RIGHTS OF PASSAGE: HIGHWAYS, DEMONSTRATIONS AND THE HOUSE OF LORDS

Director of Public Prosecutions v. *Jones and another* [1999] 2 All E.R. 257 (H.L.) (Lords Irvine LC, Slynn, Hope, Clyde and Hutton)

It has been said that in English law "cars and horses have more legal rights than people".[1] Traditionally precedence has been accorded to the right to travel on the highway at the expense of any right to assemble peaceably and non-obstructively upon it. This has been in contrast to other jurisdictions in which it has been accepted that if the right of peaceful assembly and protest is to mean anything at all there must be secured to the public some space in which they can exercise it.[2] No such position has, until now, been adopted in the UK. Indeed the very existence of any *right* of assembly, in the absence of a Bill of Rights, has been in doubt. [3]

On 4th March 1999 the House of Lords, in a case which the Lord Chancellor said raised an issue of fundamental constitutional importance, held that the public do, after all, have a right to assemble on the highway as long as their use of it is reasonable and is consistent with the public's primary right of passage.

THE FACTS

The events in question took place on 1 June 1995 on the grass verge by the side of the A344 adjacent to the perimeter fence of Stonehenge. A group had gathered there to protest about the lack of public access to the monument on the tenth anniversary of the "Battle of the Beanfield", a violent clash between "new age travellers" and the police. It was found as a matter of fact by the Crown Court (and accepted for the purposes of subsequent appeals) that the appellants and their group were behaving peacefully and were not obstructing the highway.

A police inspector present on the scene counted 21 people and concluded that they constituted a "trespassory assembly" under the Public Order Act 1986.[4] He informed them of this and asked them to leave. Many did so but some, including the appellants, Dr. Jones and Mr Lloyd, refused. They were then arrested for taking part in a trespassory assembly.[5]

THE OFFENCE OF TRESPASSORY ASSEMBLY

The offence of trespassory assembly was created by section 70 of the Criminal Justice and Public Order Act 1994 which inserted section 14A into the Public Order Act 1986. It provides that the chief officer of police can apply to the local council for a banning order if he reasonably believes that an assembly is likely to be trespassory and may result in serious disruption to the life of the community or damage to historical or other important buildings or monuments.[6] The order can last for four days and can only operate within a radius of up to five miles

1 G. Robertson, *Freedom the Individual and the Law* (Penguin, 1993), at p. 66.

2 See, for example, *Hague* v. *Committee for Industrial Organization*, 307 US (1939) *per* Justice Roberts.

3 See, for example, *Duncan* v. *Jones* [1936] 1 K.B. 218 in which Lord Hewart C.J. stated that "...English law does not recognise any special right of public meeting...the right of assembly , as Professor Dicey puts it...is nothing more than a view taken by the Court of the individual liberty of the subject".

4 Public Order Act 1986, s. 14A.

5 *Ibid*, section 14B(2).

6 *Ibid*, section 14A(1).

of a specified point.[7] An assembly is trespassory, and thus section 14A order operates to ban it, if it is held on land to which the public has "no or only a limited right of access" and takes place "without the permission of the occupier...or so as to exceed the limits of the permission...or of the public's right of access".[8] Section 14A(9) states that "limited" means that the use of the land is restricted to use for a "particular purpose".

In this case a section 14A order was in place. It covered the part of the A344 upon which the appellants were assembled. The central question then was, in holding a peaceful and non-obstructive demonstration on the highway, were the appellants exceeding their limited right to be there? The primary purpose of the highway is passage and repassage, but how far did the public's right extend beyond this? Did it only include activities merely "incidental or ancillary" to this primary purpose or did it include such activities as the holding of assemblies, that have nothing to do with the right of passage?

The appellants were convicted by the Justices but their conviction was overturned on appeal to the Crown Court because their demonstration was not obstructive or violent and was a *reasonable* use of the highway.

The Director of Public Prosecutions appealed by way of case stated to the Divisional Court which overturned the Crown Court's decision.[9] McCowan L.J. stated that the issue of reasonableness did not arise and the Crown Court's implication that any assembly on the highway is lawful as long as it is peaceful and non-obstructive was "mistaken", for "it [left] out of the account the existence of the [s.14 A order] and its operation...which occurs to restrict the limited right of access to the highway by the public".[10] Collins J. agreed, stating that "[t]he holding of a meeting, a demonstration or a vigil on the highway, however peaceable...may...be tolerated but there is no legal right to pursue [such activities]".[11]

THE DECISION OF THE HOUSE OF LORDS

The House of Lords, by a majority of three to two (Lord Slynn and Lord Hope dissenting) overturned the decision of the Divisional Court and allowed the appeal of the protesters. A peaceful, non-obstructive assembly *could* (and in this case did) come within the limits of the public's right of access to the highway. In reaching this decision the Law Lords reviewed and relied on several late nineteenth and early twentieth century cases which consider the nature and extent of the public's right of access to the highway.[12] The majority interpreted these authorities widely and relied on the most liberal constructions of the law within them.[13]

Lord Irvine went the furthest, stating that the public highway was a place which the public might enjoy for *any reasonable purpose*, provided the activity did not amount to a public or private nuisance and did not obstruct the highway by unreasonably impeding the primary right of the public to pass and repass. Subject to these qualifications there was "a public right of peaceful assembly on the highway".[14] Any fears that the rights of private landowners might be prejudiced and that this test would allow *carte blanche* to "squatters and other uninvited visitors" were unfounded, for the law of trespass would continue to protect private

7 *Ibid*, section 14A(6).

8 Public Order Act 1986, s. 14A(5).

9 [1997] 2 All E.R. 119.

10 *Ibid*, at p. 124.

11 *Ibid*, at p. 125.

12 See in particular *Lewis, Ex parte* (1888) 21 Q.B.D. 191; *Harrison* v. *Duke of Rutland* [1893] 1 Q.B. 142; *Hickman* v. *Maisey* [1900] 1 Q.B. 752.

13 See in particular the judgements of Lord Esher in *Harrison*, at pp. 146-7; and Collins L.J. in *Hickman*, at pp. 757-8.

14 [1999] 2 All E.R. 257, at p. 265.

landowners against "unreasonably large, unreasonably prolonged or unreasonably obstructive assemblies".[15]

Lords Clyde and Hutton, accepted that what is a "reasonable or usual [mode of using the highway] may develop and change from one period of history to another".[16] Critically they also held that the common law does now recognise a right of public assembly and that in some circumstances this right could be exercised on the highway, as indeed was the case here.[17]

They were more cautious than the Lord Chancellor however and fell short of issuing general guidance. They stressed that every case must depend on its own facts. Lord Clyde said that the appellants and the Crown Court had gone further than was necessary in suggesting that *any* reasonable use of the highway, as long as it was peaceful and non-obstructive was lawful, and so a matter of public right. This approach would open a "door of uncertain dimensions into an ill-defined area of uses which might erode the basic predominance of the essential use of a highway as a highway". A test could not be defined in general terms but must depend upon the particular circumstances of each case. [18]

Further support for the majority decision was derived from the argument that it was desirable that there be harmony between the law of trespass and the law relating to wilful obstruction of the highway. Section 137 of the Highways Act 1980 makes it an offence to wilfully obstruct the highway without lawful authority or excuse. In *Hirst* v. *Chief Constable of West Yorkshire* it was held that the question of whether the highway was being obstructed without lawful excuse must be "answered by deciding whether the activity in which the defendant was engaged was or was not a *reasonable user* of the highway". [19] In the present case Lord Irvine stated it to be "satisfactory that there is a symmetry in the law between the activities on the public highway which may be trespassory and those which may amount to unlawful obstruction of the highway".[20] It was therefore appropriate that the test of reasonableness should be applied to both, a view with which Lord Hutton agreed.[21]

In their dissenting judgements Lord Slynn and Lord Hope adopted a considerably more conservative approach both in their construction of the authorities and in their statutory interpretation. With regard to the former they employed a much more restrictive interpretation than did the majority. Both held that the authorities clearly supported the proposition that the public's right to use the highway was limited to passage and repassage and anything incidental or ancillary to that right. The test of what was "ordinary and reasonable" user of the highway was not to be applied in the abstract but rather in the context of the exercise of the right of passage, which was the only right which members of the public were entitled to exercise when "using the highway *as a highway*".[22]

Perhaps more interesting is the fact that it was only the dissenting judges who actually considered the *intention of Parliament* in passing section 70 of the Criminal Justice and Public Order Act in the first place. In passing this section Parliament deliberately imported the private law device of trespass into the public law sphere. As Lord Hope stated, "section 14...brings into the arena of the criminal law the rights if any which the public have as against the occupier of the land in private law".[23] Parliament may have chosen to take out of the hands of the occupier the

15 *Ibid*, at p. 265.

16 *Ibid*, at p. 285 *per* Lord Clyde and, at p. 292, *per* Lord Hutton. Both of their Lordships cited the *dicta* of Collins L.J. in *Hickman* v. *Maisey* [1900] 1 Q.B. 752, at p. 758.

17 *Ibid*, at p. 291 *per* Lord Hutton.

18 *Ibid*, at p. 287.

19 (1987) 85 Cr. App. Rep. 143, at p. 150 *per* Glidewell L.J.

20 [1999] All E.R., at p. 266.

21 *Ibid*, at p. 294-5.

22 *Ibid*, at p. 279.

23 *Ibid*, at p. 274.

right to complain of a trespass and place it at the disposal of the police (which thus gives it a public law dimension in that it concerns the relationship between the citizen and the state) but nevertheless the extent of these limits must be found in the *relationship in private law* between the public and the occupier - this is what Parliament clearly intended.[24] If the approach of the majority were to be adopted, argued Lord Hope, this would result in a "fundamental rearrangement of the respective rights of the public and of those of public and private landowners" and this in a situation in which no landowner was present to defend their interests.[25]

Also with regard to the intention of Parliament Lord Slynn commented that *but for the section in question* no action would have been taken against a peaceful, non-obstructive assembly like the one the appellants took part in. Parliament did not pass the section for nothing:

> Parliament in 1994 has enabled action *over and above existing remedies* to deal with trespass on the highway...to be taken to deal with what was seen as a growing problem. If Parliament wants to take away that form of control, it can obviously do so. I do not consider that disapproval of this power justifies a change in the law as to the public's rights over the highway, which is what at times seems to be one of the bases of the defendants' arguments. [emphasis added][26]

As regards the "lack of symmetry" argument, Lord Hope considered that "like it or not" the intention of Parliament as disclosed by the language used in the section made this inevitable.[27]

COMMENT

Of the majority, only Lord Irvine placed any reliance on the European Convention on Human Rights and Fundamental Freedoms, Article 11(1) of which guarantees the right to freedom of assembly subject to the exceptions listed in paragraph 2. He considered that unless the common law recognised that assembly on the public highway may be lawful then the Article 11(1) right would be denied. He stressed that *mere toleration* of assemblies on the highway does not secure a fundamental right to hold them. Lord Slynn and Lord Hope, finding neither the common law uncertain nor the Statute ambiguous, did not feel the need to resort to the Convention.

Notwithstanding this reluctance to place reliance on it however, it is tempting to see the Convention as forming a heavy backdrop to the decision in this case, especially given the recent passage of the Human Rights Act 1998. It is at least arguable that the interpretation of section 14A by the Divisional Court would have been in breach of Article 11 in that it failed to have sufficient regard to the principle of proportionality.[28] Perhaps it was the imminence of incorporation that, in part and obliquely, fuelled the reasoning of the majority. There are certainly hints in their speeches that indicate that this was the case. The very recognition of a common law *right* of public assembly is in itself a major departure from the traditional Diceyan position that there exist only residual liberties as opposed to positive rights in the UK. Also their Lordships were willing to stretch their construction of the authorities (resulting in a progressive interpretation of the Act which was probably not intended by the Parliament of 1994) in a way which is reminiscent of the dynamic method of interpretation employed by the European Convention organs.[29] There is also evidence of a willingness to look outside the UK for guid-

24 *Ibid*, at p. 275.

25 *Ibid*, at p. 283.

26 *Ibid*, at p. 272.

27 *Ibid*, at p. 283.

28 See B. Fitzpatrick and N. Taylor, "Trespassers Might be Prosecuted: The European Convention and Restrictions on the Right to Assemble" [1998] E.H.R.L.R. Issue 3: 292.

29 See for example *Tyrer* v.*UK* [1978] 2 E.H.R.R. 1 in which the European Court of Human Rights stated that the "Convention is a living instrument which...must be interpreted in the light of present day conditions".

ance on human rights issues. Lord Hutton derived support for his argument that the common law recognises the right of public assembly from the judgement of Lamer C.J.C. in *Committee for the Commonwealth of Canada* v. *Canada*.[30] In contrast the minority appeared reluctant to see this as a human rights case at all but rather as one which, due to the intention of Parliament as evidenced by the language it used, had to be answered by applying the principles of the "law of real property and land-ownership".[31]

It could be argued that the 1994 Parliament's use of the private law device of trespass in the realm of public law to control the exercise of a fundamental right was always going to be problematic. The nature of these problems has been examined by Kevin Gray who has persuasively argued that there necessarily exist moral limitations on private property rights, especially where such property is given over to public use as, for example, in the case of the highway. Gray argues that the very notion of property has a moral component, and private property rights should not necessarily be allowed to trump or override basic rights such as freedom of speech or assembly.[32] It may be possible to read *DPP* v. *Jones* as an example of this kind of limitation exercise.

On a more practical level it would seem that the decision in *DPP* v. *Jones* will result in the public being able to participate in a whole range of activities on the highway as long as they are reasonable and do not interfere with the primary purpose of passage. The question of what constitutes reasonable user will itself no doubt cause much confusion. How for example will the police officer on the scene of a demonstration on the highway where a section 14A order is in place be able to judge whether or not it is a reasonable user? However, despite the anticipated difficulties, it is submitted that the progressive and bold approach of the majority of the House of Lords is to be applauded and reflects an increasing awareness of the importance of positive human rights amongst the higher judiciary prior to the coming into force of the Human Rights Act 1998.

TOM LEWIS*

30 (1991) 77 D.L.R (4^{th}) 385: "...the freedom of expression cannot exist in a vacuum...it necessarily implies the use of physical space in order to meet its underlying objectives. No one could agree that the exercise of the freedom of expression can be limited solely to places owned by the person wishing to communicate: such an approach would certainly deny the very foundation of the freedom of expression".

31 [1999] 2 All E.R 257, *per* Lord Hope at p. 274.

32 K .Gray, 'Property in Thin Air' (1991) 50 C.L.J., particularly at pp. 290-292.

* B.A. (Oxon.), Solicitor, Senior Lecturer, Nottingham Law School.