Background on the Judicial Review of the Atomic Weapons Establishment (AWE) Aldermaston Byelaws 2007.

The Atomic Weapons Establishment (AWE) Aldermaston Byelaws 2007 [1] came into force on 31 May 2007 replacing the Atomic Weapons Research Establishment Aldermaston Byelaws 1986 [2]. This was the first step in a Ministry of Defence (MoD) UK-wide byelaw review at around 100 sites [3]. The MoD gave a variety of reasons for wanting to implement new byelaws but we noticed that their prioritisation list included the names of places many activists and protesters would find familiar, with Aldermaston, Fylingdales, Faslane, Fairford, Brize Norton, Lakenheath and Menwith Hill all in their top 20.

In 2006 the MoD published a notice proposing replacement byelaws at AWE Aldermaston covering two sets of areas; the 'Protected Areas' which were inside the fence and the 'Controlled Areas'. While the 1986 Byelaws had applied to an area "including the outer perimeter fence" and to a limited set of fenced areas such as the nearby AWE Blacknest, the 2007 Byelaws extended into public access land surrounding the site and therefore criminalised a wide range of activities outside of the perimeter fence for the first time. Signs were put up stating that the site was protected by Military Lands Byelaws before the end of the consultation period and the Ministry of Defence Police wanted to arrest us without delay but were disappointed to learn that, as they were only draft Byelaws, they would have to wait.

Trespass inside AWE was already an offence under the recently implemented Serious Organised Crime and Police Act, so the real impact of the proposed new byelaws was on the land outside of AWE Aldermaston which has been a site for demonstrations, protests, and direct action for many decades as well as being the place where we had held our monthly camp. The MoD claimed that "legitimate democratic protest" was still possible at AWE Aldermaston, but only so long as we didn't:

- use any mobile telephone;
- take any photographs;
- take part in, attend or organise any meeting or procession;
- camp in tents, caravans, trees or otherwise;
- distribute or display any leaflet, sign, poster, notice or any similar form of communication or affix it to any wall, fence, structure or other surface;
- loiter, commit any nuisance, or behave in an indecent or unseemly manner;
- act in any way likely to cause annoyance;
- light bonfires;

The 1986 byelaws had come into force just 4 days after being made; by contrast the 2007 Byelaws took over a year to become law. This was because, as a result of our successful campaigning, the MoD had to redraft, removing the prohibition on meetings and processions and on distribution and display of leaflets and placards. The prohibition on the taking of photographs was also amended to restrict photography of buildings and personnel within the Protected Areas only.

In the MoD's consultation response they had assured us that "[t]he byelaws neither expressly nor impliedly discriminate against people holding certain political beliefs" [3]. In June 2007 Aldermaston Women's Peace Campaign (AWPC) were arrested under the new byelaws in a mass 'group arrest' within a short time of our arrival at AWE Aldermaston although we had not put up tents and were merely 'meeting'. We were detained overnight before being made subject to draconian bail conditions which included a vast exclusion zone. It appears that to date the only people to have been prosecuted under the 2007 Byelaws have been protesters and that these byelaws were aimed at demonstrations, meetings, marches, vigils, protests and other types of activity which AWE plc and the MoD would rather did not happen. By this time we had succeeded, with Public Interest Lawyers, in our application for a Judicial Review of the Byelaws on grounds that they were incompatible with Articles 10 and 11 of the European Convention on Human Rights and Fundamental Freedoms (ECHR).

The first hearing in the Judicial Review was at the High Court on the 1st February 2008. Permission was granted to challenge the Byelaws by reference to our EHRC . We challenged the lawfulness of three of the provisions of Byelaw 7 (2) which applied to the Controlled Areas outside of the perimeter fence:

> "(2) No person shall within the Controlled Areas:
>
> …
>
> (f) camp in tents, caravans, trees or otherwise;
>
> (g) attach anything to, or place any thing over any wall, fence, structure or other surface;
>
> …
>
> (j) act in any way likely to cause annoyance, nuisance or injury to other persons … "

Our barrister, David Pievsky, argued that the word "camp" was not sufficiently defined as to give the required degree of certainty. This was not accepted by the court which found that the question of justification was more relevant. Our case was that camping was the very essence of our protest but the court saw this point "more in terms of poetry than of true principle" [4].

Byelaw 7 (2) (g) was quashed. This was a major achievement as the court decided that the Secretary of State for Defence had acted unlawfully in creating Byelaw 7 (2) (g). It was ruled that this Byelaw was too broad:

“The words used in Byelaw 7(2)(g) prohibit a visitor from sitting on a fixed bench and placing a pullover over the seat or the back of the bench, or a hiker from stopping at the monument and placing a rucksack on a convenient surface at the base of the structure. There would need to be strong justification for a ban on such apparently innocuous activities.”

The third point we contested was the provision on causing annoyance. The judgement was that a court would be ‘bound to construe “annoyance” compatibly with a defendant’s Convention right of association and free expression’ ensuring that only the “reasonably annoyed could complain successfully”. While our challenge to byelaw 7 (2) (j) technically failed, we felt that there had been clarification of how the Byelaw could be used in future. Our assessment of the outcome was that we welcomed the quashing of Byelaw 7 (2) (g) and the clarification of Byelaw 7 (2) (j) but as camping is fundamental to our existence we decided to seek permission to appeal.

In November 2006, the Under-Secretary of State, Kevan Jones, replied to a question in the House of Commons saying that “[s]ignificant delays in the progression of the MOD Byelaws Review have occurred because objectors secured a judicial review of the implementation of the first of the new byelaws at AWE Aldermaston” [5]. However, he also revealed that ministerial approval had been given to restart the process at non-nuclear sites, arguing that our appeal was “limited to issues relating to the manner and form of protests against nuclear weapons”.

Permission to appeal the decision on camping was given by Justice Waller who reasoned that “the bye-law as construed catches a form of peaceful protest used in many places”. The appeal was heard on 26th November 2008 and the reserved judgement handed down on the 5th February 2009 upheld our right to camp. In the unanimous verdict, the Court of Appeal ruled that the government’s attempts to criminalise our legitimate and peaceful political activity violated the rights to freedom of expression and assembly guaranteed by Articles 10 and 11 of the ECHR. The judgement affirmed that camping is a legitimate form of protest, saying “rights worth having are unruly things. The byelaw outlawing camping was quashed. [6]

This outcome is a landmark legal ruling which strengthens the fundamental right to protest. It is the culmination of a long process for AWPC of challenging, persuading and arguing our case, firstly securing amendments to byelaws during the consultation period and then seeing two successive High Court defeats for the Secretary of State for Defence. We have also managed since 2006 to continue our monthly camp. This has been a crucial period of redevelopment at AWE Aldermaston in advance of the decision on Trident renewal and we are not going to go away anytime soon.

NOTES

[1] Atomic Weapons Establishement (AWE) Byelaws, 2007

www.opsi.gov.uk/si/si2007/pdf/uksi_20071066_en.pdf

[2] Atomic Weapons Research Establishment Byelaws, 1986

http://www.defence-estates.mod.uk/byelaws/Pdfs/SouthEast/ToBeReviewed/Atomic%20Weapons%20Research%20Establishment%20Aldermaston/SI-486-1985-P1-P6(1).pdf

[3] Ministry of Defence Byelaws Review

http://www.defence-estates.mod.uk/byelaws/Internet/Intro.php

[4] High Court judgement 1st February 2008 (text below)

[5] Hansard 6 Nov 2008 : Column 672W

[6] Court of Appeal judgement 3rd February 2009

Neutral Citation Number: [2008] EWHC 416 (Admin)

Case No: CO/5317/2007

IN THE SUPREME COURT OF JUDICATURE
QUEEN'S BENCH DIVISION
DIVISIONAL COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 06/03/2008

Before :

LORD JUSTICE MAURICE KAY
and
MR JUSTICE WALKER

- -

Between :

Kay Tabernacle	**Claimant**
- and -	
Secretary of State for Defence	**Defendant**

(Transcript of the Handed Down Judgment of
WordWave International Limited
A Merrill Communications Company
190 Fleet Street, London EC4A 2AG
Tel No: 020 7404 1400, Fax No: 020 7831 8838
Official Shorthand Writers to the Court)

Mr Pievsky (instructed by **Public Interest Lawyers**) for the **Claimant**
Mr Nardell (instructed by **Treasury Solicitors**) for the **Defendant**

Hearing date : 01.02.2008

- -

Judgment
As Approved by the Court

Lord Justice Maurice Kay :

1. This is the judgment of the Court to which both members have contributed.

2. Nuclear weapons arouse strong feelings. Some people are moved to express their opposition by public protest. They have the right to do so within the law. The Aldermaston Women's Peace Camp (AWPC) has been engaged in protest at the Atomic Weapons Establishment Aldermaston (AWE) for many years. It has done so by camping on land ("the AWE land") owned by the Secretary of State for Defence. The AWPC comprises a small group of women who assemble on the second weekend of each month, from Friday evening until Sunday morning. Whilst there, the women hold vigils and meetings, demonstrate their views and hand out leaflets. AWE is tolerant of peaceful protest within the law. Although the current and previous sites of the camp are on the AWE land, they are not within the secure premises of the enterprise. Between the secure area and the outer boundary of the AWE land are areas to which members of the public have lawful access for leisure and other purposes.

3. The Atomic Weapons Establishment (AWE) Aldermaston Byelaws 2007 (the 2007 Byelaws) were promulgated by the Secretary of State for Defence on 27 March 2007 and they came into force on 31 May 2007. The power to make them is derived from section 14(1) of the Military Lands Act 1892 which authorises the Secretary of State to make byelaws:

> "… for regulating the use of land for the purposes to which it is appropriated, and for securing the public against danger arising from that use, with power to prohibit all intrusion on the land and all obstruction of the use thereof.
>
> Provided that no byelaws promulgated under this section shall authorise the Secretary of State to take away or prejudicially affect any right of common."

Section 14(2) then provides:

> "Where any such byelaws permit the public to use the land for any purpose when not used for the military purpose to which it is appropriated, those byelaws may also provide for the government of the land when so used by the public, and the preservation of order and good conduct thereon, and for the prevention of nuisances, obstructions, encampments, and encroachments thereon, and for the prevention of any injury to the same, or to anything growing or erected thereon, and for the prevention of anything interfering with the orderly use thereof by the public for the purpose permitted by the byelaws."

4. Section 17(1) provides for publication of any proposed byelaws and a right of objection. Section 17(2) renders a breach of any byelaws a criminal offence, triable summarily, for which the maximum punishment is presently a £500 fine.

5. The 2007 Byelaws replace the Atomic Weapons Research Establishment Aldermaston Byelaws 1986 (the 1986 Byelaws). It seems that the 1986 Byelaws were never used against the AWPC, probably because there was for a time some doubt as to whether the women were on land belonging to the Secretary of State and, more recently, because of apprehension about the impact of the Human Rights Act 1998. The 2007 Byelaws, which were refined in the course of the consultation period provided by section 17(1), resemble the 1986 Byelaws in some but not all respects.

6. The 2007 Byelaws distinguish between Protected Areas (from which members of the public are excluded) and Controlled Areas. The area in issue in the present case is a Controlled Area. Byelaw 6 is permissive. It provides:

> "Subject to the provisions of these Byelaws, the public are permitted to use all parts of the Controlled Areas not specially enclosed or entry to which is not shown by signs or fences as being prohibited or restricted, for any lawful purpose at all times when the Controlled Areas are not being used for the military purpose for which they are appropriated."

7. Byelaw 7, headed "Prohibited Activities – Controlled Areas", then prescribes the offences. They are numerous. The ones in dispute in the present case are to be found in a long list in Byelaw 7(2), the relevant parts of which read as follows:

> "(2) No person shall within the Controlled Areas:
>
> …
>
> (f) camp in tents, caravans, trees or otherwise;
>
> (g) attach anything to, or place any thing over any wall, fence, structure or other surface;
>
> …
>
> (j) act in any way likely to cause annoyance, nuisance or injury to other persons … "

8. By these proceedings, the claimant, a member of AWPC, seeks to challenge the lawfulness of Byelaw 7(2)(f), (g) and (j). On 12 November 2007, McCombe J adjourned the permission to a "rolled-up" hearing, of which we are now seised. The

challenge is principally, but not wholly, by reference to Articles 10 and 11 of the European Convention on Human Rights and Fundamental Freedoms (ECHR). It is appropriate to set them out here:

> "10(1) Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority …
>
> (2) The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary."

9. Article 11 is concerned with freedom of peaceful assembly and association. It provides:

> "(1) Everyone has the right to freedom of peaceful assembly and to freedom of association with others …
>
> (2) No restrictions shall be placed on the exercise of these rights other than such as are prescribed by law and are necessary in a democratic society in the interests of national security or public safety, for the prevention of disorder or crime, for the protection of health or morals or for the protection of the rights and freedom of others … "

10. In a nutshell, the case for the claimant is that the provisions of Byelaw 7 to which I have referred are invalid either at common law or under the Human Rights Act 1998. The common law claim identifies aspects of the Byelaw which are said to be unreasonable or uncertain. The claim under the Human Rights Act is that the provisions in question interfere with her rights under Articles 10 and 11 and that the Secretary of State cannot justify them by reference to Articles 10(2) or 11(2) either because the restrictions are not properly "prescribed by law" or because they are not proportionate or "necessary in a democratic society". The application for permission to apply for judicial review remains outstanding. We grant permission.

General legal principles

11. Many of the legal principles to be applied in this case are common ground. The dispute is as to their application. It is therefore appropriate to state the legal principles at this stage.

12. First, the Secretary of State is a public authority within the meaning of section 6 of the Human Rights Act 1998 and the 2007 Byelaws, as secondary legislation, are susceptible to judicial review if they unjustifiably interfere with the human rights of those affected by them or are otherwise unlawful.

13. Secondly, one of the consequences of the requirement that an interference is "prescribed by law" is that the law must not be so vague or imprecise as to have unforeseeable application. The principle is established in both Strasbourg and domestic jurisprudence. In Gaweda v Poland (2002) 12 EHRC 486 the Strasbourg Court said (at paragraph 39):

> "The Court recalls that one of the requirements flowing from the expression 'prescribed by law' is the foreseeability of the measure concerned. A norm cannot be regarded as a 'law' unless it is formulated with sufficient precision to enable the citizen to regulate his conduct: he must be able – if need be with appropriate advice – to foresee, to a degree that is reasonable in the circumstances, the consequences which a given action may entail."

14. A domestic example of the same principle is to be found in Staden v Tarjani (1980) 78 LGR 614, in which Lord Lane CJ said (at page 623):

> "… to be valid, a byelaw, carrying as this one does penalties for infringement, must be certain and clear in the sense that anyone engaged upon the otherwise lawful pursuit … must know with reasonable certainty when he is breaking the law and when he is not breaking the law."

15. It is common ground that, for all practical purposes, these two formulations impose essentially the same requirement. In Percy v Hall [1997] QB 924, Simon Brown LJ adopted a different formulation. He said (at page 941):

> "Better … to treat the instrument as valid unless so uncertain in its language as to have no ascertainable meaning, or so unclear in its effect as to be incapable of certain application in any case."

16. Leaving aside instruments of "no ascertainable meaning", that formulation appears to focus on the stage of application, that is the point at which a court has to apply the instrument. In a sense, it is to look at the problem through the other end of the telescope. We doubt that it will produce a different result and neither counsel in the present case is suggesting that it would.

17. Thirdly, when it comes to justification under Article 10(2) or 11(2), the authorities acknowledge that exercise of the right to freedom of assembly and exercise of the right to free expression are often closely associated: see R (Laporte) v Chief Constable of Gloucestershire [2006] UKHL 55, [2007] 2 AC 105, per Lord Bingham of Cornhill, at paragraph 36. In the same passage, Lord Bingham emphasised the fundamental importance of these rights and added (at paragraph 37):

> "Any prior restraint on freedom of expression calls for the most careful scrutiny: Sunday Times v United Kingdom (No.2) (1991) 14 EHRR 229, para 51; Hashman and Harrup v United Kingdom (1999) 30 EHRR 241, para 32. The Strasbourg Court will wish to be satisfied not merely that a state exercised its discretion reasonably, carefully and in good faith, but that it applied standards in conformity with Convention standards and based its decision on an acceptable assessment of the relevant facts: Christian Democratic People's Party v Moldova, para 70."

As always, the relevant questions become those adopted by Lord Steyn in R (Daly) v Home Secretary [2001] UKHL 26 [2001] 2 AC 532 (at paragraph 27):

> "… whether (i) the legislative objective is sufficiently important to justify limiting a fundamental right; (ii) the measures designed to meet the legislative objective are rationally connected to it; and (iii) the means used to impair the right or freedom are no more than is necessary to accomplish the objective."

18. Fourthly, it is possible to distinguish between interferences which " encroach on the essence of the right" (Ziliberberg v Moldova, European Court of Human Rights, 61821/00, 4 May 2004) and interferences which impact on the manner and form in which the rights are exercised. It is axiomatic that particularly convincing justification is required in relation to the former but that the discretionary area of judgment will be wider in the latter.

19. Fifthly, in domestic law bye-laws are susceptible to judicial review on grounds of, among other things, irrationality.

20. We shall have to refer to other authorities in the course of this judgment but the above will suffice by way of introduction and general principle. The next task is to consider the challenges to the specific provisions.

Bylaw 7(2)(f): "camp"

(1) Certainty

21. On behalf of the claimant Mr Pievsky has mounted a vigorous attack on the word "camp". He correctly observes that the word is not defined in the 2007 Byelaws. He submits that it is insufficiently precise to satisfy the tests to which we have referred. He poses a number of hypothetical examples of marginal cases. In our judgment, however, this submission is unsustainable. "Camp" is an everyday and intelligible word. As with many words in our language, its meaning may vary with context. It matters not that, as counsel's researches establish, it is variously defined in different dictionaries. On any basis, to live in a tent for the duration of a weekend is to camp. The marginal cases are susceptible to judicial resolution without infringing the principle of reasonable certainty. For the purpose of construing the word in the context of the 2007 byelaws, we would, if necessary, adopt the definition in Chambers dictionary, 1998 edition:

> "to live in a tent or in temporary or makeshift accommodation"

22. We reject this ground of challenge.

(2) Justification

23. The relevant evidence on behalf of the Secretary of State is provided in the witness statement of Timothy Pinchen who deals with estate management issues across various parts of the Defence Estate. As a matter of policy, there is a general prohibition on unauthorised camping across the Defence Estate. It is only allowed with express permission. The reasons include operational and security concerns. Dealing specifically with Aldermaston, Mr Pinchen says that camping in the vicinity of the security fence is not appropriate for security reasons. If it were allowed, additional surveillance would be necessary. Camping can be used as a base, a cover or a distraction in relation to terrorist or similar activities. There are no publicly accessible sanitation facilities anywhere in the Controlled Areas. AWE have received numerous complaints about the AWPC and its occupants, ranging from the leaving of human excreta in the area to passing motorists beeping their horns at the motorists. Mr Pinchen mentions other matters but that is enough to give the flavour. The claimant denies all allegations of antisocial behaviour and we are content to accept that, in general, the members of the AWPC do not behave badly. They have been camping there or thereabouts for many years and the

prohibition on camping in the Byelaws has existed since at least 1986. We have previously explained why it has not been enforced over the years.

24. In addition to his critique of Mr Pinchen's evidence, Mr Pievsky seeks to feed into the equation the notion that, from the point of view of the AWPC, camping is part of the very essence of their protest. It has potency as a symbol of the protest and of the ideals of the women.

25. The questions become: has the Secretary of State established that the prohibition on camping is necessary in a democratic society and that it satisfies a pressing social need by reference to the reasons set out in Articles 10(2) and 11(2). Has he accordingly established the proportionality of the prohibition, applying Lord Steyn's test? In our judgment, the answer to both questions is in the affirmative. We attach some significance to the fact that the prohibition only limits freedom of association and of expression on the property of the Secretary of State. Importantly, a prohibition on camping only impacts on one form of association and expression. Mr Pievsky is eloquent on the significance of camping to his client and her colleagues but we see his point more in terms of poetry than of true principle. In our judgment, the evidence of Mr Pinchen and the matters to which we have referred enable the Secretary of State to justify the prohibition on camping.

Byelaw 7(2)(j): "annoyance"

26. Mr Pievsky's attack on Byelaw 7(2)(j) is limited to the word "annoyance". He does not take issue with "nuisance or injury".

(1) Certainty

27. In Nash v Finlay (1902) 85 LT 682 the court considered a byelaw which provided:

> "No person shall wilfully annoy passengers in the streets."

28. Other byelaws in the same instrument proscribed more specific forms of "annoyance". Lord Alverstone CJ said (at page 683):

> "… the byelaws have endeavoured to deal with specific annoyances, and, that being so, it is difficult to understand what this particular byelaw was intended to cover that is not within the ambit of the others. I therefore think that this byelaw is not valid."

29. Darling J agreed, as did Channell J who added (ibid):

> "I think we must be understood to base our decision on the want of certainty in this byelaw … in my opinion it does not give an adequate intimation of what it is that it intends to prohibit."

30. Mr Pievsky places heavy reliance on this. We consider that reliance to be misplaced. One of Mr Pievsky's concerns is that opponents of the AWPC may be unreasonably annoyed by the presence and activities of the claimant and her colleagues and that an offence may be committed in this way. We do not find this to be a valid concern. The context is important, as it was in Nash v Finlay. Here, "annoyance" is juxtaposed with "injury" and "nuisance". We accept Mr Nardell's submission that, to found a conviction, the victim must be reasonably annoyed. In the admittedly private law context of a lease, the court in Tod-Heatley v Benham (1888) 40 ChD 80 had to construe a covenant forbidding "annoyance, nuisance, grievance or damage". Bowen LJ said of "annoyance" (at page 96):

> "The meaning is that which annoys, that which raises an objection in the minds of reasonable men may be an annoyance within the meaning of the covenant."

31. Moreover, in Staden v Tarjanyi (above), Lord Lane contemplated that the invalid byelaw in that case might have been saved if the uncertainty had been "delineated by, if you like, the nuisance to those on the ground or annoyance to those on the ground" (at page 623).

32. With characteristic candour, Mr Pievsky produced to us the latest fruits of his research, in the form of Chorherr v Austria (1993) 17 EHRR 358 in which the Strasbourg Court considered that "likely to cause annoyance" satisfied the requirement of reasonable certainty. Indeed, as Mr Nardell submits, the Human Rights Act can be relied upon to ensure that the claimant's fears do not materialise. By reason of section 3, a court would be bound to construe "annoyance" compatibly with a defendant's Convention rights of association and free expression. That, too, would ensure that only those reasonably annoyed could complain successfully. This was anticipated by Sedley LJ shortly before the Human Rights Act came into force in Redmond-Bate v DPP, CO/188/99, 23 July 1999, at paragraph 19.

33. For all these reasons, we conclude that "annoyance" passes the test of reasonable certainty.

(2) Justification

34. In his witness statement, Mr Pinchen explains that the legal advice received by the Secretary of State's officials was to the effect that, absent the word "annoyance", "nuisance" would or might be construed as being synonymous with an actionable nuisance at common law. The purpose of the inclusion of "annoyance" was to address behaviour "that is antisocial, or interferes with the public's reasonable enjoyment of their permitted access". Thus, the proffered justification is on the basis of "necessary … for the prevention of disorder or crime … , for the protection of … the rights of others". We cannot see this as anything other than a proportionate provision. It does not prevent peaceful protest within the Controlled Areas. It restricts it as to its manner but in an unobjectionable and proportionate way.

Byelaw 7(2)(g): "attach anything to, or place anything over any wall, fence, structure or other surface"

35. It is pertinent to observe that this provision came into the 2007 Byelaws at a late stage as a result of the consultation process. The original draft, reflecting the 1986 Byelaws, would have prohibited distributing or displaying any leaflet, sign, poster, notice or any similar form of communication or affixing it to any wall, fence, structure or other surface. The Secretary of State abandoned that formulation for Article 10 and 11 reasons. Mr Nardell submits that that points to the validity of the final version. In principle, however, it does not. It does not relieve us of the task of rigorous assessment of what remains.

(1) <u>Certainty and reasonableness</u>

36. Mr Pievsky's submission focuses on the words "other surface". Taken out of context, a prohibition of the placing of "anything over any … other surface" suffers not from the vice of uncertainty but from the risk that it is so all-embracing that it goes further than must have been intended. However, it has to be considered not out of context but in context. The meaning of "other surface" is limited by the preceding words. Mr Nardell, supported by the statement of Mr Pinchen, submits that the only "structures" to which the prohibition relates are ones with the same qualities as walls and fences, namely man-made structures which are attached to the land. He further submits that "other surfaces" are only those sharing the same characteristics of being man-made structures attached to the land. In our judgment, it is open to us to adopt and we should adopt that interpretation. On that basis, the common law and Convention requirements of certainty are satisfied. That leaves, however, the question whether it is irrational or unreasonable at common law to adopt an all-embracing ban preventing those lawfully visiting the Controlled Areas from placing anything over a man-made structure attached to the land. The controlled areas include sports facilities, at least one monument, and other man-made structures which have no relevance to national security. Even on Mr Nardell's construction the words used in Byelaw 7(2)(g) prohibit a visitor from sitting

on a fixed bench and placing a pullover over the seat or the back of the bench, or a hiker from stopping at the monument and placing a rucksack on a convenient surface at the base of the structure. There would need to be strong justification for a ban on such apparently innocuous activities.

(2) Justification

37. Once the provision has been narrowly construed, Mr Pinchen seeks to justify it in this single paragraph of his witness statement:

> "This provision applies to everyone who uses the Controlled Areas. I do not believe that it interferes unacceptably with the claimant's rights of expression or assembly. There is no need to drape banners over or attach posters to property in order to make an effective point. In many cases such action would interfere with the function of the item, such as traffic lights or notice boards. In other cases, such as the covering of a perimeter fence, security could be compromised by interference with a line of sight. Items such as station guardians often have a sentimental value and their defacement may cause offence."

38. This paragraph identifies matters of concern, but takes no account of other ways of dealing with those matters. Defacing items is already covered by Byelaw 7(2)(o) ("deface any sign, wall, fence, structure or other surface"). Interfering with traffic lights and notice boards would infringe Byelaw 7(2)(d) ("interferes with … the use of any property which is under the control of the Crown, or the service authorities of a visiting force or in either case its agents or contractors"). If part of the use of a portion of perimeter fence is to enable a line of sight then covering it will be a similar infringement.

39. Mr Nardell submitted that considerations of this kind would only come into play if Article 10 or 11 were infringed. That is not so: on the contrary, if part of a byelaw is invalid at common law then ordinarily that part will be quashed. Convention questions arise only if all or part of the relevant provision is not quashed. Applying common law principles to Byelaw 7(2)(g), the concerns identified can be met in other ways which avoid a prohibition on innocuous activities. It follows that the broad prohibition in Byelaw 7(2)(g) infringes common law principles. Unless the Secretary of State can advance good reason for some contrary course, it must be quashed. That being so, no useful purpose is served by seeking at this stage to examine compatibility of Byelaw 7(2)(g) with Articles 10 and 11.

Conclusion

40. The challenges to Byelaws 7(2)(f) and (j) fail. To the extent we have indicated, the challenge to Byelaw 7(2)(g) succeeds. The parties are asked to seek to agree consequential orders.