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Case No: CO/12613/2011

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
ADMINISTRATIVE COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 27 April 2012

Before :

THE PRESIDENT OF THE QUEEN'S BENCH DIVISION
-and-
MR JUSTICE SILBER

- -

Between :

THE QUEEN on the application of MARIA GALLASTEGUI	**Claimant**
- and -	
WESTMINSTER CITY COUNCIL	**Defendant**
THE COMMISSIONER FOR THE METROPOLIS	**First Interested Party**
THE SECRETARY OF STATE FOR THE HOME DEPARTMENT	**Second Interested Party**

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Jessica Simor and **Christopher Brown** (instructed by **Bindmans LLP**) for the **Claimant**
Nathalie Lieven QC and **Jacqueline Lean** (instructed by **Solicitor for Westminster City Council**) for the **Defendant**
Adam Clemens (instructed by **The Solicitor for the Metropolitan Police**) for the **First Interested Party**
Jonathan Swift QC and **Gerard Clarke** (instructed by **Treasury Solicitor**) for the **Second Interested Party**

Hearing dates: 6 and 7 March 2012

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Approved Judgment

MR JUSTICE SILBER:

This is the judgment of the Court.

I. Introduction

1. Maria Gallastegui ("the claimant") is a peace campaigner and has been conducting a protest from a specific site on the East pavement of Parliament Square in London since 2006. She makes a challenge on various grounds to Part 3 of the Police Reform and Social Responsibility Act 2011 ("the Act"), which confers powers to stop "*a prohibited activity*". This term covers the erection and use in Parliament Square Gardens or on the pavements surrounding it of "tents" or "other structure that is designed, or adapted… for the purpose of facilitating sleeping or staying in a place for any period" (s143 (1) and (2)). Constables, who are under the control of the Commissioner of the Metropolitan Police ("the Commissioner") and authorised officers of the Greater London Authority ("GLA") and Westminster City Council ("Westminster") are given the power to issue directions to a party to cease carrying out that activity (s 143 (1)) and a person who without "reasonable excuse" fails to comply with a direction commits an offence (s143 (8)). They are also given the power to seize any of the items set out in section 143(1) and to retain it: s145. We set out the provisions of s.143 and 145 at paragraph 32 below.

2. The claimant contends that these provisions infringe her rights under Articles 10 and 11 of the ECHR as well as potentially those arising under Article 6 and Article 1 of Protocol 1. The claimant's case requires consideration of the extent to which the State can prevent members of the public from erecting or using tents or structures in Parliament Square in which they will sleep as part of a public protest, while at the same time permitting them to demonstrate there in all other ways at all times during the day and night. It is important to emphasise, contrary to the claimant's contention, that these provisions do not, as we shall explain, amount to a prohibition on long term protest or a 24 hour protest. Their scope limits the right to protest of only those who wish to protest by sleeping in Parliament Square, although they can protest at all times of the day and night.

3. The claimant:

    i) Seeks a declaration that these provisions are incompatible with her rights under Articles 10 and 11 of the ECHR as well as potentially those arising under Article 6 and Article 1 of Protocol 1.

    ii) Seeks a declaration that the actual decision of Westminster to enforce these provisions in the Act against her in December 2011 infringes those rights.

    iii) Claims an entitlement to continue her protest, because pursuant to section 134 of the Serious Organised Crime and Police Act 2005 ("SOCPA"), she had been granted permission on a number of occasions by the Commissioner to conduct a protest from a specified site of the East pavement of Parliament Square since 2006. She says she is entitled under that authorisation to conduct a 24-hour vigil within an authorised site of 3m x 3m x 1m (but not within a specific site) within which she is required to contain her structure ("the

authorised site") until April 2015. Her case is that the authorisation means that she can still keep and use a tent in her site in Parliament Square for sleeping in even though section 141 of the Act has repealed sections 132-138 of SOCPA with effect from 31 March 2012.

4. The case for the claimant is that the enforcement of Part 3 of the Act would compel her to end her protest because she could not afford to travel to Parliament Square from her home in Eastbourne every day to conduct her protest. She therefore needs to sleep at the authorised site. Another protestor Barbara Tucker, who had previously camped in Parliament Square for several years, has remained present in the Square since 16 January 2012 exercising her rights under Articles 10 and 11, but she has not used either a tent or sleeping equipment. This provides an illustration that even those protestors who want to spend all day and night in Parliament Square may still be able to do so.

5. These claims are resisted by the Secretary of State for the Home Department ("the Secretary of State"), by the Commissioner and by Westminster. This is a rolled-up hearing and so if permission is granted, the Court will then proceed to hear the substantive application.

II. The Parties and the Procedural Background

6. There is no dispute that the claimant holds genuine anti-war beliefs and has campaigned peacefully. She wishes to maintain a constant reminder of what she considers to be the folly of war and armed conflict including the participation of the UK in it through her campaign known as "Peace strike". A 24-hour vigil in a position facing the Houses of Parliament is in her view crucial to the effectiveness of that aim. In any event, significantly she claims she could not afford to commute daily from her home in Eastbourne and such a trip would involve her carrying all her placards. The claimant's campaign is located on the East pavement of Parliament Square Gardens on St Margaret's Street which is used as a pedestrian footway. Since 2007, the claimant has been in receipt of specific authorisation, but only from the Commissioner for her permanent campaign under section 134 of SOCPA, which regulates demonstrations outside Parliament. We will return to consider the precise terms and effect of it in paragraphs 19 to 29 below when we consider Ground 1.

7. Westminster is the relevant Highways Authority under the Highways Act 1980 ("the Highways Act") for the pavement on which the authorised site used by the claimant is located. It has sought to remove the claimant from her authorised site by invoking two different forms of action.

   i) The first was taken on 15 February 2011 by commencing proceedings for an injunction to remove the claimant (and at least 12 other persons) based on its powers under section 130 of the Highways Act and section 222 of the Local Government Act 1972. In order to obtain an injunction in those proceedings ("the Highway Act Proceedings"), it had to be established that the defendants to that action were blocking the pavement without reasonable cause contrary to section 137 of the Highways Act: **Westminster City Council v Haw** [2002] EWHC 2073 [10]. It should be added that the proceedings are very different from the claim for possession made in the civil proceedings in the very recent "Occupy" campaign at St Paul's Cathedral (**The Mayor, Commonalty and**

Citizens of London v Samede and Others [2012] EWCA Civ. 160) or the "Democracy Village protest" on Parliament Square (**Mayor of London v Hall and others** [2010] EWHC 1613 (QB), on appeal [2011] 1 WLR 504 and on remission [2011] EWHC 585(QB)). Those proceedings involved a judicial determination of the issue as to whether the individuals could be evicted having regard to all the facts. They did not involve, unlike the Highways Act Proceedings, the need to establish that the defendants in that action were blocking the pavements without lawful excuse or authority. The Highways Act Proceedings against the claimant and others have not been pursued with any sense of urgency. Orders for expedition were not sought. They have now been adjourned generally.

ii) The second was taken by seeking to remove the claimant from the authorised site by using its powers under section 143 of the Act which came into force on 19 December 2011: **Police Reform and Social Responsibility Act (Commencement No 2) Order** 2011 SI2834/2011.

8. On 16 December 2011, the claimant heard that section 143 was going to come into effect. She contacted her solicitors, who wrote to Westminster asking it to undertake not to remove the claimant over Christmas. Westminster refused to do so. By a letter dated 19 December 2011, it stated that it was its:-

> "intention to seek to enforce these provisions [and that] the Council is not prepared to delay the enforcement of these provisions before the New Year to enable you to take legal action. Neither does the council consider that there is any requirement to give such a guarantee… I would invite [the claimant] to comply with the provisions of [Part 3 of the Act] forthwith by:
>
> (a) ceasing all prohibited activities which she may be doing and
>
> (b) removing any prohibited item from the area covered by this legislation".

9. The claimant did not remove her tent. She continued to sleep in Parliament Square. After further correspondence, urgent judicial review proceedings and an application for an injunction were issued on behalf of the claimant on 22 December 2011. On that day, Blake J granted the injunction "until an oral hearing… for interim relief" could be fixed. It remains in force.

10. At an interim relief hearing before Lang J, Westminster and the Commissioner conceded that interim relief could continue. The claimant sought an order that the present judicial review should be joined with the Highways Act Proceedings on the basis that findings of fact in those proceedings were relevant to the issues in the present proceedings. Westminster did not agree to this. Instead it preferred to vacate the hearing for the injunction under the Highways Act, which it has now done.

11. Part 3 of the Act has been enforced against other individuals in Parliament Square protesting next to the claimant. Those other parties are not involved in the present proceedings.

III. The Grounds of Challenge

12. There are three grounds of challenge which are:-

(A) Ground 1: that the decision of Westminster dated 19 December 2011 to enforce Part 3 of the Act so as to direct the claimant to cease all the "prohibited activities" and remove "any prohibited items" (which comprise a structure that is designed or adapted for the purpose of facilitating sleeping or staying at a place for any period) and remove any "prohibited items" from the area covered by the Act was unlawful and unreasonable, having regard to the fact that the claimant's protest is authorised under section 134 of the SOCPA and that it remains authorised until April 2015 for the purpose of conducting a 24-hour vigil.

(B) Ground 2: that the claimant is entitled to a Declaration of Incompatibility under section 4 of the Human Rights Act 1998 ("HRA") on the grounds that the prohibitions contained in section 143 (2) (b)–(d) of the Act are in breach of the claimant's rights to freedom of expression and assembly under Articles 10 and 11, while the power of seizures under section 145 of the Act is in breach of Article 1 Protocol 1 and the prohibition in section 143 and the power of seizure in section 145 of the Act infringes the claimant's right under Article 6 to have a dispute as to civil rights determined by a court because the claimant's rights are "civil rights".

(C) Ground 3: that Westminster's decision to enforce the provisions of Part 3 of the Act against the claimant in December 2011 is in breach of the claimant's right to freedom of expression and protest under Articles 10 and 11 and Article 1 of Protocol 1 as well as Article 6 of the ECHR.

IV. The Relevant Statutory Provisions

13. The legislative provisions, which relate to or have related to the small area of land round Parliament Square, can be categorised under five headings. It will be necessary to consider and analyse some of them in much greater detail when dealing with the issues and in particular the proportionality of Part 3 of the Act, but a brief summary will suffice at this stage.

(i) Part 3 of the Act

14. The most recent relevant legislation is Part 3 of the Act. It covers Parliament Square Gardens and the pavement around it and it prohibits all items that could be used for sleeping or "*staying*" for "*any period*". The Government has stated that its enactment of these provisions was based on the adoption of similar by-laws for the entire area around Parliament in order to ensure that tents are not simply displaced to other locations around Parliament. Their objective is to have a complete ban on tents, sleeping equipment or other structures adapted to allow a person to stay in any location for any period in the area around Parliament.

(ii) SOCPA

15. SOCPA covers an area including Parliament Square Gardens. It laid down an authorisation requirement for demonstrations within the area (ss133-134) because without such authorisation, a criminal offence would be committed (s132). The

authorisations can contain conditions to prevent matters such as hindrance to the proper operation of Parliament disruption to the life of the community. The claimant obtained authorisations under section 134 and which were only repealed on 30 March 2012: **Police Reform and Social Responsibility Act 2011 (Commencement No 2) Order 2011** para 3. The effect of these authorisations will have to be considered when Ground 1 is considered in paragraphs 19 to 29 below.

(iii) The Parliament Square byelaws

16. The Parliament Square by-laws cover Parliament Square Gardens which are under the control of the Mayor of London. The by-laws prohibit tents or any other structures within Parliament Square Gardens and other specified activities without the written permission of the Mayor. Individuals are required to comply with any reasonable request to leave the square: rule 3.

(iv) The Highways Act

17. Provisions contained in the Highways Act confer on Westminster as the Highways Authority the responsibility for the pavement around Parliament Square Gardens. This power has been used by Westminster to seek injunctive relief in relation to its powers under section 130 of the Highways Act in relation to an offence under section 137, namely wilful obstruction without reasonable excuse of the highway. These are the proceedings to which we referred at paragraph 7(i) above. They remain outstanding against the claimant.

(v) The Public Order Act 1986

18. The Public Order Act 1986 covers the whole area, but section 14 was disapplied in relation to the Parliament Square by SOCPA s132(6). The Act purports to re-apply section 14 of the 1986 Act to the relevant area: section 141 (2).

V. Ground 1: Do the authorisations granted to the claimant under Section 134 of SOCPA prevent Westminster using the powers under Part 3 of the Act against her?

19. Ms Jessica Simor, who appears for the claimant, contends that the decision to invoke the provisions of Part 3 of the Act against the claimant is unlawful as it is contrary to the authorisations granted to her under section 134 of SOCPA to use the authorised site, including for her structures and tent until at the earliest April 2015 for the purpose of conducting a 24-hour vigil.

20. Pursuant to section 134 of SOCPA, the claimant has since 2007 been granted authorisations by the Commissioner to demonstrate on "the paved area of Whitehall owned by Westminster City Council in the Square". Indeed, the Police have a long history of supervising and controlling demonstrations as is explained by Professor Sir David Williams in *Keeping the Peace* (1967).

21. Each of the claimant's authorisations refers to a particular demonstration as "ongoing". Each reflects the information which the claimant provided to the Commissioner, as she was required to do under Section 133(4) of SOCPA, relating to how long the protest was to last. One of those authorities is said to last until 25 April

2015; others are stated to be "24 hour ongoing". Each contains a condition under s.134(3) that:-

> "the area of the site associated with your demonstration will not exceed 3 metres in width, 3 metres in height and 1 metre in depth. All Articles associated with the demonstration must be contained within these dimensions".

22. It is accepted that the Commissioner could have imposed a condition on the authorisations prohibiting the claimant having a tent in Parliament Square. Nor is it disputed that none of these authorisations imposed any conditions restricting or prohibiting the placing of a tent there, even though the repeated authorisations have been granted at a time when the Commissioner must have known the nature of the claimant's protest as well as her use of a tent and of "peace boxes". It has never been suggested that the claimant is not carrying out her protest in accordance with the particulars of authorisation or that she has acted in contravention of any conditions. No proceedings have ever been commenced against the claimant for any failure to obtain authorisations or for any breaches of any of her conditions.

23. In a letter of 11 August 2009 from the Metropolitan Police, the claimant was asked, "to consider streamlining your protest applications" and the letter refers, but it does not take exception, to "the tents and placards displayed on the footway". It must therefore be accepted that the Commissioner and indeed Westminster were well aware at that stage that the claimant was using a tent for sleeping purposes in the Square from at least that time. It is therefore contended by the claimant that the Commissioner must have held the view that the prohibition of tents and sleeping equipment was not necessary for any of the purposes set out in s.134(3).

24. Westminster contends that neither the authorisations from the Commissioner nor anything in Part IV of SOCPA either expressly or impliedly authorises the claimant to set up house in Parliament Square or to sleep there whether in a tent or in any other structure designed, or which is capable of facilitating sleeping on the site. Its case is that the existing authorisations granted to the claimant under section 134 of SOCPA do not prevent the claimant being directed under section 143 of the Act not to use or erect her tent in Parliament Square.

25. The resolution of this dispute entails analysing the purpose and the effect of section 134 of SOCPA and the authorisations granted pursuant to it to the claimant. The sole purpose of Part IV of SOCPA in relation to Parliament Square is to set out a procedure by which the Commissioner is permitted to authorise demonstrations in the Square, which would otherwise constitute criminal offences. Indeed, these statutory provisions in the words of paragraph 21 of the Explanatory Notes to SOCPA "confer additional powers on the police to control demonstrations in Parliament Square or its environs". (Explanatory Notes of course are an admissible aid to statutory construction: **Tarlochan Singh Flora v Wakom (Heathrow) Limited** [2006] EWCA Civ 1103 [16]). Thus, the provisions in sections 132 to 138 of SOCPA set out the steps, which the Police require protestors to carry out so as to avoid being prosecuted for demonstrating in Parliament Square.

26. The role of the Commissioner in relation to demonstrations set out in sections 132 to 138 of SOCPA is very different from the role of Westminster, as the highways

authority. As Lindblom J explained in **City of London v Samede** [2012] EWHC 34(QB) [35]:

> "I think it is necessary to give considerable weight to the fact the Parliament has legislated to give highway authorities powers and duties to protect public rights over the highway land vested in them".

It is very significant that nothing in SOCPA transfers to the Commissioner the powers, duties and responsibilities vested in Westminster as the highways authority nor do the provisions affect in any way any of these well-established matters.

27. This conclusion is fortified by two other factors. First, there are requirements in section 133 of SOCPA for the notice to be served by those (such as the claimant) seeking authorisation to participate in a demonstration to state certain matters, but they do not include details of any structures or tents which would be used in the demonstration. Second, the conditions in the authorisations for demonstrations can relate to many matters such as "the number and size of banners used" (section 134 (4) (e)), but significantly they do not expressly mention structures or tents. If the authorisation in SOCPA was intended to cover tents, it would be very surprising, if they were not referred to as the subject of one of the possible conditions, which could be imposed in section 134 (4).

28. The inevitable consequence of this is that the provisions in sections 132 to 138 of SOCPA neither purport to authorise nor indeed do they actually authorise the placing on the footway of a tent or of any other obstruction of the highway. The reason for this is that the control of such activities has been, and indeed remains, a matter for Westminster as the highway authority with responsibility for the appropriate area in Parliament Square.

29. This ground of challenge must therefore be rejected because there is no inconsistency between the provisions in Part 3 of the Act and the authorisations granted under section 134 of SOCPA. They deal with different matters. SOCPA authorisations deal with the way in which the police control demonstrations in Parliament Square, while sections 143 and 145 of the Act deal with the different issues of the use of amplifying noise equipment and the prohibition of the erection and use of tents or structures for the purpose of sleeping overnight in the Square. With very considerable hesitation and only because the issue has not been previously decided, we find that this challenge only just reaches the threshold for granting permission. We therefore grant permission, but dismiss without hesitation the claim on the substantive hearing.

VI. Ground 2: Claim for Declaration of Incompatibility

(i) Introduction

30. Ms. Simor contends that the claimant is entitled to a declaration of incompatibility in relation to the provisions in sections 143 and 145 of the Act under section 4 of the HRA as:-

i) The prohibitions contained in section 143(2)(b)–(d) of the Act infringe the claimant's rights to freedom of expression and of assembly under Articles 10 and 11 ECHR;

ii) The prohibition in section 143 of the Act and the powers of seizure in section 145 infringe the claimant's rights under Article 6 ECHR to have a dispute as to civil rights determined by a court because the claimant's rights are "civil rights"; and

iii) The powers of seizure under section 145 of the Act are in breach of the claimant's rights under Article 1 Protocol 1 ECHR.

31. Ms Simor properly accepts that if she fails to succeed under ground (i) or (ii), then she cannot succeed under ground (iii). It is therefore unnecessary to say anything more about the relevance of Article 1 Protocol 1 ECHR.

32. The relevant provisions of section 143(2)(b) –(d) and section 145 of the Act state that: -

> "**143 Prohibited activities in controlled area of Parliament Squar**e
>
> (1) A constable or authorised officer who has reasonable grounds for believing that a person is doing, or is about to do, a prohibited activity may direct the person—
>
> (a) to cease doing that activity, or
>
> (b) (as the case may be) not to start doing that activity.
>
> (2) For the purposes of this Part, a "prohibited activity" is any of the following—
>
> (a) operating any amplified noise equipment in the controlled area of Parliament Square;
>
> (b) erecting or keeping erected in the controlled area of Parliament Square—
>
> (i) any tent, or
>
> (ii) any other structure that is designed, or adapted, (solely or mainly) for the purpose of facilitating sleeping or staying in a place for any period;
>
> (c) using any tent or other such structure in the controlled area of Parliament Square for the purpose of sleeping or staying in that area;
>
> (d) placing or keeping in place in the controlled area of Parliament Square any sleeping equipment with a view to its use (whether or not by the person placing it or keeping it in place) for the purpose of sleeping overnight in that area;

(e) using any sleeping equipment in the controlled area of Parliament Square for the purpose of sleeping overnight in that area. ….

(6) It is immaterial for the purposes of a prohibited activity—

(a) in the case of an activity within subsection (2)(b) or (c) of keeping a tent or similar structure erected or using a tent or similar structure, whether the tent or structure was first erected before or after the coming into force of this section;

(b) in the case of an activity within subsection (2)(d) or (e) of keeping in place any sleeping equipment or using any such equipment, whether the sleeping equipment was first placed before or after the coming into force of this section.

(7) In this section "sleeping equipment" means any sleeping bag, mattress or other similar item designed, or adapted, (solely or mainly) for the purpose of facilitating sleeping in a place.

(8) A person who fails without reasonable excuse to comply with a direction under subsection (1) commits an offence and is liable on summary conviction to a fine not exceeding level 5 on the standard scale.

145 Power to seize property

(1) A constable or authorised officer may seize and retain a prohibited item that is on any land in the controlled area of Parliament Square if it appears to that constable or officer that the item is being, or has been, used in connection with the commission of an offence under section 143.

(2) A constable may seize and retain a prohibited item that is on any land outside of the controlled area of Parliament Square if it appears to the constable that the item has been used in connection with the commission of an offence under section 143.

(3) A "prohibited item" is any item of a kind mentioned in section 143(2).

(4) A constable may use reasonable force, if necessary, in exercising a power of seizure under this section.

(5) An item seized under this section must be returned to the person from whom it was seized—

(a) no later than the end of the period of 28 days beginning with the day on which the item was seized, or

(b) if proceedings are commenced against the person for an offence under section 143 before the return of the item under paragraph (a), at the conclusion of those proceedings.

(6) If it is not possible to return an item under subsection (5) because the name or address of the person from whom it was seized is not known—

(a) the item may be returned to any other person appearing to have rights in the property who has come forward to claim it, or

(b) if there is no such person, the item may be disposed of or destroyed at any time after the end of the period of 90 days beginning with the day on which the item was seized.

(7) Subsections (5) (b) and (6) do not apply if a court makes an order under section 146(1) (a) for the forfeiture of the item.

(8) The references in subsections (1) and (2) to an item that is "on" any land include references to an item that is in the possession of a person who is on any such land".

33. Articles 10 and 11 of the ECHR provide that:-

"**Article 10**

Freedom of expression

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 and regardless of frontiers. This Article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.

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.

Article 11

Freedom of assembly and association

1. Everyone has the right to freedom of peaceful assembly and to freedom of association with others, including the right to form and to join trade unions for the protection of his interests.

> 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. This Article shall not prevent the imposition of lawful restrictions on the exercise of these rights by members of the armed forces, of the police or of the administration of the State."

(ii) The Scope of Articles 10 and 11.

34. It is common ground that:-

i) The claimant's political and anti-war beliefs are genuine, that they are sincerely held by her and that her protest reflects her genuine convictions.

ii) The claimant herself believes it as an integral part of her protest that she maintains a permanent 24-hour presence in Parliament Square;

iii) The European Court of Human Rights observed in **Djavit An v Turkey** (2003) Reports of Judgments and Decisions 2003-III, p 233 that :

> "56. …. the right to freedom of assembly is a fundamental right in a democratic society and, like the right to freedom of expression, is one of the foundations of such a society. Thus, it should not be interpreted restrictively";

iv) Parliament Square is a very significant place in which to stage a protest because of its proximity to Parliament and the Supreme Court as well as the fact that it is visited by many tourists; and that

v) Articles 10 and 11 are engaged by the claimant's protest which embraces her wish to sleep in Parliament Square bearing in mind the purpose of the claimant's presence there is part of her anti-war campaign. In **Samede** (supra), the Court of Appeal accepted at paragraph [28] that Articles 10 and 11 were engaged by those defendants who were members of the Occupy Movement and who occupied the area outside St Paul's Cathedral as means of protesting and communicating their protest. Similar conclusions had been reached by the Strasbourg Court (see for example **Lucas v United Kingdom** (App No 39013/02) 18 March 2003 on Article 10 and **Sergey Kuznetsov v Russia** [2008] ECHR 1170) on Article 11).

35. The submissions have to be considered in the light of the fundamental significance of the rights under Article 10 and 11 to democracy and the rule of law. The Strasbourg court has recognized that exercise of the right to freedom of assembly and exercise of the right to free expression are often, in practice, closely associated: see, for example**, Ezelin v France** (1991) 14 EHRR 362 [37] and [51]; **Djavit An v Turkey** (2003) Reports of Judgments and Decisions, 2003-III, p 233 [39]; **Christian Democratic People's Party v Moldova** (App no 28793/02, 14 May 2006, unreported) [62]; and **Öllinger v Austria** (App no 76900/01, 29 June 2006, unreported) [38].

36. Thus in **Steel and Others v United Kingdom** (1998) 28 EHRR 603, freedom of expression was said to constitute

> "101. an essential foundation of democratic society and one of the basic conditions for its progress and for each individual's self-fulfillment".

Similarly in **Ezelin v France** (supra) [53], the court considered that: -

> "53…that the freedom to take part in a peaceful assembly - in this instance a demonstration that had not been prohibited - is of such importance that it cannot be restricted in any way, even for an avocat, so long as the person concerned does not himself commit any reprehensible act on such an occasion."

37. In **Ziliberberg v Moldova** (App no 61821/00, 4 May 2004, unreported), the court observed at the outset that

> " 2…the right to freedom of assembly is a fundamental right in a democratic society and, like the right to freedom of expression, is one of the foundations of such a society".

38. These well-known statements set out in the last three preceding paragraphs were cited by Lord Bingham of Cornhill with approval in **R (Laporte) v Chief Constable of Gloucestershire** [2007] 2 AC 105 [36].

39. A similar approach to Articles 10 and 11 has been expressed by our courts. For example, Lord Neuberger M.R explained the significance of the Article 10 and 11 rights of protestors when he gave the only reasoned judgment of the Court of Appeal in **Mayor of London (on behalf of the GLA) v Hall** (supra) when he explained in relation to a previous demonstration in Parliament Square, that: -

> "17. The right to express views publicly, particularly on the important issues about which the defendants feel so strongly, and the right of the defendants to assemble for the purpose of expressing and discussing those views, extends to the manner in which the defendants wish to express their views and to the location where they wish to express and exchange their views. If it were otherwise, these fundamental human rights would be at risk of emasculation. Accordingly, the defendants' desire to express their views in Parliament Square, the open space opposite the main entrance to the Houses of Parliament, and to do so in the form of the Democracy Village, on the basis of relatively long term occupation with tents and placards, are all, in my opinion, within the scope of Articles 10 and 11".

40. The claimant's case is that section 143 of the Act constitutes in practice an "absolute prohibition" on any form of long term protest in Parliament Square. This is disputed by the Secretary of State who contends that Part 3 of the Act does not contain a prohibition, but that Part 3 merely confers a power on a Constable and an officer authorised by Westminster, in the exercise of which account must be taken of the

Convention rights of protesters including those rights set out in Articles 10 and 11. In any event, the Secretary of State contends that the claimant's rights under Articles 10 and 11 are not infringed by the fact that she cannot put up and sleep in a tent in Parliament Square, bearing in mind that she and anybody else can protest for 24 hours in Parliament Square.

41. Ms Simor also contends that section 143 of the Act infringes the positive obligation imposed on the State to ensure that citizens such as the claimant can protest and express their views. Mr Jonathan Swift QC, who appears for the Secretary of State, submits that the positive duty imposed on the State does not extend that far and that any duty on the State would have been satisfied by the existing rights to protest, even after taking account of sections 143 and 145 of the Act. Mr Swift contends that, in any event, even if there had been infringements of the claimant's rights as specified in Articles 10(1) and 11(1), then the provisions in Articles 10(2) and 11(2) show that there have been no actual breaches committed as the terms of sections 143 and 145 of the Act can be justified. In any event, Mr Swift says that any interference with the claimant's rights can be justified by reliance on the margin of appreciation accorded to the State. All of these submissions are disputed by Ms Simor.

(iii) Does Section 143 constitute a prohibition against erecting or using a tent or does it contain a power to direct a party to stop doing these things?

42. Ms Simor contends that section 143 contains a prohibition. She points out the heading for the section is "Prohibited Activities in Controlled Area of Parliament Square". Her submission is that, first, the use of the word "prohibited" in the heading and, second, the reference in the section to "prohibited activity" show that there is a prohibition contained in it. In response, Mr Swift states that what is important is not the label used in the Act, but the effect of this section. He submits that these sections confer a power to order the cessation of these activities, but not a prohibition or a duty to prohibit.

43. The basis of that submission is section 143 (1) which states, with emphasis added, that

> "a constable or authorised officer who has reasonable grounds for believing that a person is doing or about to do a prohibited activity <u>may</u> direct the person – (a) to cease doing that activity or (b) (as the case may be) not to start doing that activity".

The use of the word "may", in Mr. Swift's submission, shows that section 143(1) is not a prohibition, but that instead it confers a discretion (not a duty) on the part of the constable or authorised officer to make a direction.

44. We consider that the submissions made by Mr Swift on behalf of the Secretary of State are correct. Similar reasoning applies to section 145, which states that a constable or an authorised officer "may" seize and retain a "prohibited item" in Parliament Square (sub-section (1)), or outside that area if used in the commission of an offence (sub-section (2)). The case for the claimant requires a rewriting of these sections so that the word "may" is replaced by the word "must" in both sections 143 and 145 of the Act.

45. In reaching this conclusion, we have not overlooked two matters relied on by Ms. Simor as showing that sections 143 and 145 contain prohibitions. First, as we have pointed out, she seeks to derive assistance from the heading to section 143, which is entitled "Prohibited Activities in Controlled Area of Parliament Square". The purpose of the heading to a section is first that it is a short indication of the contents of the section, and second that it does not attempt to summarise the contents, because to do this accurately is nearly always impractical, as otherwise headings would be very lengthy. (See **Bennion on Statutory Interpretation** (2008) Fifth Edition page 747). Slade LJ explained of a side note (which is the predecessor of a heading to a section) that it was a brief summary of a section and it was therefore "a most unsure guide to its construction" (**Page (Inspector for Taxes) v Lowther** [1983] SLT61). Roskill LJ said that "strictly the side note is irrelevant for the purpose of construing the statute" (**R v Harbax Singh** [1979] 1 QB 319, 322C). For those reasons, no assistance in construing section 143 can be obtained from this heading in the light of the use of the word "may" in the text. Nor does the use of the defined terms "prohibited activity" or "prohibited items" assist Ms Simor's argument; they are simply short hand expressions and do not in any way detract from the discretion that the section contains.

46. Second, Ms. Simor contends that the fact that sections 143 and 145 contain prohibitions is apparent from the Home Office Publication on the Act which is entitled "**Guidance on the Provisions Relating to Parliament Square and Surrounding Areas"** and which explains that the view of the Home Office is that:-

> "What we are seeking to do, therefore, is to prevent encampments and other disruptive activity on Parliament Square by **anyone**, not just protesters." (Emphasis in the original).

47. When a court is considering whether a statutory provision is incompatible with the Convention, as in this case, it cannot look beyond the wording of the Act to ascertain incompatibility. These provisions in the Guidance are therefore of no assistance on the issue of whether the provisions are incompatible with the ECHR, though they may be relevant to the way in which the Act is enforced.

48. Our conclusion is that, although sections 143 and 145 refer respectively to "a prohibited activity" and "a prohibited item", it is very clear from the wording of those sections that these activities and items only become prohibited if and when the constable or authorised officer decides to exercise the power to make a direction in the case of section 143 or a seizure in the case of section 145.

(iv) Are the powers given to Constables and Authorised Officers under sections 143 and 145 of the Act inconsistent with the claimant's Article 10 and rights?

49. The next issue to determine is whether the power given in section 143(1) of the Act to a constable or an authorised officer to direct the person to cease doing a prohibited activity (or not to start one or the power to seize "*a prohibited item*" pursuant to section 145) is limited so as not to infringe the rights under Articles 10 and 11 of those involved in protest. If appropriate remedies are given to the recipient of direction, then the statutory provisions giving them those powers cannot be incompatible with the claimant's rights under Articles 10 and 11.

50. Section 143(8) of the Act provides that a person who fails "without reasonable excuse" to comply with a direction under section 143(1) commits an offence. If a direction is made, the issue would be whether the recipient of the direction was acting "without reasonable excuse" and that would require a fact-sensitive decision which might also depending on the circumstances entail considering the Article 10 and 11 rights of the recipient.

51. The effect of these provisions is, therefore, that unless the State has a positive obligation to protect the Article 10 and 11 rights of citizens, neither section 143 nor 145 of the Act in themselves constitutes an infringement of the claimant's rights under Articles 6, 10 or 11. In consequence, subject to the existence of such a positive obligation, a declaration of incompatibility cannot be granted.

52. If a person empowered to act under section 143 or 145 acts in breach of the Article 10 or Article 11 rights of a particular person, then that person would be entitled to the remedies of judicial review (with interim injunctive relief), of claiming damages and of availing himself or herself of the "reasonable excuse" defence under section 143(8) of the Act, if prosecuted.

(v) Is there a positive obligation on the State to protect the Article 10 and 11 rights of citizens?

53. Ms Simor contends that there is a positive obligation imposed on the State to ensure that the Article 10 and Article 11 rights of its citizens are protected. The circumstances in which such an obligation was required was considered by the Strasbourg Court in **Appleby v United Kingdom** (2003) 37 EHRR 38 in which the Court concluded that:-

> "40. In determining whether or not a positive obligation exists, regard must be had to the fair balance that has to be struck between the general interest of the community and the interests of the individual, the search for which is inherent throughout the Convention. The scope of this obligation will inevitably vary, having regard to the diversity of situations obtaining in Contracting States and the choices which must be made in terms of priorities and resources. Nor must such an obligation be interpreted in such a way as to impose an impossible or disproportionate burden on the authorities."

54. In that case, the owners of a shopping mall prevented those campaigning against a plan to build on a playing field from protesting in the mall. The protesters complained that their rights under Articles 10 and 11 had thereby been infringed. The Strasbourg Court concluded that even though the freedom of expression was an important right, it was not unlimited. There were conflicting rights, namely those of the property rights of the owner of the shopping centre under Article 1 Protocol 1. The court concluded that there had been no failure on the part of the United Kingdom Government to protect the rights of the applicants under Article 10 and Article 11 and no positive obligation was found to exist. The decision in that case shows that it is only when a restriction imposed by the State has the effect of preventing *any* effective exercise of freedom of expression that a positive obligation might arise.

55. In our judgment, balancing the respective interests, no additional positive obligation is required of the State because of the limited effects of sections 143 and 145 of the Act. As we have already emphasised, the Act confers powers which, if exercised constitute a restriction which only relates to sleeping items. It is of crucial importance that these provisions do not prevent any effective exercise of Article 10 and 11 rights at any other time or at any place or in any other way. They do not impede, let alone prevent, any other form of demonstration or protest in Parliament Square at any time of day or night. Indeed they do not prevent the protestors remaining overnight as is shown by the case of Barbara Tucker to whom we referred at paragraph 4 above. She has not been prevented from exercising her Article 10 and 11 rights by section 143. Two matters are noteworthy. First that it has not been suggested by the claimant that there is any particular need for her to remain overnight in the Square other than on account of the cost of travelling to and from her home which happens to be in Eastbourne. Second no other protestor has come forward to state that section 143 has impeded his or her Article 10 and 11 rights. Indeed the only basis for determining that there was a positive duty on the State to take further steps to ensure that the claimant's Article 10 and 11 rights were preserved would be that the claimant had a right to protest whenever and wherever she liked. Nothing has been put forward to show that this is required.

56. We therefore conclude that there is no positive obligation imposed on the Secretary of State to take any further steps to ensure that the claimant's Article 10 and 11 rights are preserved.

(vi) Are sections 143 and 145 of the Act proportionate?

57. In order to determine whether Part 3 of the Act is proportionate, it is necessary to consider the effect of the Act, in order to ascertain if it satisfies the established requirement of proportionality, applying the well known statement of Lord Clyde in **De Freitas v Ministry of Agriculture** [1999] 1AC 69, 80 that in respect of the provisions in question:-

> "(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."

58. As we have recorded at paragraphs 35 to 39 above, the rights under Articles 10 and 11 are of fundamental importance. As Lord Nicholls of Birkenhead explained in the **Pro-Life Alliance case** [2004] 1 AC 185 [8],:-

> "Freedom of political speech is a freedom of the very highest importance in any country which lays claim to be a democracy. Restrictions on this freedom need to be examined rigorously by all concerned, not least the Courts".

59. Nevertheless, unlike the absolute rights in the Convention (such as, for example, Article 3), the rights in Articles 10 and 11 are qualified rights with the consequence that some restriction of them can exceptionally be justified if there is an important

and cogent legislative object and if the means used in Part 3 go no further than necessary to accomplish this objective.

(vii) Is the legislative objective of Part 3 of the Act sufficiently important to justify limiting the rights in Articles 10 and 11?

60. Mr Swift, in support of his submission that this question must be answered affirmatively, relies on what has been said in Explanatory Notes prepared by the Government and published with the Bill as well as statements made by Ministers to Parliamentary Committees. This evidence is regarded as admissible in determining the proportionality of restrictions imposed because for the reasons given by Lord Nicholls of Birkenhead in **Wilson v First County Bank Trust Limited (No 2)** [2004] 1 AC 816 , 843:-

> " 63… . Moreover, as when interpreting a statute, so when identifying the policy objective of a statutory provision or assessing the 'proportionality' of a statutory provision, the court may need enlightenment on the nature and extent of the social problem (the 'mischief') at which the legislation is aimed. This may throw light on the rationale underlying the legislation.
>
> 64. This additional background material may be found in published documents, such as a government white paper. If relevant information is provided by a minister or, indeed, any other member of either House in the course of a debate on a Bill, the courts must also be able to take this into account. The courts, similarly, must be able to have regard to information contained in explanatory notes prepared by the relevant government department and published with a Bill. The courts would be failing in the due discharge of the new role assigned to them by Parliament if they were to exclude from consideration relevant background information whose only source was a ministerial statement in Parliament or an explanatory note prepared by his department while the Bill was proceeding through Parliament".

61. There are six sources of information on the legislative objects of sections 143 and 145 of the Bill, which would appear to be relevant. First, in the Explanatory Notes to the Bill, which eventually became the Act, it is explained that the provisions which became sections 143 and 145 of the Act: -

> "do not prevent such a vigil or prevent someone from demonstrating: rather they prevent some of the paraphernalia that might be associated with such a vigil...
>
> 285... the government considers that such interference (with the rights under Articles 10 and 11) is in accordance with the law and sufficiently acceptable, foreseeable and precise. The Government considers that such interference is necessary in pursuit of several legitimate aims – namely the prevention of disorder and crime, the prevention of the rights of others and protection of health".

62. Second, the Explanatory Notes proceed to explain that the Government did not consider that the prohibition on tents and sleeping bags "…is a disproportionate interference with Article 10 and 11 rights". In coming to these decisions, the

Government took note of the findings of Wyn Williams J in **Mayor of London v Rebecca Hall and Others** (supra) in which he concluded at paragraph 143, that:-

> "I am satisfied that PSG [Parliament Square Gardens] is wholly unsuited for camping; there is no sanitation…no running water…no public toilets open 24 hours daily in the immediate area… no safe means of cooking; a camp site is wholly incompatible with the location; it would deprive the public of the use of the total area of well-maintained lawn and gardens at the heart of British democracy and government and a world renowned WHS [World Heritage Site]".

63. Third, the Explanatory Notes noted that Wyn Williams J considered the importance of the:-

> "Protection of the rights and freedoms of others to access PSG [Parliament Square Gardens]… but also importantly for the protection of health… and the prevention of crime" [133] and that:
>
> "the Government considers that preventing individuals from erecting or maintaining tents, or using sleeping bags is a proportionate manner in which to pursue these legitimate aims" [133].

64. Fourth, when the Bill was going through Parliament, the Joint Committee on Human Rights asked the Secretary of State for some further information. Mr Nick Herbert MP, the Minister of State for Policing and Criminal Justice at the Home Office, responded and he explained that:-

> "The Government considers that these measures are necessary in the area of Parliament Square Gardens because the unique characteristic of this area, Parliament Square Gardens is a World Heritage Site, situated directly opposite the Houses of Parliament, Westminster Abbey and the Supreme Court. Visitors and members of the public have varying reasons to wish to visit this site – whether as tourists, to see the Houses of Parliament and Big Ben; as a cultural experience, by visiting a World Heritage Site; as an individual interested in the democratic process, by seeing where Parliament is situated; or is someone who wants to express their point of view within site or earshot of parliament.
>
> This means we need to balance competing and legitimate needs of the members of the public with members of Parliament who need to be able to carry out their daily work.
>
> As this is a popular place, it is a reason to ensure a level of control over the use of this space in order to ensure that no one particular person or group of persons can take over the area to the detriment of others.
>
> For example, at present there is an ongoing encampment in Parliament Square that many people find unsightly. This has the ability to spoil the public enjoyment of this unique location and even deter people from visiting this unique spot."

65. He later stated that:-

> "The Government's proposals are intended to prevent encampments and other disruptive activity on Parliament Square the provisions apply to everyone – not just protestors. The area around Parliament is understandably one of the most protested areas in the country and space is limited for those wishing to protest or simply enjoy the amenities of the Square. The Government is seeking to preserve that site for everyone." and that:-
>
> "The Government takes the view that there is no legitimate reason why Parliament Square Gardens should become a campsite and the restriction applies to anyone (not just protestors) erecting tents or having sleeping equipment for a proportionate manner in which to ensure that it does not become a campsite. Limiting the period for which anyone could erect tents or use sleeping equipment would not solve this since one person could simply replace another person, leading to a permanent encampment manned by different people. The damage to the Garden would remain, as would the problem of the area then being inaccessible to other members of the public."

66. Finally, in a letter written to the Chair of the Committee on Human Rights on 28 June 2011 after the Committee had produced its report, Mr Herbert explained that the Government had been seeking to balance competing and legitimate needs for members of the public who come to an:-

> "iconic public site as protestors, with those of Members of Parliament and others who need to be able to carry out their daily work or enjoy the space as visitors. The Government is clear that no one particular person or group of persons should take over the area to the detriment of others."

67. These are formidable considerations, which show that the legislative objective of sections 143 and 145 is sufficient, in our judgment, to justify limiting the rights in Articles 10 and 11.

(viii) Are the restrictions in Sections 143 and 145 of the Act designed to meet the legislative objectives rationally connected to them?

68. We turn to the second of Lord Clyde's considerations. The restrictions in Part 3 of the Act do prevent sleeping bags and tents being erected and used in Parliament Square. In our judgment, there can be no doubt that the restrictions in Part 3 are designed to meet the legislative objectives and in Lord Clyde's words are "rationally connected" to them.

(ix) Are the means in Part 3 no more than is necessary to accomplish the legislative objective?

69. There is a substantial dispute about the impact of Part 3 of the Act on the rights under Articles 10 and 11. Ms Simor contends that this Part of the Act in effect bans protests that last longer than a day. That is because individuals, who do not live in or close to London or anyone else who does not have the means to travel to Parliament Square

daily (including the claimant) are in practice prohibited from protesting over an extended period. She accepts that putting up a tent only becomes a *"criminal act"* when an individual is given a direction to that effect, but that fact must be seen against the background that any protester considering whether or not to carry out a prohibited activity under section 143 would assume that he or she would be directed to cease that activity. This, she submits, would have a chilling effect on those demonstrating or those considering demonstrating.

70. Ms. Simor submits that the Strasbourg Court has repeatedly stated that individuals cannot be expected to act in breach of the law prior to claiming that it should constitute a violation of their rights (see for example **Bowman v United Kingdom** [1998] 26 EHRR 1(tab 1/31)[26] – [29]). In addition, the claimant's case is that the rights to freedom of expression and of assembly is only guaranteed when individuals can exercise their rights with the protection of the law: **Baczkowski and others v Poland** App. No. 1543/06-24 September 2007 [67] (tab 1/40).

71. Ms Simor places great reliance on the decision in **Tabernacle v Secretary of State for Defence** [2009] EWCA Civ 23 in which the Court of Appeal quashed a byelaw enacted by the Secretary of State and which prohibited camping in an area adjoining the Atomic Weapons Establishment at Aldermaston. The basis of the decision was that this byelaw infringed the protestors' rights under Articles 10 and 11.

72. In **Samede,** (supra) the Master of the Rolls said that the facts in that case in which members of the "*Occupy"* group were protesting on the pavement outside St. Paul's Cathedral were "a long way from those in **Tabernacle**" [45]. He set out a number of distinguishing features which apply equally in this case:-

> "45. The facts of this case are a long way from those in Tabernacle [2009] EWCA Civ 23,where (i) members of the public (and therefore, at least prima facie the protesters) had the right to pitch tents where the protest was camped, (ii) the protest camp was in place only one weekend a month, and (iii) there was no interference with any third party rights, (iv) the very object of their protest was on adjoining land owned by the same public landowner, and (v) the protest had continued for twenty years with no complaint."

73. There are many similar factors distinguishing the present case from **Tabernacle**:-

(i) in **Tabernacle**, the provision in question prevented any protest at the relevant site, while in sharp contrast section 143 of the Act does not prevent any protest at any time of the day or in any place and this is particularly important because as Laws LJ accepted in **Tabernacle**:-

> "19…. the learning shows … 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.";

(ii) Others have been able to carry on a 24-hour protest in Parliament Square after section 143 came into effect; we have referred to the position of Barbara Tucker. This illustrates how far removed the restrictions in this case are from those in **Tabernacle,** where there was a total ban on demonstrating on the site in question;

(iii) The rights of third parties were not affected in **Tabernacle,** but they are affected by the claimant sleeping in Parliament Square. It is a World Heritage Site visited by thousands of tourists and many others throughout the year;

(iv) The protest in **Tabernacle**, unlike that of the claimant in the present case, had continued for 20 years with no complaint;

(v) Members of the public in **Tabernacle** (and therefore, at least prima facie the protesters) unlike the claimant, had the right to pitch tents where the protest was camped; and

(vi) The only reason why the claimant's right to protest could be curtailed by the provisions in sections 143 and section 145 is because of her own position and in particular because she lives in Eastbourne and her own financial position is such that she is unable to afford to commute every day from Eastbourne.

74. The claimant's case that her Article 10 and 11 rights are infringed is to a significant extent based on her own personal circumstances; it was unreal to submit that those living outside London could not carry out a long term protest and that even for those in London, the cost would be prohibitive. Such personal factors pertaining to the claimant do not in themselves show that section 143 is incompatible with the claimant's Convention rights. It is settled law that the fact that a statutory provision might cause unfairness to one person does not mean that a declaration of incompatibility should be granted. As Lord Bingham of Cornhill explained in **R (Animal Defenders) v Secretary of State for Culture** [2008] 1 AC 1312 – 148 at paragraph 33:-

> "Thirdly, legislation cannot be framed so as to address particular cases. It must lay down general rules: James v United Kingdom (1986) 8 EHRR 123 , para 68; Mellacher v Austria (1989) 12 EHRR 391 , paras 52–53; R (Pretty) v Director of Public Prosecutions (Secretary of State for the Home Department intervening) [2002] 1 AC 800 , para 29; Wilson v First County Trust Ltd (No 2) [2004] 1 AC 816 , paras 72–74; R (Carson) v Secretary of State for Work and Pensions [2006] 1 AC 173 , paras 41, 91. A general rule means that a line must be drawn, and it is for Parliament to decide where. The drawing of a line inevitably means that hard cases will arise falling on the wrong side of it, but that should not be held to invalidate the rule if, judged in the round, it is beneficial."

75. Merely invoking Convention rights is not sufficient for the claimant or any citizen to obtain immunity from the effects of ordinary state regulations; see Laws LJ in **Tabernacle** [20] and **Chapman v United Kingdom** (2001) 10 BHRC 48 [96]). What is significant is that for many who wish to protest in Parliament Square, the use of a tent or sleeping equipment is not central or essential to the exercise of his or her Convention rights. There is no absolute right conferred by the ECHR or otherwise to protest whenever and wherever a protestor wants. Laws LJ in **Tabernacle** cited with approval the statement of Professor Barendt *(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 and information."

76. For the reasons we have given, sections 143 and 145 go no further than is necessary to accomplish the legislative objective bearing in mind the limited effect of those provisions and above all the ability and rights to protest in Parliament Square, which are unaffected by the Act.

77. In reaching the conclusion that the means in sections 143 and 145 go no further than was necessary to accomplish the legislative objective, we have considered with care whether the existing legislation would be enough to achieve that objective but concluded that they do not. It is clear that until the Act was passed, people were sleeping in Parliament Square and as Mr Herbert explained in his letter of January 2011 to the Chair of the Human Rights Committee:

> "The byelaws in place to secure the proper management of Parliament Square Garden, were shown to be unenforceable during the occupation of Parliament Square Garden by the Democracy Village encampment".

78. Indeed the decisions in **Hall** and **Haw** show the difficulty of obtaining possession. There were no previous powers of seizure of sleeping equipment. Indeed, the previous provisions had not deterred let alone prevented the claimant from sleeping in her tent in Parliament Square. It is clear that the existing legislation did not achieve the legislative objective of ensuring the people did not camp and sleep in Parliament Square.

79. We therefore conclude that that the provisions in sections 143 and 145 of the Act are proportionate.

(x) What is the effect of Articles 10(2) and 11 (2)on the claimant's rights?

80. Articles 10 and 11 do not confer absolute rights because the rights will not be regarded as having been infringed if the restrictions imposed by the State are in the words of paragraphs (2) of those Articles "prescribed by law and are necessary in a democratic society.. for the protection of the rights and freedoms of others". At this stage it is necessary to consider the terms of Articles 10(2) and 11(2) which have been set out in paragraph 33 above.

(xi)"Prescribed by law"

81. Any interference with the claimant's rights would be prescribed by law as they would be based on statutory provisions set out in sections 143 and 145 of the Act. As has been explained in paragraphs 19 to 29 above, the claimant's authorisation to protest under SOCPA from the Commissioner does not confer an authorisation for her to maintain indefinitely an encampment in Parliament Square. There is no inconsistency between the legal regime under Part IV of SOCPA and Part 3 of the Act.

(xii) *"..necessary in a democratic society for the protection of the rights and freedoms of others"*

82. The word "necessary" has been considered by the Strasbourg Court in the case of **Sunday Times v UK** (1979) 2 EHRR 245 when it explained that:-

> "59. The Court has already had the occasion in its above-mentioned Handyside judgment to state its understanding of the phrase "necessary in a democratic society", the nature of its functions in the examination of issues turning on that phrase and the manner in which it will perform those functions.
>
> The Court has noted that, whilst the adjective "necessary", within the meaning of Article 10 (2) (art. 10-2), is not synonymous with "indispensable", neither has it the flexibility of such expressions as "admissible", "ordinary", "useful", "reasonable" or "desirable" and that it implies the existence of a "pressing social need" (p. 22, para. 48)…"

83. First there are the rights of others who wish to have access to and enjoy Parliament Square. We have described its Word Heritage status at paragraph 73; that needs no elaboration. Though we accept that the claimant has co-operated with police on occasions such as the Royal Wedding in 2011, Mr Swift contends correctly in our view that a permanent encampment of tents impedes the right of members of the public to visit, pass through and enjoy the use of Parliament Square whether for reasons of tourism, recreation or ordinary access.

84. Indeed the area in which the claimant places her tent and makes her home is a public space which should belong to and should be accessible to all. It cannot be appropriated by any single person or group such as the claimant who has no proprietary rights in the area which she wishes to have as her home. The rights of the public to enjoy and use a place of such significant historical, political and cultural interest such as Parliament Square cannot be overridden by the claimant's right to take over part of that Square and use it as her home on an indefinite basis even as part of a protest.

85. It is noteworthy that in the case of **Mayor of London v Hall**, Lord Neuberger of Abbotsbury MR explained that apart from the rights of demonstrators in Parliament Square:-

> "..there are the rights of those who simply want to walk or wander in [Parliament Square Gardens], not perhaps Convention rights but nonetheless important rights connected with freedom and self expression".

86. Similarly in **Samede**, the court recognised the importance of the public right of access to a place of historical and cultural interest, which in that case was St Paul's Cathedral. Thus it is clear that that sections 143 and 145 of the Act are necessary to give the public proper access to Parliament Square.

87. Second there are the rights of others who wish to protest. Parliament Square has been an obvious location for many people (other than the claimant) to protest over the years. The presence of a permanent camp in Parliament Square reduces the space

available for others to stage lawful protests whether about the same issues as concern the claimant or about any other issues.

88. Third, there is the protection of health. Parliament Square has no sanitation or cooking facilities as was explained by Wyn Williams J in the passages quoted in paragraphs 62 and 63 above and in paragraph 48 of his judgment.

89. In reaching these conclusions, we have been fortified by the fact that in **Hall**, the Court of Appeal upheld the judge's conclusion on the compatibility of prohibiting an indefinite encampment in Parliament Square with the expression of rights under Articles 10 and 11. Lord Neuberger giving the judgment of the Court of Appeal explained that:-

> 46. The Judge concluded at [2010] EWHC 1613 (QB), paragraph 133 that there was "a pressing social need not to permit an indefinite camped protest on PSG for the protection of the rights and freedoms of others to access all of PSG and to demonstrate with authorisation but also importantly for the protection of health - the camp has no running water or toilet facilities - and the prevention of crime - there is evidence of criminal damage to the flower beds and of graffiti". He went on to say that he was "satisfied the GLA and the Mayor are being prevented from exercising their necessary powers of control management and care of PSG and the use of PSG by tourists and visitors, by local workers, by those who want to take advantage of its world renowned setting and by others who want to protest lawfully, is being prevented."
>
> 47. In my view, insofar as those conclusions amounted to findings of fact, they were, to put it at its lowest, findings, which were open to the Judge on the evidence before him. Once those findings were made, there are no grounds for attacking the conclusion reached by the Judge in the following paragraph, namely that "[w]hile the removal of the defendants … would interfere with their Article 10 and Article 11 rights, that is a wholly proportionate response and so no defendant has a convention defence … to the claim for possession."
>
> 48. It is important to bear in mind that this was not a case where there is any suggestion that the defendants should not be allowed to express their opinions or to assemble together. The claim against them only relates to their activities on PSG. It is not even a case where they have been absolutely prohibited from expressing themselves and assembling where, or in the manner, in which they choose. They have been allowed to express their views and assemble together at the location of their choice, PSG, for over two months on an effectively exclusive basis. It is not even as if they will necessarily be excluded from mounting an orthodox demonstration at PSG in the future. Plainly, these points are not necessarily determinative of their case, but, when it comes to balancing their rights against the rights of others, they are obviously significant factors."

90. Although these factors were considered against a different legislative background, similar reasoning applies here. We are satisfied that the Secretary of State is right in her submission on Articles 10(2) and 11(2) with the consequence that sections 143 and 145 of the Act do not infringe the rights of the claimant under Article 10 and 11.

(xiii) Deference or margin of appreciation owed to Parliament

91. If, which is not the case, we had been in any doubt about whether to make declarations of incompatibility, we would have to consider the extent to which we should take cognisance of the decision of Parliament in relation to the manner in which it had framed the restrictions imposed by Part 3. However it is not necessary for us to say any more on this issue, in the light of our decision on other issues.

(xiv) Article 6

92. The claimant contends that under the Act, an individual has no access to courts as required by Article 6 in relation to a direction made under section 143 or to a decision to seize made under section 145, notwithstanding that such decisions give rise to disputes as to the individual's "civil rights" and obligations, involving as they do interference to his rights to freedom of expression assembly and property. Thus it is said that Part 3 of the Act is incompatible with Article 6.

93. The claimant seeks to derive assistance from the decision in **R (Wright) v Secretary of State for Health** [2009] 1 AC 739, which concerned statutory provisions for placing care workers on a list of persons precluded from working with vulnerable adults. The claimant had been provisionally included in the list, which indicated that he or she posed a risk to vulnerable adults without her having had an opportunity to have a fair trial. This perception of being placed on the list could according to the evidence have resulted in a stigma for the person concerned so great as to constitute an interference with his or her right to respect for private life under Article 8 as such rights extended to the right of care workers to establish and develop relations with others including work colleagues. The absence of the opportunity for the claimant to have a fair trial before this occurred was in the view of Appellate Committee incompatible with her rights under Articles 6 and 8 of the Convention.

94. It is submitted by Ms Simor that by parity of reasoning in this case, a person receiving a direction under section 143 or having property seized under section 145 does not have the right to make representations before a direction is given or property seized, notwithstanding that both steps must be regarded as "the determination" of a civil right or obligation.

95. In our judgment, there is no determination of a civil right when a direction is made. There is a procedure for "the determination" of the civil rights because if a section 143 direction is not complied with, then the matter is heard by court. If a direction is made, the issue would be whether the recipient of the direction was acting "without reasonable excuse" and that would require a fact-sensitive decision, which might also depending on the circumstances entail considering the Article 10 and 11 rights of the recipient.

96. This case is different from that in **Wright**. First there is no question of irreparable damage being done to a person against whom a section 143 or section 145 direction or

order is made; the person is not being stigmatised in the way that the claimant was in **Wright**. Second, unlike the position in **Wright**, the detrimental effect is not irreversible because, as these proceedings illustrate, a person liable to receive a direction can go to court and obtain an injunction (as the claimant in this case has done) or the person concerned can raise a defence to proceedings for the offence under section 143(8).

97. The claimant also contends, in reliance on the decision of the Strasbourg Court in **Ekin v France** [Application No. 39288/98), that Article 6 requires prior judicial authorisation before a direction is made. **Elkin** was very different from the position prevailing in the present case; the ban on the publication of a foreign book was imposed by Ministerial Decree under nineteenth century legislation containing sweeping powers to ban foreign books with virtually no safeguards. The decision does not address the issue or whether a prior judicial process was needed.

98. We therefore conclude that the claimant is not entitled to a declaration of incompatibility on the Article 6 ground.

(xv) Conclusions on Issue 2

99. In our judgment, each of the submissions advanced by the claimant in support of her claim for a declaration of incompatibility fails. There has been no infringement of her rights under Articles 6, 10 and 11 of the ECHR. The provisions plainly do not destroy the right of the claimant to her freedom of expression. They are limited and proportionate. In view of the importance of the issue, we grant permission. We dismiss the claim.

VII. Ground 3: Westminster's Decision to invoke the Act infringed the Claimant's ECHR rights.

100. Ms Simor contends that Westminster's decision to enforce the provisions of Part 3 of the Act against the claimant in December 2011 constituted a breach of the claimant's right to freedom of expression and protest under Articles 10 and 11 and Article 1 of Protocol 1 as well as Article 6 of the ECHR. As has already been explained in paragraph 31 above, the claim relating to Article 1 of Protocol 1 is not actively pursued by the claimant, while the Article 6 complaint has been rejected in paragraphs 92 to 97 above. This therefore leaves for consideration the contention that Westminster's decision infringed the claimant's rights to freedom of expression and protest under Articles 10 and 11.

101. Mr Leith Penny, the Strategic Director for City Management employed by Westminster, has been delegated to be responsible for and to make decisions in respect of legislative provisions such as those in Part 3 of the Act. He has explained in a witness statement that Westminster has been concerned for many years to manage the protests in Parliament Square; it had been closely involved with the issues for many years and with the Bill. By taking action against the claimant under Part 3 of the Act, Westminster had sought to reach a balance between the claimant's right to protest on the one hand and on the other hand the use and the general enjoyment of Parliament Square by countless others by ensuring, among other action, that structures used for the purposes of sleeping or staying in the area were removed.

102. Westminster explained that the nature of the claimant's claim was that she was entitled to make her protest by an encampment for an indefinite period on highway in Parliament Square. Its view was that the claimant was in effect seeking that an obligation should be imposed on Westminster to provide her with (or at least permit her to occupy) on a permanent basis a plot of publicly owned land intended for use by the public at large at which she could take up residence in order to carry out her protest in the manner she wished to for as long as she wished to do that. Westminster also took into account the rights of the claimant under Articles 10 and 11 as well as the factors set out in Article 10(2) and Article 11(2), which apply for the reasons set out in paragraphs 84 to 101 above; it attached weight to the fact that Parliament had undertaken a thorough examination of the issues and the limited effect of Part 3.

103. In our view, it was plainly open to Westminster to conclude on the facts of this case that it was entitled to exercise its powers under Part 3. For those reasons we must reject this ground as well. As was the case with regard to ground 1, it is with very considerable hesitation and only because the issue has not been previously decided, we find that this challenge only just reaches the threshold for granting permission. We therefore grant permission, but dismiss the claim on the substantive hearing.

VIII. Conclusion

104. For the reasons which we have set out at some length in deference to Ms Simor's very comprehensive and clear submissions, we unhesitatingly dismiss the applications.