than lawful business.

43. Generalised and unspecified criminal activity was presumed to be committed by unidentified parties at unidentified times; and the reasons given for the obstruction of the highway were not uniform. As the District Judge noted, some defendants were specific in relation to the crimes they believed they were acting to prevent, some were objecting to arms sales in general, some to the participation of particular states, while others said they were acting to 'draw attention' to wider issues of concern. There was nothing to link the obstruction of the highway with an imminent or immediate crime. It was not being said, for example, that the lorries making their way to the exhibition were carrying prohibited weapons or substances.

44. The District Judge had found earlier that the Interested Parties' actions were reasonable in the light of the 'democratic deficit'. Although it is unnecessary to

express a concluded view about the issue, I am doubtful whether this finding properly reflected what Lord Hoffmann had in mind when he used this phrase. The reasonableness of the actions in obstructing the highway has to be examined in the context of a democratic society and the rule of law. This was plainly not a case in which the Interested Parties were driven inexorably to obstruct the highway as the only means to achieve the end of preventing what they believed to be the commission of crime.

45. The second unsatisfactory feature of this part of the ruling was the reference to the sincerity of the defendants' beliefs. Although it may have been a justified finding on the facts, it was irrelevant to the second question and introduced a confusing subjective element.

46. In my view this part of the ruling, which was crucial to the decision to acquit, demonstrated a material error of law.

47. A further question arose in the course of argument as to whether the conduct of the Interested Parties could be said to constitute the use of force for the purposes of s.3(1). Since this does not arise in the light of the above, I can express myself shortly.

48. In *Swales v. Cox* [1981] 1 QB 849 the Divisional Court (Donaldson LJ and Hodgson J) held that force used to gain entry, within the meaning of s.2(6) of the CLA 1967, consisted of the application of energy to the obstacle with a view to removing it. In *R v. Renouf* [1986] 1 WLR 522, the defendant used his car to force another car off the road, the occupants of which had committed an offence. His conviction for reckless driving was set aside. The Court of Appeal Criminal Division held (at p.525B) that the s.3(1) defence should have been left to the jury and that 'force' was word of ordinary usage in English and did not require judicial interpretation.

49. In *R v. Jones (Margaret) and others* (see above) Lord Bingham at [25] expressed doubt as to whether s.3 was ever intended to apply to conduct 'which, although causing damage to property in some cases, was entirely peaceable and involved no violence of any kind to any person.' He referred to *Swales v. Cox* and *R v. Renouf* but observed that since the matter had not been fully investigated, he would treat s.3 of the CLA 1967 as applying to what the defendants in that case had done. Lord Hoffmann at [71] was willing to assume that chaining oneself to railings or putting sugar in the petrol tanks of lorries involved the use of force, although he said that there was 'much to be said' for the view that force in s.3 'means force against persons committing crimes or escaping arrest'.

50. In the light of these authorities I have concluded that the defence applies to the direct application of force, although the force would not necessarily have to be applied directly against a person. It would apply for example to a defendant who attached him or herself to a lorry which was believed to be carrying chemical weapons, see in a different context *DPP v. Bayer* [2004] 1 WLR 2856 (Divisional Court; Brooke LJ and Silber J) at [25] where the court found it hard to understand why the relevant defence should not apply in a case where the defendants tied themselves to tractors rather than attacking the tractor drivers. In contrast, the defence would not be available to those who lie down in the road in front of lorries making their way to their way to a place where crimes are believed to be taking place or who block access by chaining themselves to gates, see *Birch v. DPP* (above).

51. Mr Fitzgerald QC and Mr Payter pointed to the anomaly that force may be relied as a statutory defence but that something less than force does not come within this defence. I would accept that submission, at least to this extent: something short of the application of force may give rise to a defence to a criminal offence, but that, as in the case of the statutory defence, there must be a nexus between the conduct and the criminality.

Determination

52. For the reasons set out above, I have concluded that the District Judge should not have permitted the Interested Parties to rely on the defence under s.3 of the CLA 1967 and, having done so, misdirected himself in law as to the availability of the defence. In these circumstances, Mr Perry QC submitted that this court should quash the acquittals and remit the case so that it can be decided according to the law.

53. This would normally be the appropriate course. However, the Interested Parties submit that there are special circumstances that make this course inappropriate. First, this is not a case in which this court can direct the Magistrates Court to convict in the light of the judgment, since the Interested Parties had further arguments, for example in the case of Susannah Mengesha and Lisa Butler whether the place where their protests took place was a public highway, which (despite the case taking 5 days) had not been determined. Secondly, it is said that the Interested Parties will suffer difficulties in presenting their evidence on a retrial in view of the delay. Thirdly, there is reliance on the delays in progressing the judicial review proceedings, which involved the claim being struck out for failure to pay fees. At least some of the Interested Parties were informed by the Administrative Court office in December 2016 that the case was 'closed'. Our attention was also drawn to the contents of witness statements lodged in response to the DPP's application to reinstate the claim as a result of the protracted nature of the proceedings. Finally, counsel submit that their clients are of previous good character and that the offence is only triable summarily with a fine as the maximum penalty.

54. None of these, taken individually, would justify departing from the usual practice of remitting the case. However, taken together, it is my view that they militate in favour of a different course. The matters of principle have been resolved and the overall interests of justice do not, in my judgment, call for the prosecution to continue.

55. For these reasons, and subject to hearing any further submissions as to its precise wording, I would make an order declaring that the District Judge made material errors of law in his ruling; but in the unusual circumstances I would not order the case to be remitted for a retrial.

Sir Kenneth Parker

56. I agree.

Appendix

(Extracts from the speech of Lord Hoffmann in *R v. Jones (Margaret and others)* [2007] 1 AC 136)

The limits of self-help

73. … I am willing to assume that, in judging whether the defendant acted reasonably, it must be assumed that the facts were as he honestly believed them to be. But the question remains as to whether in such circumstances his use of force would be reasonable. And that is an objective question. The position may be different under section 5 of the 1971 Act but section 3 of the 1967 Act does not excuse a defendant if he uses such force as he himself thinks to be reasonable. It must actually have been reasonable.

74. The crucial question, in my opinion, is whether one judges the reasonableness of the defendant's actions as if he was the sheriff in a Western, the only law man in town, or whether it should be judged in its actual social setting, in a democratic society with its own appointed agents for the enforcement of the law. I take, by way of example only, the statement by Margaret Jones and Paul Milling appended to their printed case, which states their beliefs when they entered RAF Fairford:

> By disrupting the loading of bombs onto aeroplanes and by interfering with the ability of the base to refuel the aircraft they were acting lawfully, reasonably and proportionately in order to (i) prevent armed aircraft from operating from RAF Fairford and (ii) in order to prevent domestic and international criminal offences from being committed.
> That the action they took was reasonable to protect persons and property in Iraq from injury and damage caused by criminal acts. That their action would at least in part prevent the commission of the crime of aggression. Their action would at least in part prevent invasion by armed forces of the aggressor or would at least in part prevent the attack by the airpower of the aggressor.

…

76. It is a fundamental characteristic of the state as a social structure that, in the classic formulation of Max Weber (*Politics as a Vocation (Politik als Beruf)*, 1918), it

> claims the monopoly of the legitimate use of physical force within a given territory…[T]he right to use physical force is ascribed to other institutions or to individuals only to the extent to which the state permits it.

77. That formulation does not of course answer the questions which arise in these appeals, because the appellants say that the state, by its legislation, did indeed permit them to use physical force in the circumstances which existed, or which they honestly thought to exist. But when Parliament speaks of a person being entitled to use such force as is reasonable in the circumstances, the court must, in judging what is reasonable, take into account the reason why the state claims the monopoly of the legitimate use of physical force. A tight control of the use of force is necessary to prevent society from sliding into anarchy …

78. In principle, therefore, the state entrusts the power to use force only to the armed forces, the police and other similarly trained and disciplined law enforcement officers. Ordinary citizens who apprehend breaches of the law, whether affecting themselves, third parties or the community as a whole, are normally expected to call in the police and not to take the law into their own hands. In *Southwark London Borough Council v Williams* [1971] Ch 734, 745 Edmund Davies LJ said:

> the law regards with the deepest suspicion any remedies of self-help, and permits those remedies to be resorted to only in very special circumstances.

79. There are exceptions when the threat of serious unlawful injury is imminent and it is not practical to call for help. The most obvious example is the right of self-defence. As Hobbes said (*Leviathan*, Chapter 27):

> No man is supposed at the making of a Common-wealth, to have abandoned the defence of his life, or limbes, where the Law cannot arrive time enough for his assistance.

But, he went on to say:

> To kill a man, because from his actions, or his threatnings, I may argue he will kill me when he can, (seeing I have time, and means to demand protection, from the Soveraign Power) is a Crime.

80. In the same spirit as Hobbes, Lord Upjohn said in *Burmah Oil Co Ltd v Lord Advocate* [1965] AC 75, 164 – 165:

> No doubt in earlier times the individual had some … rights of self-help or destruction in immediate emergency, whether caused by enemy action or by fire, and the legal answer was that he could not in such circumstances be sued for trespass on or destruction of his neighbour's property. Those rights of the individual are now at least obsolescent. No man now, without risking some action against him in the courts, could pull down his neighbour's house to prevent the fire spreading to his own; he would be told that he ought to have dialled 999 and summoned the local fire brigade.

81. What is true of the use of self-help to protect one's own interests is *a fortiori* true of the use of self-help to protect the interests of third parties or the community at large. In a moment of emergency, when individual action is necessary to prevent some imminent crime or to apprehend an escaping criminal, it may be legitimate, praiseworthy even, for the citizen to use force on his own initiative. But when law enforcement officers, if called upon, would be in a position to do whatever is necessary, the citizen must leave the use of force to them.

…

83. The right of the citizen to use force on his own initiative is even more circumscribed when he is not defending his own person or property but simply wishes to see the law enforced in the interests of the community at large. The law will not tolerate vigilantes. If the citizen cannot get the courts to order the law enforcement authorities to act (compare *R v Commissioner of Police of the Metropolis, Ex p*

Blackburn [1968] 2 QB 118) then he must use democratic methods to persuade the government or legislature to intervene.

84. Often the reason why the sovereign power will not intervene is because it takes the view that the threatened action is not a crime. In such a case too, the citizen is not entitled to take the law into his own hands. The rule of law requires that disputes over whether action is lawful should be resolved by the courts. If the citizen is dissatisfied with the law as laid down by the courts, he must campaign for Parliament to change it ….

86. My Lords, to legitimate the use of force in such cases would be to set a most dangerous precedent. As Lord Prosser said in *Lord Advocate's Reference No 1 of 2000* 2001 JC 143, 160G-H:

> What one is apparently talking about are people who have come to the view that their own opinions should prevail over those of others…They might of course be persons of otherwise blameless character and of indubitable intelligence. But they might not. It is not only the good or the bright or the balanced who for one reason or another may feel unable to accept the ordinary role of a citizen in a democracy.

87. A time of war is the extreme example of the dangers. Of course citizens are entitled, indeed required, to refuse to participate in war crimes. But if they are allowed to use force against military installations simply to give effect to their own honestly held view of the legality of what the armed forces of the Crown are doing, the Statute of Treason would become a dead letter.

88. In my opinion, therefore, the District Judges would have been right to convict even if aggression had been a crime in domestic law. The apprehension, however honest, that such a crime was about to be committed could not have made it reasonable for the defendants to use force of any kind to obstruct military activities at Marchwood or Fairford.

Civil disobedience

89. My Lords, civil disobedience on conscientious grounds has a long and honourable history in this country. People who break the law to affirm their belief in the injustice of a law or government action are sometimes vindicated by history. The suffragettes are an example which comes immediately to mind. It is the mark of a civilised community that it can accommodate protests and demonstrations of this kind. But there are conventions which are generally accepted by the law-breakers on one side and the law-enforcers on the other. The protesters behave with a sense of proportion and do not cause excessive damage or inconvenience. And they vouch the sincerity of their beliefs by accepting the penalties imposed by the law. The police and prosecutors, on the other hand, behave with restraint and the magistrates impose sentences which take the conscientious motives of the protesters into account. The conditional discharges ordered by the magistrates in the cases which came before them exemplifies their sensitivity to these conventions.

90. These appeals and similar cases concerned with controversial activities such as animal experiments, fox hunting, genetically modified crops, nuclear weapons and the

like, suggest the emergence of a new phenomenon, namely litigation as the continuation of protest by other means. (See, for examples, *R v Hill* (1988) 89 Cr App R 74 (nuclear weapons) *Blake v Director of Public Prosecutions* [1993] Crim LR 586 (Gulf War) *Morrow, Geach and Thomas v Director of Public Prosecutions* [1994] Crim LR 58 (anti-abortion) *Hibberd v Director of Public Prosecutions* (27 November 1996) Divisional Court, unreported (Newbury by-pass) *Hutchinson v Newbury Magistrates' Court* (2000) 122 ILR 499 (Trident missiles) *Nelder v Crown Prosecution Service* (3 June 1998) Divisional Court, unreported (fox hunting) *Lord Advocate's Reference No 1 of* 2000 2001 JC 143 (Trident missiles) *Director of Public Prosecutions v Tilly* [2002] Crim LR 128 (genetically modified crops) *Monsanto v Tilly* [2000] Env.L.R 313 (genetically modified crops). The protesters claim that their honestly held opinion of the legality or dangerous character of the activities in question justifies trespass, causing damage to property or the use of force. By this means they invite the court to adjudicate upon the merits of their opinions and provide themselves with a platform from which to address the media on the subject. They seek to cause expense and, if possible, embarrassment to the prosecution by exorbitant demands for disclosure, such as happened in this case.

91. In *Hutchinson v Newbury Magistrates' Court* (2000) 122 ILR 499, where a protester sought to justify causing damage to a fence at Aldermaston on the ground that she was trying to halt the production of nuclear warheads, Buxton LJ said:

> There was no immediate and instant need to act as Mrs Hutchinson acted, either [at] the time when she acted nor at all: taking into account that there are other means available to her of pursuing the end sought, by drawing attention to the unlawfulness of the activities and if needs be taking legal action in respect of them. In those circumstances, self-help, particularly criminal self-help of the sort indulged in by Mrs Hutchinson, cannot be reasonable.

92. I respectfully agree. The judge then went on to deal with Mrs Hutchinson's real motive, which ("on express instructions") her counsel had frankly avowed. It was to ‘bring the issue of the lawfulness of the government's policy before a court, preferably a Crown Court.’ Buxton LJ said:

> In terms of the reasonableness of Mrs Hutchinson's acts, this assertion on her part is further fatal to her cause. I simply do not see how it can be reasonable to commit a crime in order to be able to pursue in the subsequent prosecution, arguments about the lawfulness or otherwise of the activities of the victim of that crime.

93. My Lords, I do not think that it would be inconsistent with our traditional respect for conscientious civil disobedience for your Lordships to say that there will seldom if ever be any arguable legal basis upon which these forensic tactics can be deployed.

94. The practical implications of what I have been saying for the conduct of the trials of direct action protesters are clear. If there is an issue as to whether the defendants were justified in doing acts which would otherwise be criminal, the burden is upon the prosecution to negative that defence. But the issue must first be raised by facts proved or admitted, either by the prosecution or the defence, on which a jury could find that the acts were justified. In a case in which the defence requires that the acts of the defendant should in all the circumstances have been reasonable, his acts must be

considered in the context of a functioning state in which legal disputes can be peacefully submitted to the courts and disputes over what should be law or government policy can be submitted to the arbitrament of the democratic process. In such circumstances, the apprehension, however honest or reasonable, of acts which are thought to be unlawful or contrary to the public interest, cannot justify the commission of criminal acts and the issue of justification should be withdrawn from the jury. Evidence to support the opinions of the protesters as to the legality of the acts in question is irrelevant and inadmissible, disclosure going to this issue should not be ordered and the services of international lawyers are not required.