Richard Roberts, Simon Blevins, Richard Loizou v. Regina
Case No: 2018/04159 A1
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2018/04161 A1
Court of Appeal (Criminal Division)
6 December 2018

[2018] EWCA Crim 2739

2018 WL 06345027

Before: The Right Honourable The Lord Burnett of Maldon The Lord Chief Justice of England and Wales The Honourable Mr Justice Phillips and The Honourable Mrs Justice Cutts
Date: 06/12/2018

Analysis

On Appeal from Crown Court at Preston

His Honour Judge Altham

T2018-0167

Hearing date: 17 October 2018

Representation

- Kirsty Brimelow QC & Richard Brigden (instructed by Robert Lizard Limited) for the Appellants.
- Craig MacGregor (instructed by Crown Prosecution Service) for the Respondent.

Approved Judgment
Lord Burnett of Maldon CJ:

On 22 August 2018 in the Crown Court at Preston before His Honour Judge Altham the applicants were convicted of public nuisance contrary to the common law. Their convictions arose out of their conduct in protesting against the authorisation to Cuadrilla by the Oil and Gas Authority to begin hydraulic fracturing, now well known as fracking, to explore for shale gas at a site just off the Preston New Road, the A583, near Blackpool. On 26 September 2018 the judge sentenced Mr Blevins and Mr Roberts to 16 months' imprisonment and Mr Loizou to 15 months. The applicants sat on top of the cabs of lorries for between two and half and three and a half days with the result that one carriageway of the road was blocked. Substantial disruption was caused to thousands of people.

The applications for leave to appeal against sentence were referred by the Registrar to the full court as a matter of urgency. On Wednesday 17 October we heard the applications, granted leave to appeal and allowed the appeals. We concluded that an immediate custodial sentence in the case of these appellants was manifestly excessive. In our judgment the sentence which should have been imposed on 26 September was a community order with a significant requirement for unpaid work. However, by the time of the hearing, the appellants had been in custody for three weeks meaning that they had served a sentence equivalent to six weeks. As a result, and only in consequence of that, we concluded that the appropriate sentence was a conditional discharge for two years. A conditional discharge leaves the appellants vulnerable to being resentenced if they offend in any way within the period of two years.

These are our reasons for arriving at this conclusion.

Public Nuisance

Public nuisance is a common law offence, the boundaries of which were explored in R v Rimmingtan [2006] 1 AC 459 . Both Lord Bingham of Cornhill and Lord Rodger of Earlsferry (at 484A and 487D respectively) were content to adopt, with minor modification, the definition of public nuisance in the then current edition of *Archbold, Criminal Pleading, Evidence and Practice,* with this result:

> "A person is guilty of a public nuisance (also known as common nuisance), who (a) does an act not warranted by law, or (b) omits to discharge a legal duty, if the effect of the act or omission is to endanger the life, health, property, or comfort of the public, or to obstruct the public in the exercise or enjoyment of rights common to all Her Majesty's subjects."

The other members of the Committee agreed. The essence of the case advanced by the prosecution against these appellants, accepted by the jury, was that their occupation of the lorries was not warranted by law and it had the effect of obstructing the public from going about their business. It is a serious offence of a different order, for example, from temporarily obstructing the highway.

The Grounds of Appeal

The appellants relied upon four grounds of appeal:

- (i) An immediate custodial sentence is never appropriate for a non-violent crime committed as part of peaceful protest as a matter of domestic law and would breach article 10 of the European Convention of Human Rights ["ECHR"];
- (ii) Even if the custody threshold had been passed on the facts of these cases, the judge should have imposed a suspended sentence having regard to all the circumstances. In particular, the judge erred in concluding that immediate imprisonment was unavoidable because these appellants were unsuitable for rehabilitation given their unswerving beliefs against fracking;
- (iii) The sentence was manifestly excessive because the undoubted disruption that followed the appellants' action was largely the direct cause of the concurrent actions of others;
- (iv) Information obtained after the sentences were imposed raised the question of the appearance of bias on the part of the judge.

We decided to hear oral argument on the first three grounds and were assisted by written submissions from Liberty and Friends of the Earth. The fourth ground had arisen very shortly before the hearing of the applications. The respondent had not had an opportunity to investigate the matter and neither had any inquiry been possible of the judge to establish what he knew of the matters relied upon by the appellants. In the event it was not necessary to hear the argument in this appeal.

There is no suggestion that the judge was in fact biased. The test to be applied in cases of apparent bias was set out by Lord Hope in Porter v Magill [2002] 2 AC 359 at [103]:

> "The question is whether the fair-minded and informed observer, having considered the facts, would conclude that there was a real possibility that the tribunal was biased."

Such questions generally arise in advance of a trial when the facts can be properly explored but as Lord Bingham CJ observed in Locabail (UK) Ltd v Bayfield Properties Ltd [2000] QB 451 at [18] it may be necessary to explore whether the judge was aware of the features said to give rise to concern, because if the judge was ignorant of something said to require him to recuse himself, there would be no danger of bias.

In view of the rather lurid news reporting that surrounded this ground, we shall summarise the evidence relied upon.

It is contained in a statement produced by a "climate justice campaigner" employed by Friends of the Earth who states that on 27 September 2018 (that is the day following the sentencing) he "was requested to research the links

between [the judge's family] and the fossil fuel industry." The information he provides in the statement was gathered from the internet on that day.

The judge's octogenarian parents remain directors of a family business, which is run by his sister (who we are told was born in 1963), that has operated since the mid-nineteenth century as a grocer and butcher. Prior to 1984 the business diversified into supplying ships' stores in the north west. The website of the business said that new areas of business were developed including supplying the new Freight Ferry services from Heysham and Liverpool to Ireland. Then in 2000, the business began supplying stores to the area's offshore gas and oil platforms. It is in that way that it is said the business "supplies the oil and gas industry". The next step in the chain is the statement that "one of the dominant firms engaged in the Irish Sea oil and gas industry is Centrica." The final step is that Centrica is a substantial investor in Cuadrilla.

The statement shows that the judge is not a shareholder in the family business.

Even were the judge to have been aware that the rigs supplied with stores by the business were owned or operated by Centrica (if that be the case, which is not established by the evidence filed) and that Centrica had an interest in Cuadrilla, which is evidenced by quotations from public statements, at first blush this looks tenuous when considering the test for apparent bias.

Two other features are relied upon.

The lorries occupied by the appellants had travelled from Immingham Docks, through which the drilling equipment was imported. There is no direct connection suggested between the business operated by members of the judge's family and the lorries in question, but a website operated by an organisation called 4C Offshore suggests that the business "is one of four suppliers to Immingham Docks". It appears to be suggested that because the business has commercial dealings with the port through which the lorries entered the United Kingdom that somehow that would lead a reasonable and fully informed observer to suppose that the judge might be biased.

Finally, the appellants place reliance on the fact that the judge's sister put her name to an open letter in 2014 to Lancashire County Council supporting the grant of permission for two exploratory wells in Lancashire. The letter, signed by a large number of local business people who expressed a desire to enhance the economic prosperity of the region, was co-ordinated by the North West Energy Task Force. That declares itself independent of, but receiving support from, both Centrica and Cuadrilla. Whether the judge was aware of any of this is unknown. That said, it would be surprising if anyone living in the vicinity did not have an opinion on the question of fracking in Lancashire, even more surprising if members of their immediate or extended families did not have opinions, sometimes publicly expressed. Judges are generally not their brother's keeper and public support expressed for or against a cause by a sibling or child would be unlikely to give rise to any concern in any reasonable objective observer. If a sibling signing a round-robin letter of this sort disqualified a judge in these circumstances, the implications would be significant. What of a child or sibling who was a vocal supporter of an environmental cause? The argument, if sound, would cut both ways.

The Facts

In January 2017 the oil and gas exploration and production company Cuadrilla was granted a licence by the Oil and Gas Authority to explore for shale gas by fracking. The licence allowed them to explore at a site just off the Preston New Road, the A583, near Blackpool. That is the main road between Blackpool and Preston.

Fracking remains controversial. Many people hold sincere views that it should not be permitted. There are those who have what might be described as local concerns, which centre on objections to a particular site; and those who have wider concerns linked to the general abstraction of and use of hydrocarbons to provide energy. Many campaigners oppose the development of any new oil, gas or coal reserves because their use will generate greenhouse gases. Others take a different view focussing on economic prosperity, energy security and, at least as regards gas, that it produces less greenhouse gas than some other hydrocarbon fuels.

The site at Preston New Road has been the subject of various demonstrations since Cuadrilla began to make preparations in advance of fracking. That has included disrupting attempts to transport the necessary equipment to the site and also the use of civil legal action to challenge what is proposed by reference to environmental law. Those legal actions have been unsuccessful.

On Tuesday 25 July 2017, seven lorries travelled from the port of Immingham to the Cuadrilla site carrying specialist drilling equipment which had been imported from the continent. The police were given about 15 minutes advance notice of the imminent arrival of the convoy before its appearance on the Preston New Road. Many protestors were in the vicinity and so the police placed patrol cars in front of and behind the convoy. They deployed police officers to provide a physical cordon in an attempt to enable the vehicles to get to the site. At 08:06 Mr Roberts managed to get through the police cordon and climbed onto the top of the cab of the first lorry in the convoy. Naturally, it stopped to protect Mr Roberts' safety. Very shortly afterwards Mr Loizou managed to get through the cordon and climbed on top of the cab of the last lorry. The traffic on the A583 very quickly was brought to a standstill in both directions but the actions of the two appellants were not the sole cause. The convoy of lorries blocked one of the carriageways. Other protestors were milling around on the other carriageway, not least encouraged by and interested in the activities of these appellants, causing the complete blockage of the road. There was a total of 75 police officers on site. Road diversions were set up and, as was inevitable, massive disruption developed.

The road was still blocked at 15:18 when Mr Blevins climbed onto the roof of the lorry next to the one on which Mr Roberts was positioned. It remained blocked in both directions until about 17.00.

Later that evening the police established a contraflow which enabled traffic to negotiate the blockage. The appellants' occupation of the lorries was understandably very popular with other demonstrators, whatever the impact on the thousands of people inconvenienced, and so although the lorries themselves did not cause the complete blockage of the road, the appellants' conduct with the inevitable attention it drew from likeminded supporters was a significant contributory cause of the closure of the road.

Mr Loizou was the first of the appellants to come down from a lorry. He did so at 05:10 on 27 July after just short of 2 days. Mr Blevins came down at 16:45 on Friday 28 July having spent just over 3 days on his lorry. Mr Roberts climbed down at 20:13 later that day having been on his lorry for 3 and a half days.

A fourth man, Mr Brock, had also climbed on top of one of the lorries. He pleaded guilty to public nuisance and received a suspended sentence. He did not come down until 11:35 on Saturday 29 July 2017, after just over 3 days.

The Judge's approach to sentencing

The judge set out the background facts and noted that a decision was taken by the police not to seek to force the appellants (and Mr Brock) from the lorries. He summarised the very significant disruption suffered over a wide area as a result of the blockage and subsequent contraflow and its effects on local residents and businesses. The lorry drivers were affected not least because they had to stay in the vicinity until the unlawful interference with the lorries was over. The judge made clear that he intended to sentence the appellants only for the disruption for which they were responsible.

The judge correctly directed himself to have regard to both harm and culpability in determining the sentences. He considered that previously decided cases on sentencing for public nuisance gave little assistance, observing that each case turned on its particular facts in respect of which he had the advantage of hearing the evidence over a relatively lengthy trial. He continued:

> "Culpability … is high. Even if the defendants did not appreciate immediately the impact of what they were doing, and it is difficult to see how they could not have appreciated it, it would soon have become abundantly clear to them …

> naivety must surely have been quickly dispelled. … This would have been a completely different case for the purposes of sentencing if after a few hours that originally unseemly euphoria had abated and they had decided to come down."

The judge rejected the suggestion that the appellants were sorry for the disruption they caused, a submission which had been made on their behalf. They appreciated the implications of blocking a main road between a city and a town. The prolonged length of the disruption was the critical factor in weighing culpability.

> "What could have been regarded as a protest which made its point and created a level of disruption which was not so intolerable was deliberately turned into a significant public nuisance by these defendants placing their belief in their own correctness above the interests of the wider public and indeed without regard to the interests of the wider public."

The judge noted that the harm suffered by those inconvenienced was widespread with each individual, subject to a few exceptions, suffering modest harm. It was the length of the disruption that extended the harm to a very large group.

The judge had regard to the personal position of each of the appellants. Mr Loizou was 31. He was self-employed, working in education talking about the environment. He had no previous convictions. There was a substantial number of letters attesting to his positive good character. Mr Blevins was 26. After his arrest for this offence, and whilst under investigation (he was not on bail) he committed another offence of vehicle tampering. The judge recognised that this did not aggravate the offence with which he was concerned, but it did throw light on the risk of reoffending and the chances of his complying with the conditions of a non-custodial sentence. At the time of his offending Mr Blevins was employed as a research scientist at Sheffield University. His employers indicated that they could hold the job open for him for three months, but not longer. He too had many references which attested to his positive good character and had no previous convictions. Mr Roberts was 36 at the time of sentencing. He was studying environmental science at the Open University and completing a thesis on the impact of fracking but worked as a piano tuner and restorer. He was convicted in 2005 when, as an undergraduate, he used his vehicle as an unlicensed taxi. There was evidence of his current good character.

The judge was referred to a number of previous cases in which protesters had received non-custodial sentences (albeit not for public nuisance) but noted that none was as serious or involved such prolonged inconvenience to the public. He quoted from the speech of Lord Hoffmann in R v Jones (Margaret) [2007] 1 AC 161 at [89] (to which we will return) explaining the honourable history of civil disobedience. He was alive to the right of free expression guaranteed by article 10 ECHR .

The judge concluded that the custody threshold was crossed but, having regard to the relevant Sentencing Council definitive guideline, decided that the sentences could not be suspended. He accepted that there was strong personal mitigation in the case of each of these appellants and that their immediate imprisonment would have adverse impacts upon them and others. But he considered, contrary to the conclusions in the pre-sentence reports, that there was a present risk of reoffending. He said:

> "Each of them remains motivated by an unswerving confidence that they are right and it was plain that during the course of their evidence at trial that they felt even then that they

> were justified in how they acted. Whilst they each make protestations of remorse those came only after they were convicted. It is most unlikely that they can be dissuaded from any intention to carry on by meaningful work, to that extent there is no real chance of rehabilitation."

A custodial sentence not appropriate as a matter of principle?

Miss Brimelow QC's core submission was that those convicted on any offence in the course of protesting, as a matter of domestic and ECHR law, should not receive a custodial sentence in the absence of violence against the person. She submits that in such cases it is punishment enough to receive the stigma of a conviction and that, in this case, the judge should have imposed absolute discharges, or at most a fine.

We were unable to accept that submission. There is a wide range of offences that may be committed in the course of peaceful protest of differing seriousness; and within the offending very different levels of harm may be suffered by individuals or groups of individuals. They carry various maximum sentences. Some are triable only as summary offences (for example low level criminal damage or wilful obstruction of the highway) and others are indictable. Many protests are directed at government or official bodies and the harm is suffered at what might be described as official level only. Trespassing at military bases or damaging their perimeter fences, are examples. But the essential approach to sentencing by looking at harm and culpability and with the three aims of sentencing in mind (punishment, deterrence and rehabilitation) remain in play. The motivation of an offender can go to increase or diminish culpability. It forms no part of a court's function to adjudicate, even *sub silencio* , on the merits of controversial issues but it is well established that committing crimes, at least non-violent crimes, in the course of peaceful protest does not generally impute high levels of culpability.

It is in this context that the observations of Lord Hoffmann in Margaret Jones have resonance. The case concerned many appellants who were said to have caused damage at military bases for which they were criminally responsible, unless there was legal justification for what they were said to have done. The issue in each appeal concerned the legal justification. The common feature of the appeals was that they raised the question whether the crime of aggression, if established in customary international law, was a crime recognised by or forming part of the domestic criminal law of England and Wales. The appellants' argument was that they acted as they did because they wished to disrupt the commission of that crime, or what they believed would be the commission of that crime against Iraq, by Her Majesty's Government or the Government of the United States. They relied upon the defence that they acted reasonably to prevent crime. Those contentions failed, but Lord Hoffmann made important observations about protest and the criminal process in the course of his speech. They bear repetition:

> "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 (Valerie) (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 LR 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 or 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.

Paragraph 89 echoes the understanding that the conscientious motives of protestors will be taken into account when they are sentenced for their offences but that there is in essence a bargain or mutual understanding operating in such cases. A sense of proportion on the part of the offenders in avoiding excessive damage or inconvenience is matched by a relatively benign approach to sentencing. When sentencing an offender, the value of the right to freedom of expression finds its voice in the approach to sentencing.

The succeeding paragraphs emphasise the limits of an appeal to legal justification in the offending behaviour. But Lord Hoffmann's *dicta* do not support the proposition that there is a bright line between custody and non-custody in such cases. It should not be overlooked that public nuisance is a serious offence, the commission of which would suggest that the protestor in question has not kept his side of the bargain adverted to by Lord Hoffmann.

Miss Brimelow QC's research suggests that peaceful protestors have not been imprisoned since 1932 for the commission of offences associated with their protest. That may well be right, but it reflects the operation of the consideration of the factors identified in Margaret Jones , rather than a hitherto unspoken rule of law. We have also considered R v Jones (Annwen) [2006] EWCA Crim 2942 . The appellants were convicted on their guilty pleas of obstructing a train contrary to section 36 of the Malicious Damage Act 1861 , which carries a maximum sentence of two years' imprisonment. One appellant received a community order which was reduced to a conditional discharge and another a suspended sentence reduced to a community order. They caused disruption and inconvenience for a total of about seven hours. This case also demonstrates the intensely fact specific nature of sentencing in civil disobedience cases, both having regard to the offending and the offender, but nonetheless sensitive to the underlying context.

The long-established recognition in the United Kingdom of the value of peaceful protest, echoed in Lord Hoffmann's remarks, is a manifestation of the importance attached by the common law to both the right to protest and free speech: see, e.g., Hubbard v Pitt [1976] 1 QB 142 at 174D and 178 per Lord Denning MR; Bonnard v Perryman [1891] 2 Ch 269 at 284 per Lord Coleridge CJ (sitting with Lord Esher MR. Lindley, Bowen and Lopes LJJ); McCartan Turkington Breen v Times Newspapers Ltd [2001] 2 AC 277 at 297 per Lord Steyn; R v Shayler [2003] 1 AC 247 at [21] per Lord Bingham; Redmond-Blake v DPP [2000] HRLR at [20] per Sedley LJ. In a free society all must be able to hold and articulate views, especially views with which many disagree. Free speech is a hollow concept if one is only able to express "approved" or majoritarian views. It is the intolerant, the instinctively authoritarian, who shout down or worse supress views with which they disagree.

That importance of freedom of speech and freedom of association is reflected by the ECHR in articles 10 and 11 , the first guaranteeing the right to freedom of expression, the second freedom of assembly. Both are qualified rights. Freedom of speech may be subject to "such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society … for the prevention of disorder or crime, [or] for the protection of the reputation or rights of others." A similar, although not identical, qualification applies to article 11 .

There is no doubt that direct action protests fall within the scope of articles 10 and 11 : e.g. Mayor of London (On behalf of the GLA) v Hall [2011] 1 WLR 504 ; Mayor, Commonalty and Citizens of London v Samede [2012] 2 All ER 1039 . From time to time the Strasbourg Court has considered the question of the proportionality of a sentence imposed for crime committed in the course of peaceful protest. The principles in play were recently restated in Taranenko v Russia (App. No. 19554/05). At [81] the court noted that in Steel and others v the United Kingdom (1999) 28 EHRR 603 short terms of imprisonment were

proportionate in connection with interfering with a grouse shoot and breaking into a construction site to impede engineering works. At [85] the court recorded that in Barraco v France (App. No. 31684/05) a suspended sentence of imprisonment, together with a fine, was a proportionate sanction for a protest which resulted in the severe slowing-down of traffic on a motorway. Reference was made also at [83] to Drieman and others v Norway (App.No. 33678/96) which concerned direct action against whaling by Greenpeace where a fine was considered to be proportionate; and at [84] to Lucas v the United Kingdom (App. No. 39013/02) where detention for a few hours following arrest for wilful obstruction of the highway and then a fine was proportionate. At [87] the Strasbourg Court said:

> "An analysis of the Court's case-law … reveals that the Contracting States' discretion in punishing illegal conduct intertwined with expression or association, although wide, is not unlimited. It goes hand in hand with European supervision by the Court, whose task it is to give a final ruling on whether the penalty was compatible with Article 10 or 11 . The Court must examine with particular scrutiny the cases where sanctions imposed by the national authorities for non-violent conduct involve a prison sentence."

Taranenko concerned a group of protestors who on 14 December 2004 forced their way into a building used by the President of the Russian Federation and occupied and barricaded themselves into a room on the ground floor. Their original plan had been to meet officials, hand over a petition and distribute leaflets. The action they took was a reaction to the security guards' attempts to stop them entering the building. Beyond pushing a guard out of the way, there was no violence. Once inside they waved anti-Putin placards from the windows, threw leaflets and chanted slogans calling for his resignation. They stayed for an hour and damaged furniture and the walls and ceilings. The applicant was arrested and charged with criminal damage and the attempted violent overthrow of the state (and later with participation in mass disorder). She was remanded in custody and many requests for release were refused. On 8 December 2005 she was convicted of the mass disorder offence and of criminal damage, although in respect of the latter it was not established that the applicant was personally responsible. The various defendants had voluntarily compensated the state for the damage they had caused. The applicant was sentenced to a suspended sentence of three years' imprisonment.

The Strasbourg Court, having reviewed the ruling of the court which convicted the applicant, note that her conviction was founded, at least in part, on the Russian court's condemnation of the political message which the protestors were conveying.

At [93] the court observed that the conduct of the applicant was "closer on the facts to Steel , Drieman , Lucas and Barraco " than to a case called Osmani v the former Yugoslav Republic of Macedonia (App. No. 50841/99). In that case, the applicant, a mayor, organised an armed vigil to protect the Albanian flag in defiance of an order of the Constitutional Court. He made a speech fomenting interethnic violence. Weapons were found in the town hall and there was a riot involving about 200 people during which police officers were injured. The original sentence of seven years' imprisonment was severe but, as a result of an amnesty he served 15 months in prison. That could not be considered disproportionate. It continued:

> "93. The above circumstances lead the Court to conclude that the present case is different from Osmani *and Others* because the protesters' conduct, although involving a certain degree of disturbance and causing some damage, did not amount to violence. It is therefore closer on the facts to Steel and Others , Drieman and Others , Lucas and Barraco .

94. The exceptional severity of the sanction, however, distinguishes the present case from the cases of Steel and Others , Drieman and Others , Lucas and Barraco , where the measures taken against the applicants in comparable circumstances were considered to be justified by the demands of public order. Indeed, in none of those cases was the sentence longer than a few days' imprisonment without remission, except in one case Barraco) where it amounted to a suspended sentence of three months' imprisonment which was not, in the end, served. The court accordingly considers that the circumstances of the instant case present no justification for being remanded in custody for a year and for the sentence of three years' imprisonment, suspended for three years.

95. The Court therefore concludes that, although a sanction for the applicant's actions might have been warranted by the demands of public order, the lengthy period of detention pending trial and the long suspended prison sentence imposed on her were not proportionate to the legitimate aim pursued. The court considers that the unusually severe sanction imposed in the present case must have had a chilling effect on the applicant and other persons taking part in protest actions (see, mutatis mutandis, *Cump? n? and Maz?re, cited above, § 116).*

The Strasbourg jurisprudence does not support the proposition that detention is necessarily disproportionate for the conduct with which these appeals are concerned. On the contrary, the Strasbourg Court has accepted as proportionate both immediate sentences of imprisonment and suspended sentences in cases where the conduct in question caused less harm and was less culpable. In this way, the ECHR marches with the common law. The underlying circumstances of peaceful protest are at the heart of the sentencing exercise. There are no bright lines, but particular caution attaches to immediate custodial sentences.

The sentence in these cases

The judge noted that each of these appellants was of good character (or effective good character) and referred to the many letters of support setting out the positive nature of that good character, that is beyond the mere fact of absence of previous convictions. His conclusion that the custody threshold was passed, and that he could not suspend the sentences, rested upon three features. First, the widespread harm caused to many people as a result of the extended length of the protest. Secondly, his evaluation that these appellants were culpable because they persevered in their protest despite it being obvious that the impact was severe. Thirdly, that they were unrepentant and adhered to their underlying views and convictions.

Custody is only appropriate if the court considers that the offence (alone or in combinations with one or more other offences) is so serious that neither a fine nor a community sentence can be justified; section 152 Criminal Justice Act 2003 . That judgement must be made in the light of all the circumstances. In our view, having regard to the good character of these appellants and the underlying motivation for their criminal behaviour, even taking into account the widespread disruption for which they were responsible, the custody threshold was not crossed. Miss Brimelow QC developed detailed submissions on the precise extent of the disruption for which, either alone or combined with the coincident behaviour of others, these appellants were responsible (Ground 3). We consider that the judge, having heard all the evidence, was in an unrivalled position to evaluate that question. We are unpersuaded by an exercise

of picking through bits and pieces of the evidence, that he was wrong.

But we respectfully part company with the judge's unqualified view that these appellants will offend again. Time, of course, will tell.

In concluding that the appellants were likely to reoffend, the judge was unimpressed by their expressions of remorse and good intent for the future. It was in this context that he referred to the deeply held beliefs of the appellants, and the certainty that they were right: see paragraph 30, above. We do not read the judge's remarks as penalising the appellants for their beliefs. That would be wrong. However, to the extent that it is necessary for the purposes of sentencing to make a judgment about the risks of future offending, underlying motivations can be of great significance.

The appellants expressed regret for what they had done and two of them recognised that their actions, that is to say the extended duration of the protest with its widespread impact, were (we paraphrase) unreasonable and irresponsible. It was on that basis that they asked to be sentenced. The following extracts from the pre-sentence reports illuminate how they reacted.

The report dealing with Mr Roberts notes the evidence "of the elderly who were unable to go out due to no buses, the emergency services, blood transport and patient transport that had to use alternative, longer routes …". It continues:

> "He stated that after hearing the evidence from during the trial he felt guilt and remorse for their inconvenience and admitted he was naïve, not understanding the consequences of his actions at the time but has had time to reflect. … He asserts that prior to the verdict, he had already made a decision to move away from working with the protest group."

Mr Loizou's pre-sentence report contains the following:

> "He explained that he thought he was supporting the local community; as it was his understanding they are in the main against fracking in their area. He now accepts his assumptions here were based upon the attitudes of those on the protest likely to share his views. However, he does add that he often received 'thumbs up' from drivers who were able to get past the obstruction caused, adding to his feeling that he was doing something positive for the local Community.
>
> Mr Loizou explained that he was disavowed of these views during his trial; whilst he had seen statements indicating the difficulties he caused, he explained that listening to exactly how various people had been impacted brought that home to him. It was apparent in interview that Mr Loizou regretted his actions and expressed remorse for those he harmed as a result of his behaviour."

The position with Mr Blevin was less clear-cut:

> "He claims it never occurred to him how it might be negatively affecting anyone. … He assured me that he cares deeply and had he realised the negative impact of his behaviour he would have come down from the vehicle.

> When challenged about his thought process retrospectively Mr Blevins informed me that although climate change is still important to him and he would still campaign to raise awareness, he would not put himself in this position again. Mr Blevins explained how upsetting it had been to hear during the trial how various members of the community had been affected. He tells me that this hadn't been his intention and if there had been any other way he would have taken a different course of action. He justified his actions informing me that there were no other options available stating 'conventional routes were not working and voices were being ignored'. Although he verbalises his remorse, his continued justifications call in to question the extent of this."

When these sentiments are added to the features already referred to, we are reinforced in our view that a custodial sentence was not called for in these cases. A community sentence, with a punitive element involving work (or perhaps a curfew) would have met the justice of the cases. As has often been remarked, a community sentence is a serious penalty. Moreover, if the terms of a community sentence are not complied with, the offender may be resentenced. No complaint could be made about that; and if the original sentence was appropriate there could be no legitimate complaint if non-compliance led to a custodial sentence. The same would be true were a suspended sentence appropriately imposed, a further offence committed, and the sentence then activated.

A person with strongly held beliefs remains free to manifest them when subject to such an order of the court. There are many ways in which peaceful protest can be achieved without breaking the law.

Despite our conclusion that a community sentence was the appropriate disposal in these cases, by the time the appeals came on for hearing, these appellants had spent three weeks in custody, the equivalent of serving a sentence of six weeks. In those circumstances, we concluded that it would not be appropriate now to impose a community order with a punitive element. The time in custody represented adequate punishment. The conditional discharge that we imposed introduced no additional active element of punishment but does provide some protection to the public against repeat offending.

Ground two does not arise in view of our conclusion that the custody threshold was not crossed on the facts of this case. Ground three, to the extent that it arises, is touched on in paragraph 45 above.

It was for the reasons which we have set out that we granted leave to appeal against sentence and allowed the appeals.

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