to prevent the genocide and that its failure to co-operate with the International Criminal Tribunal for the Former Yugoslavia was a breach of its obligation to punish.

JILLAINE SEYMOUR

PROTECTING PROTEST – A CONSTITUTIONAL SHIFT

THE law regulating public protest is constituted by a miscellaneous assortment of statutes (such as the Public Order Acts of 1936 and 1986) and judicial decisions (which may or may not be directly concerned with persons exercising a right to protest), none of which sources were traditionally thought of as giving rise to a right to protest in public. That was the Diceyan analysis of the position at common law. In the course of giving judgment in a case decided just before the Human Rights Act 1998 came into force (*Redmond-Bate* v. *Director of Public Prosecutions* (1999) 163 J.P. 789, 795), Sedley L.J. predicted that that legislation would give rise to a "constitutional shift". And so it has, according to the decision of the House of Lords in *R on the application of Laporte* v. *Chief Constable of Gloucestershire* [2006] UKHL 55, [2007] 2 W.L.R. 46. There, it was held that the police have no power to prevent a breach of the peace that might arise in the course of the gathering, either by arrest or by the use of measures falling short of arrest, unless a breach of the peace is "imminent".

At the very centre of our public order law sits the *sui generis* phenomenon of the "breach of the peace". To commit a breach of the peace is not as such a criminal offence in England (it is otherwise in Scotland), but a person who has committed or caused a breach of the peace or is about to do so may be required by a policeman to desist and, should he fail to do so, he can be arrested. The power has been used frequently in the public order context to require a speaker whose message is unwelcome to the audience to whom it is addressed to desist from speaking, a plain curb on the right to freedom of speech in public. Into the common law mix, however, has come the Human Rights Act 1998, and the protections afforded by Articles 10 and 11 of the European Convention on Human Rights ("ECHR"), which guarantee rights to freedom of expression and freedom of assembly respectively. If those rights are engaged in any particular situation, after the Human Rights Act the onus rests upon the authorities to show that any interference with or restrictions imposed are prescribed by law, necessary in a democratic society and no more than is proportionate to the legitimate aim being pursued.

https://doi.org/10.1017/S0008197307000396 Published online by Cambridge University Press

Ms Laporte had been a passenger on one of three buses going to Fairford to protest against the war with Iraq. Fearing that some of those on board the buses might eventually resort to violence, the senior police officer ordered that the buses and passengers should be escorted back from Lechlade to London. At first instance, [2004] EWHC (Admin), [2004] 2 All E.R. 874, (noted [2004] C.L.J. 535), it was held by two judges of the Divisional Court that the detention short of arrest of the passengers for the period during which they were being escorted back to London violated Article 5 of the ECHR relating to powers of arrest. But the decision not to allow the passengers to proceed from Lechlade to the airbase did not violate the Article 10 and 11 rights, since, although the power to arrest was not available because the senior police officer had clearly concluded that a breach of the peace was not "imminent", he nevertheless had powers to take reasonable steps short of arrest to prevent breaches of the peace that were not imminent, so long as his conduct was reasonable. Both of these rulings were upheld in the Court of Appeal.

In the House of Lords, the primary focus was upon whether the second of these conclusions was correct. The Law Lords ruled unanimously against the Metropolitan Police Commissioner, although with slight differences of view about some of the issues at stake. All were agreed, however, that before any preventative action – whether it be arrest, or something short of that - could be taken against persons seeking to exercise their Article 10 and 11 rights, a breach of the peace must be imminent. The troublesome case of the striking miners, *Moss* v. *McLachlan* [1985] I.R.L.R. 76, which had been relied upon by the Court of Appeal, but which on one reading appears to suggest that the feared breach need not be imminent (and in Lord Rodger's view it does so hold and is therefore wrongly decided as a matter of law), was distinguished on the facts by the other members of the House. One effect of *Laporte* is to cast doubt upon the propriety of some of the other mainstays of public order law such as *Duncan* v. *Jones* [1936] 1 K.B. 218 and *Piddington* v. *Bates* [1960] 3 All E.R. 660.

The clearly stated conclusion of the senior police officer that no breach of the peace was imminent when the protesters were at Lechlade was in one sense determinative of the question actually posed. But all of their Lordships went on to deal with questions that might have arisen had the law been otherwise than they believed it to be in its application to the case in hand. In particular, after analysis of the European Court of Human Rights case law, they applied the increasingly familiar methodology that protecting human rights now entails. Lord Bingham took the line that the interference by the police with the claimant's right to demonstrate was not "prescribed by law", and Lord Mance concluded that the decision to turn back all of the

https://doi.org/10.1017/S0008197307000396 Published online by Cambridge University Press

protesters, rather than the few who were known to be potential troublemakers, was neither reasonable nor proportionate but "general and indiscriminate" and for that reason judicially reviewable. A small constitutional shift, perhaps, but a very important one in the protection of what can now surely be described as a right to demonstrate.

A.T.H. SMITH

DISTINGUISHING THE UNLAWFUL FROM THE UNJUSTIFIABLE IN THE RULES ON EARLY RELEASE FROM PRISON

ENGLISH rules on early release from prison are a nightmare to understand. Not only have the rules been dramatically and regularly changed (most notably by the Criminal Justice Act 1991, the Crime and Disorder Act 1998 and the Criminal Justice Act 2003) but under each regime different rules apply to different "categories" of offenders: short-term, long-term, indeterminate, determinate, and so on. In addition, there are difficulties in calculating release dates due to the complex and changing rules on consecutive sentences and the effects of pre-trial remands. Different roles are allocated to the Home Secretary, the Parole Board and in practice to prison governors (and their equivalents in private prisons) operating the discretionary Home Detention Curfew regime. Then there are the complex transitional provisions required when the rules change. The potential for error and unfairness is obvious.

The three appellants in *R (Clift)* v. *Secretary of State for the Home Department; Secretary of State for the Home Department* v. *Hindawi and another* [2006] UKHL 54, [2007] 2 W.L.R. 24 sought declarations of incompatibility under the Human Rights Act 1998. Clift had been sentenced to 18 years for attempted murder and other offences in 1994. In March 2002, when he became eligible for release on discretionary parole, the Parole Board recommended his release, but the Home Secretary rejected that recommendation. He was eventually released after two further Parole Board hearings in March 2004. If Clift had been sentenced either to less than 15 years, or to a life sentence, the Home Secretary would have been obliged to comply with the Parole Board's recommendation and Clift therefore argued that the system was discriminatory. Hindawi and Headley are both foreign nationals. Hindawi was sentenced to 45 years for terrorist offences in 1986. Because he is a long-term prisoner subject to removal from the UK, the decision to release remains with the Home Secretary. Headley was sentenced in 2000 to seven years imprisonment, and a deportation

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