Neutral Citation Number: [2009] EWCA Civ 23

Case No: C1/2008/0649

IN THE SUPREME COURT OF JUDICATURE
COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE DIVISIONAL COURT
(LORD JUSTICE MAURICE KAY AND MR JUSTICE WALKER

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 05/02/2009

Before :

LORD JUSTICE LAWS
LORD JUSTICE WALL
and
LORD JUSTICE STANLEY BURNTON

- -

Between :

Tabernacle	**Appellant**
- and -	
The Secretary of State for Defence	**Respondent**

- -
- -

Mr David Pievsky (instructed by Public Interest Lawyers) for the Appellant
Mr Gordon Nardell (instructed by **The Treasury Solicitor**) for the Secretary of State for Defence

Hearing dates : 26 November 2008

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Approved Judgment

Lord Justice Laws:

INTRODUCTION

1. This is an appeal, with permission granted by Waller LJ on 13th May 2008, against the decision of the Divisional Court (Maurice Kay LJ and Walker J) given on 6th March 2008 by which it dismissed the appellant's application for judicial review seeking to challenge the legality of paragraph 7(2)(f) of the Atomic Weapons Establishment (AWE) Aldermaston Byelaws 2007 (the 2007 Byelaws).

2. The appellant is a long-time member of the Aldermaston Women's Peace Camp (the AWPC). The AWPC protest against nuclear weapons. They do so in the vicinity of the Atomic Weapons Establishment at Aldermaston (the AWE). They have camped on land at Aldermaston, most recently in an area owned by the respondent Secretary of State within what the 2007 Byelaws call "the Controlled Areas". Paragraph 7(2)(f) of the 2007 Byelaws prohibits camping in the Controlled Areas from which, therefore, it bans the AWPC. The question in the case is whether this prohibition violates the appellant's right of free expression guaranteed by Article 10 of the European Convention on Human Rights (the ECHR).

THE FACTS

3. What follows is an outline. It will be necessary to say a little more about some of the facts in the context of particular submissions advanced by counsel and the conclusions I will arrive at.

4. The camp has been going for some 23 years. The women assemble on the land for the second weekend of each month. They stay from Friday evening until Sunday morning. They hold vigils, meetings and demonstrations, and hand out leaflets. Their protest is and always has been entirely peaceful.

5. The land occupied by the AWE includes what are called the Protected Areas and the Controlled Areas. Public entry into the Protected Areas, where the actual Research Establishment is situated, is forbidden. However the public has free access to the Controlled Areas, and it is there, as I have indicated, that the AWPC foregathers each month. We were told that the Controlled Areas have been open to the public at least since 1986.

THE LEGISLATION

6. The 2007 Byelaws have been in force since 31st May 2007. Their *vires* is s.14(1) of the Military Lands Act 1992. S.14(2) is also material. The relevant provisions are:

> "(1) Where any land belonging to a Secretary of State or to a volunteer corps is for the time being appropriated by or with the consent of a Secretary of State for any military purpose, a Secretary of State may make byelaws for regulating the use of the 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 …

(2) 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."

7. Paragraph 6 of the 2007 Byelaws allows the public to have access to the Controlled Areas. It provides:

> "Subject to the provisions of these byelaws, members of 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."

Paragraph 7(2) of the 2007 Byelaws opens with the words "No person shall within the Controlled Areas …", and there then follow twenty prohibited acts, listed under (a)-(t). I should read paragraph 7(2)(f), (g) and (j):

> "(f) camp in tents, caravans, trees or otherwise;
>
> (g) attach any thing 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 …"

Contravention of any provision of Byelaw 7 is a criminal offence: see Byelaw 9.

8. ECHR Article 10 provides:

> "(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."

I should also set out Article 11:

> "(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 freedoms of others ..."

THE ISSUE

9. The appellant sought originally to challenge the legality of paragraph 7(2)(f), (g) and (j). The Divisional Court, having granted permission to seek judicial review and proceeded to determine the substantive judicial review claim, upheld the challenge to paragraph 7(2)(g) but dismissed the balance of the application relating to 7(2)(f) and (j). We are no longer concerned with (j). The appeal relates only to (f).

10. As I have foreshadowed the appellant's primary case is that paragraph 7(2)(f) of the 2007 Byelaws constitutes an unlawful interference with her right – indeed the right of every member of the AWPC – of freedom of expression guaranteed by ECHR Article 10. It is also said there is a violation of Article 11. That, I think, is on the facts not so much to be regarded as an autonomous claim, but rather as underlining the mode of free expression relied on: a communal protest in a camp established for the purpose.

11. It is of course common ground, having regard to s.6 of the Human Rights Act 1998 which I need not read, that in framing paragraph 7(2)(f) of the 2007 Byelaws the Secretary of State was obliged to respect the Article 10 rights of persons potentially affected by the prohibition thereby enacted. It is clear that paragraph 7(2)(f) constitutes in practice an interference with the rights of the AWPC pursuant to Article 10(1). So much is also common ground. The ultimate question in the appeal, therefore, is whether this byelaw is nevertheless justified by any of the considerations in Article 10(2).

THE SECRETARY OF STATE'S CASE

12. Although the Secretary of State is respondent to the appeal it is convenient first to explain his case. He bears the burden of justifying the accepted interference with the Article 10 right. As a preliminary, there are some foothills to cross.

The Legal Setting

13. In deciding whether the interference is justified the court has to consider whether paragraph 7(2)(f) serves the achievement of a legitimate aim and, if it does,

constitutes a proportionate means of doing so. The requirement of proportionality is derived from the rubric "necessary in a democratic society" in Article 10(2). It is well established that this standard can only be satisfied if the impugned measure is required to fulfil what the European Court of Human Rights has described as a "pressing social need": see, amongst a welter of authority, *Sunday Times v United Kingdom* (1979) 2 EHRR 245.

14. Moreover the weight of the Article 10(2) justification advanced by the State cannot – certainly in this case – be looked at in isolation. Whether paragraph 7(2)(f) imposes no more than a proportionate restriction of AWPC's free expression rights depends also on the particular nature and quality of the right's exercise with which the prohibition interferes. Here the Secretary of State's case has two specific aspects. First, Mr Nardell on his behalf submits that we should attach importance to the fact that the only source of the public's right (thus AWPC's right) to go on the Controlled Areas is to be found in the 2007 Byelaws themselves: paragraph 6, which I have set out. They are not, otherwise, public land at all. Mr Nardell says that all that has happened is that the Secretary of State has through the 2007 Byelaws granted the public a right to go on the Controlled Areas, but subject to conditions including that provided for by paragraph 7(2)(f). The State owes no positive obligation whatever to set aside any part of the property as a place for public protest. Moreover the Secretary of State has not previously admitted the public to the Controlled Areas for camping purposes, let alone political protest: the predecessor byelaws also prohibited camping. In all those circumstances, while as I have foreshadowed Mr Nardell accepts that paragraph 7(2)(f) constitutes an interference with AWPC's rights under Article 10, he says that the interference is weak.

15. The second aspect of the Secretary of State's case concerning the particular nature and quality of the Article 10 right's exercise (with which the paragraph 7(2)(f) prohibition interferes) is altogether broader. It consists in what Mr Nardell submits is an important distinction: between the so-called essence of the Article 10 right on the one hand, and the "manner and form" of its exercise on the other. Mr Nardell submits that paragraph 7(2)(f) only intrudes upon the latter, and this has, or should have, a significant bearing on the court's readiness to hold that paragraph 7(2)(f) is no more than a proportionate interference. Plainly there is not, nor could there be, any suggestion that the Secretary of State has sought to impose anything approaching a blanket ban on AWPC's rights of protest. They may protest as much as they like: all they are stopped from doing is camping in the Controlled Areas. Mr Nardell submits that such a restriction goes at most to the manner and form of AWPC's exercise of the right of free expression; and not to the right's essence.

16. The distinction between a right's essence and the manner and form of its exercise has been recognised in the Strasbourg jurisprudence: *Ziliberberg v Moldova* (Application 61821/00), *Ashingdan v UK* (1985) 7 EHRR 528 (paragraph 57), and *F v Switzerland* (1987) 10 EHRR 411. Of particular interest in the context of this case is an authority referred to by Mr Nardell in response to the reply skeleton argument put in by Mr Pievsky for the appellant, namely *Rai, Allmond & "Negotiate Now" v UK* (1995) 19 EHRR CD93. Mr Nardell would submits that this case tends to show – and does so in the then highly charged context of protest and demonstration concerning Northern Ireland – that restrictions on the manner of the Article 10 right's exercise may very well be regarded as proportionate provided they betray no bias or arbitrariness and do

not amount to a blanket prohibition. *Rai, Allmond* concerned an application to hold a political rally in Trafalgar Square by an organisation favouring negotiations without pre-conditions in Northern Ireland. The police considered that there would be no danger to public order, but the application was turned down having regard to the policy of successive governments since 1972 to refuse permission for public demonstrations or meetings in Trafalgar Square on the Northern Ireland issue. After the IRA bombing in Aldershot which killed seven civilians, the Secretary of State had in 1972 stated that

> "... the Government had to decide whether it would be fitting to permit the use of the Square by any organisation that had declared its support for the perpetrators of violence of that kind and they had no hesitation in deciding that it would be an affront to the British people to do so. The Government having made the decision, it would be wrong to attempt to distinguish between different organisations..."

17. In Strasbourg the applicants submitted that their assembly was banned in Trafalgar Square because it was "controversial" and liable to shock or offend rather than for any reason of public safety. The Commission, which concluded that the applicants' complaint was manifestly ill-founded, held that the question whether the applicants' policy was merely "controversial" was within the government's margin of appreciation, and said this (CD98):

> "Having regard to the fact that the refusal of permission did not amount to a blanket prohibition on the holding of the applicants' rally but only prevented the use of a high profile location (other venues being available in central London)... the restriction in the present case may be regarded as proportionate and justified as necessary in a democratic society within the meaning of Article 11(2) of the Convention."

18. One might compare *Chorherr v Austria* (1993) 17 EHRR 358, in which persons displaying placards and distributing leaflets at a military ceremony were arrested and convicted of "causing a breach of the peace by conduct likely to cause annoyance". The court, holding there had been no violation of Article 10, stated:

> "31. ... [The] margin of appreciation extends in particular to the choice of the - reasonable and appropriate - means to be used by the authorities to ensure that lawful manifestations can take place peacefully...
>
> 32. ... [W]hen he chose this event for his demonstration against the Austrian armed forces, Mr Chorherr must have realised that it might lead to a disturbance requiring measures of restraint, which in this instance, moreover, were not excessive. Finally, when the Constitutional Court approved these measures it expressly found that in the circumstances of the case they had been intended to prevent breaches of the peace and not to frustrate the expression of an opinion...

> 33. In the light of these findings, it cannot be said that the authorities overstepped the margin of appreciation which they enjoyed in order to determine whether the measures in issue were 'necessary in a democratic society' and in particular whether there was a reasonable relationship of proportionality between the means employed and the legitimate aim pursued."

19. Mr Nardell would submit that the learning shows not only that there is a real distinction between restrictions on the manner and form of a protest (or other utterance) and a prohibition of the protest altogether; it shows also that once the court is satisfied that the case is in the former territory and not the latter, it will be much readier to allow the State what may be a generous margin of appreciation to take restrictive measures for practical or prudential reasons. As Professor Barendt has said (*Freedom of Speech*, 2nd edn., p. 281):

> "[R]easonable time, manner, and place restrictions have been upheld, provided at any rate that they leave ample alternative channels for communication of the ideas an information."

One may compare the decision of the Divisional Court in *Blum v DPP & Orsv DPP* [2007] UKHRR 233 in which it was held that a requirement for prior authorisation of a demonstration would not generally be repugnant to ECHR Article 11.

20. On Mr Nardell's case the space given by the Strasbourg court to manner and form restrictions is, moreover, all of a piece with another dimension of the court's jurisprudence. This is the care taken in the authorities to avoid a position in which invocation of a Convention right might seem to, or might in fact, confer an immunity from the effects of ordinary State regulation for proper purposes. *Chapman v UK* (2001) 10 BHRC 48 (Application No 272385/95) is a good example. The applicant was a gypsy. The local authority refused planning permission for her mobile home to be stationed on a piece of land she had purchased, and served enforcement notices which were upheld at a public inquiry. Further applications for planning permission for a bungalow were refused, and the refusals again upheld at public inquiries. The court at Strasbourg held that the authority's decisions constituted an interference with the applicant's right to respect for her private life, family life and home pursuant to ECHR Article 8; but the interference had the legitimate aim of protecting the rights of others, the national authorities enjoyed a margin of appreciation as to how that should be achieved, and they had weighed in the balance the various competing interests. Accordingly the decisions arrived at were proportionate to the legitimate aim of preserving the environment. At paragraph 96 the court observed that

> "the fact of belonging to a minority with a traditional lifestyle different from that of the majority does not confer an immunity from general laws intended to safeguard the assets of the community as a whole, such as the environment..."

21. Mr Nardell submits that all these aspects of the case-law provide the setting for the Secretary of State's justification of the interference with the AWPC's rights constituted by paragraph 7(2)(f) of the 2007 Byelaws. Their effect is that while the justification must be real and not fanciful, and of course serve a legitimate aim, it

must be judged by reference to a very broad margin of appreciation enjoyed by the Secretary of State.

The Secretary of State's Justification of paragraph 7(2)(f) of the 2007 Byelaws

22. What then is the Secretary of State's justification for paragraph 7(2)(f)? It is offered in the witness statement of Mr Timothy Pinchen, who is employed by the Ministry of Defence dealing with estate management issues across various parts of the Defence Estate. The essence of his evidence is crisply summarised by Maurice Kay LJ giving the judgment of the Divisional Court:

> "23. … 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 … 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."

The reference to a previous explanation is to paragraph 5 of the Divisional Court's judgment:

> "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."

23. I should notice some further specific points made by Mr Pinchen. At paragraph 48 of his statement he says that camping on the verges "is in dangerous proximity to high volume traffic... [and] provides a distraction to motorists". At paragraph 52 he refers to an area called "Bluebell Wood" which has been used for camping, but is also "regularly used by residents for recreational and access purposes as there is no footpath along the verge of the busy road. Last year there was an attack on the unauthorised camp by, it is believed, local residents."

24. In light of all these matters Mr Nardell would pray in aid a series of legitimate aims or purposes, among those listed in ECHR Article 10(2), which are promoted by

paragraph 7(2)(f): national security, public safety, the prevention of disorder or crime, and the protection of the rights of others. And given the broad margin of appreciation to be accorded to the Secretary of State for the reasons which (on Mr Nardell's case) I have explained, the court should not undercut the Secretary of State's deployment of paragraph 7(2)(f) as a proportionate measure supporting those aims.

25. Given all these considerations Mr Nardell submits that paragraph 7(2)(f) of the 2007 Byelaws constitutes no violation of the appellant's rights under ECHR Article 10; and if it does not, there is no free-standing case under Article 11.

THE APPELLANT'S CASE

The Legal Setting

26. Mr Pievsky for the appellant does not dispute, nor could he, that the Strasbourg court has accepted a distinction between manner and form on the one hand and the essence of a Convention right on the other. He also concedes that the prevention of public disorder may in appropriate cases justify such measures as a requirement of prior authorisation or even the prohibition of a protest; though he submits that the feared disorder must be imminent. He does not, however, accept that in principle the law allows a wider discretionary area of judgment in relation to the manner and form, as opposed to the essence, of a political protest. ("Discretionary area of judgment" is a better phrase than "margin of appreciation": as is well known the latter is a Strasbourg term of art reflecting the international court's distance from the facts and circumstances of decision-making in the States Parties.)

27. In any event, however, Mr Pievsky roundly submits that we are not in "manner and form" territory. His case is that the AWPC camp is not merely the setting or the context – the manner and form – of his client's protest: it is an inherent part of the protest itself. It has a symbolic effect. Attending a peace camp is a traditional and well-recognised form of political expression. There are many well-known instances. Waller LJ granting permission to appeal considered that "the byelaw as construed catches a form of peaceful protest used in many places..." It is undoubted that acts as well as words may constitute political expression: see for example *Vajna v Hungary* (Application 33629/06). In his reply skeleton argument Mr Pievsky puts it thus (paragraph 4):

> "Defacing a flag, deliberately using a seat on a bus supposedly reserved for citizens of a different race, in order to defy a racist law on segregation, going on a hunger strike, carrying out a silent vigil, and attending a peace camp are well-known ways in which political messages about fundamentally important political matters can be very powerfully expressed – albeit silently."

28. As for the contention that the appellant's ECHR rights are the less because (in light of paragraph 6 of the 2007 Byelaws) all that has happened is that the Secretary of State has granted public access to the Controlled Areas subject to conditions, this is, on Mr Pievsky's argument, a *non sequitur*. He submitted in terms that government property is held for the public good; the Secretary of State has no legitimate private axe to grind. I apprehend Mr Pievsky would say that once it is accepted that the appellant

enjoys Article 10 rights with the AWPC, the fact that the government landowner has granted access to the land means only that the AWPC is not a trespasser.

29. Mr Pievsky also submits that the Secretary of State has given no weight to the subject-matter of the AWPC protest: nuclear weapons. Where the acts or speech in question relate to "a debate on a matter of general concern and [constitute] political and militant expression ... a high level of protection of the right to freedom of expression is required under Article 10": *Lindon and others v France* (2008) 46 EHRR 35.

30. In all these circumstances Mr Pievsky submits that the interference with his client's rights constituted by paragraph 7(2)(f) of the 2007 Byelaws, far from being weak or insubstantial, goes to the right's core or essence; and the discretionary area of judgment which the domestic court should allow the Secretary of State (whatever the margin of appreciation which might be contemplated by the international tribunal) should be severely circumscribed. Paragraph 7(2)(f) could only be vindicated by a substantial objective justification, amounting to an undoubted pressing social need.

The Secretary of State's Justification of paragraph 7(2)(f) of the 2007 Byelaws

31. Mr Pievsky has advanced arguments in reply to all of the points put forward by Mr Pinchen. As for concerns about security, it has not been suggested that the AWPC have ever proposed to enter the Protected Areas, and (as my Lord Wall LJ suggested in the course of argument) the perimeter fence is presumably patrolled in any event. Then there is a point about sanitation: the appellant has given evidence, which I do not think is contradicted, as to the availability of adequate sanitation facilities. Moreover the 2007 Byelaws include provisions relating to nuisance and waste and there has been no suggestion of any breach. Next there is Mr Pinchen's evidence of "numerous complaints about the AWPC and its occupants", some of them taking a particularly unpleasant form. The Divisional Court accepted that "in general, the members of the AWPC do not behave badly", and the evidence overall shows that their activities down the years have been consistently peaceful.

32. On this last aspect of the case, the reaction of other members of the public to the presence and the activities of the AWPC, Mr Pievsky understandably relies on the decision of the Divisional Court in *Redmond-Bate v DPP* [1999] EWHC Admin 732. That case concerned an episode in which one or more of three women, Christian fundamentalists, were preaching from the steps of Wakefield Cathedral. A crowd gathered. Some of the people in the crowd showed themselves hostile to the women. A police officer at the scene feared a breach of the peace. He asked the women to stop preaching. They refused. He arrested them for breach of the peace. One of the women was subsequently convicted of obstructing a police officer. Her appeal to the Crown Court was dismissed. She launched a further appeal, by way of case stated, to the High Court; and this appeal was successful. Sedley LJ (with whom Collins J agreed) said this:

> "18. ... The question for PC Tennant was whether there was a threat of violence and if so, from whom it was coming. If there was no real threat, no question of intervention for breach of the peace arose. If the appellant and her companions were (like the street preacher in *Wise v Dunning*) being

> so provocative that someone in the crowd, without behaving wholly unreasonably, might be moved to violence he was entitled to ask them to stop and to arrest them if they would not. If the threat of disorder or violence was coming from passers-by who were taking the opportunity to react so as to cause trouble (like the Skeleton Army in *Beatty v Gilbanks*), then it was they and not the preachers who should be asked to desist and arrested if they would not."

33. In all these circumstances Mr Pievsky submits that the Secretary of State has not begun to demonstrate a substantial objective justification for paragraph 7(2)(f) of the 2007 Byelaws, amounting to an undoubted pressing social need.

THE DECISION OF THE DIVISIONAL COURT

34. The Divisional Court's conclusions are expressed in paragraph 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 ...? 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."

CONCLUSIONS

The Legal Setting

35. In my judgment the supposed distinction between the essence of a protest and the manner and form of its exercise has to be treated with considerable care. In some cases it will be real, in others insubstantial. All depends on the particular facts; and it is worth remembering that the Strasbourg court has always been sensitive to factual nuance.

36. As I have said it is plain in this case that the Secretary of State has not sought to impose anything approaching a blanket ban on AWPC's rights of protest. They may protest as much as they like: all they are stopped from doing is camping in the Controlled Areas. In that sense it may be said that paragraph 7(2)(f) of the 2007 Byelaws only goes to the manner and form of the exercise of the appellant's rights under ECHR Article 10. It is not on its face directed towards the suppression of free speech, on the part of the AWPC or anyone else. It merely prohibits camping, which

happens to be the mode or setting chosen by the AWPC for its protest. It happens also (Mr Pinchen, paragraph 37) that there is a general prohibition of unauthorised camping across the Defence estate.

37. But this "manner and form" may constitute the actual nature and quality of the protest; it may have acquired a symbolic force inseparable from the protesters' message; it may be the very witness of their beliefs. It takes little imagination to perceive, as I would hold, that that is the case here. As I have said, the AWPC has been established for something like 23 years. Some of those involved may have been steadfast participants the whole time. Others will have come and gone. But the camp has borne consistent, long-standing, and peaceful witness to the convictions of the women who have belonged to it. To them, and (it may fairly be assumed) to many who support them, and indeed to others who disapprove and oppose them, the "manner and form" *is* the protest itself.

38. In my judgment, therefore, the fact that the camp can be categorised as the mode not the essence of the protest carries little weight. And the fact that the Secretary of State is himself the source of the public's right to go on the Controlled Areas carries none. Mr Pievsky's submission that government property is held for the public good is obviously correct; indeed, nothing could be more elementary. The Secretary of State has, as I have said, no legitimate private axe to grind. It follows that the Secretary of State's grant of a general permission to go on the Controlled Areas would only have resonance if the case were like a private landowner's grant, whereby he reserved certain rights to himself. In such a case the reserved rights would of course limit the permission in the landowner's own legitimate interests. There is no analogy here.

39. In light of all these considerations I consider that if he is to show compliance with his obligations under the Human Rights Act the Secretary of State must demonstrate a substantial objective justification for paragraph 7(2)(f) of the 2007 Byelaws, amounting to an undoubted pressing social need. The byelaw's interference with the appellant's rights is far from being weak or insubstantial. The Secretary of State does not enjoy so broad a margin of discretionary judgment as Mr Nardell submits.

The Secretary of State's Justification of paragraph 7(2)(f) of the 2007 Byelaws

40. Against that background I turn to the Secretary of State's justifications for the interference with the appellant's Article 10 rights constituted by paragraph 7(2)(f) of the 2007 Byelaws. Mr Pinchen helpfully explains that the making of the 2007 Byelaws followed a Byelaws Review which began in 2004 as a rolling exercise. Various recent legal developments were considered, and the Review led to "a number of adjustments to the generic byelaws template" (Mr Pinchen, paragraph 20). There was correspondence with the AWPC in which the AWPC (and their lawyers) asserted Convention rights. At length the Byelaws were made.

41. In my judgment the Secretary of State's justifications are insubstantial. First of all, the fact that no steps were taken to put a stop to the camp over the 23 years of its existence to my mind speaks loud. I have already referred to the explanation offered for the fact that the 1986 Byelaws were never used against the AWPC: "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" (Divisional Court judgment, paragraph 5). I am afraid I think this

is extremely feeble. I acknowledge that the AWPC has occupied different locations over the years, and there seems even today to be a degree of uncertainty, if not confusion, as to where the boundaries of the Controlled Area have precisely lain. But if the Secretary of State in truth entertained substantial objections to the presence of the camp, he was surely able to deploy appropriate resources to ascertain the exact position and take legal steps to deal with it. And acting on expert advice he would, no less surely, have adopted a clear stance on the Human Rights Act, which has now been in force for eight years and more.

42. Mr Pievsky's responses to the individual justifications canvassed in Mr Pinchen's evidence are all generally persuasive. Paragraph 7(2)(f) was not framed in the face of high-profile public concerns, as in *Rai, Almond* (1995) 19 EHRR CD93; or threats of violent public disorder, as in *Chorherr v Austria* (1993) 17 EHRR 358; or defiance of the general law, as in *Chapman v UK* (2001) 10 BHRC 48. In my judgment the Secretary of State has viewed, or treated, the AWPC's presence at Aldermaston for all the world as if it were no more nor less than a nuisance. I accept he appears to have regarded it as more than that, and I certainly accept that Mr Pinchen's evidence accurately describes the Secretary of State's perception of the matter. But the individual points made – the security fence, traffic problems, lavatories, the bad behaviour of other members of the public – are, in objective terms, nuisance points.

43. Rights worth having are unruly things. Demonstrations and protests are liable to be a nuisance. They are liable to be inconvenient and tiresome, or at least perceived as such by others who are out of sympathy with them. Sometimes they are wrong-headed and misconceived. Sometimes they betray a kind of arrogance: an arrogance which assumes that spreading the word is always more important than the mess which, often literally, the exercise leaves behind. In that case, firm but balanced regulation may be well justified. In this case there is no substantial factor of that kind. As for the rest, whether or not the AWPC's cause is wrong-headed or misconceived is neither here nor there, and if their activities are inconvenient or tiresome, the Secretary of State's shoulders are surely broad enough to cope.

44. For all these reasons, in my judgment the effect of paragraph 7(2)(f) of the 2007 Byelaws is to violate the appellant's rights guaranteed by ECHR Articles 10 and 11. I would accordingly allow the appeal. If my Lords agree, we should hear argument as to the appropriate form of relief.

Lord Justice Wall :

45. I do agree. Since I have had the great advantage of reading in draft the judgment of my Lord, Laws LJ and since I find myself in complete agreement with it, I propose to add only a short judgment of my own; (1) because of what I see as the importance of the case; and (2) because we are differing from the Divisional Court on the critical issue.

46. I would like to make two short points. The first is that I was unimpressed, on the facts of this case, by the argument advanced on behalf of the Secretary of State in paragraph 6 of Mr. Pinchen's witness statement that the prohibition on camping was

merely a means of redirecting the protest, and not of extinguishing it. In Mr Pinchen's words: -

> The MOD recognises that members of the public may have strongly held opinions about military activity, not least about the development and manufacture of nuclear weapons...... It entirely respects the entitlement of individuals to express views and participate in protest activity about those matters. The MOD's aim in making and enforcing byelaws for Controlled "Areas is not to prevent people from participating in such activity, but to impose on all who wish to use the Controlled Areas the regulation considered necessary to enable the Ministry to offer public access in a way that is compatible with the operational requirements of the establishment".

47. In my judgment, this paragraph is vulnerable to attack on a number of fronts. I will identify only two. In the first place, it seems to me to give take no cognisance of the nature of the protest, as explained by the appellant in paragraph 7 of her second witness statement: -

> "I would like to emphasise how fundamental camping is to the AWPC's protests at Aldermaston. As AWPC's name suggests, its very nature is the camp. Without the camp AWPC simply would not exist......"

48. In the second place, there is absolutely no evidence that the presence of the AWPC over many years has been incompatible "with the operational requirements of the establishment". Had it been, Mr. Pinchen's statement would, no doubt have provided a great deal of detail. As it is, his statement, as I read it, is highly unspecific.

49. I therefore find myself in respectful disagreement with paragraph 25 of the judgment of the Divisional Court, which my Lord has set out and which I will not repeat. Whatever one's views of the AWPC (which are, as my Lord says, neither here nor there) the penultimate sentence of that paragraph strikes me as unduly dismissive, and in my judgment the evidence of Mr. Pinchen comes nowhere near demonstrating a "pressing social need". In this regard, I gratefully adopt and associate myself with my Lord's analysis of Mr. Pinchen's evidence which I cannot better and need not repeat.

50. My second point is that, in my judgment, this is a case about freedom of expression under ECHR Article 10, and freedom of association and assembly under Article 11. For the Secretary of State, Mr Nardell spent a considerable amount of time taking us through the decision of the ECtHR in *Chapman v UK* which my Lord discusses in paragraph. 20 of his judgment. *Chapman* is, of course, a case concerned with ECHR Article 8, and speaking for myself, I found wholly unpersuasive Mr. Nardell's argument that the margin of appreciation allowed in such a case could be translated to a case such as the present, involving as it does, Articles 10 and 11.

51. I have given these short reasons, which are I think entirely parasitic on my Lord's judgment, to explain how, in part at least, I reached the clear conclusion at the end of the argument that this appeal should succeed. It follows, of course, that I am extremely grateful to have the reasons for allowing the appeal so fully and clearly articulated by my Lord.

Lord Justice Stanley Burnton:

52. I agree both with the judgment of Laws LJ and that of Wall LJ.