

Moot Competition Instructions

PLEASE READ CAREFULLY

In the following page, you will find a document entitled 'Brief to Counsel' which forms the Moot Problem. You are asked to **prepare Grounds for Judicial Review** and **identify the Order you want the judge to make**.

Please note the following:

1. The submission **must** be your own work.
2. The submission **cannot** exceed **1000 words** (including any authorities cited).
3. The submission **must** be submitted in a legible font and size (e.g. Arial, 11).
4. At the end of your submission, please write the following, **aligned to the right**, as follows:

COUNSEL FOR THE CLAIMANT
DATED
Team XXX

Please note that marking will be anonymous. Accordingly, DO NOT include the names of yourself or your partner, or any other personal information within your submission. This includes any information which may potentially suggest a personal fact about you, such as your location or background.

You also should not write your team number **anywhere else** on the document.

5. Your submission **must** be a **single document**, saved as a **Word Document or PDF** and named as follows:

'Written Submission [YOUR TEAM NUMBER]'

6. Your submission **must** be received by **6:00pm UK time on Friday, 22nd October 2021** via this [Google Form](#).

Please allow enough time before the deadline to comply with these instructions in full. A failure to follow these instructions may lead to your submission being discounted.

To contact the HRLA Young Lawyers' Committee: hrla.younglawyers@gmail.com

HUMAN RIGHTS LAWYERS' ASSOCIATION

HUMAN RIGHTS JUDICIAL REVIEW MOOT COMPETITION 2021

IN THE HIGH COURT OF JUSTICE
ADMINISTRATIVE COURT

IN THE MATTER OF

Regina, on the application of
Ms NINA PATEL

First Claimant

-and-

Mr DAVID SMITH

Second Claimant

-v-

THE COMMISSIONER OF POLICE FOR THE METROPOLIS

First Defendant

-and-

THE DIRECTOR OF PUBLIC PROSECUTIONS

Second Defendant

-and-

THE Highbury Corner Magistrates' Court

Interested Party

BRIEF TO COUNSEL

Counsel is instructed to represent the Claimant and to prepare the Grounds for Judicial Review. Counsel is also instructed to attend any oral hearing of the application for permission, or any substantive hearing, as applicable.

We have set out a summary below of the factual material relevant to the resolution of the issues arising. There is no further information that we are able to provide counsel with. The facts are not in dispute between the parties, as has been confirmed by the pre-action correspondence. Within the pleadings that counsel shall draft we would ask counsel to please highlight any factors considered relevant to the submissions to be advanced. An agreed

summary of the facts, as per the below, has already been filed, so there is no need to recount all of the information which the Court possesses.

SUMMARY OF THE FACTS

The background

The First Claimant, Ms Nina Patel is an adult who is the organiser and director of the organisation Justice for Todd Smith Campaign.

Mr Todd Smith was her ex-boyfriend, with whom she had remained close friends. He worked as a security adviser and officer to the Chinese embassy based in London. On the evening of 15 November, 2008 CCTV showed that he did not return from work to the flat in Southgate, London, where he resided alone. The following morning, at about 10 am, a dog walker discovered his body in a wasteland in East London. He was wearing the suit he wore to work and had been shot twice, the subsequent forensic examination of the pathologist revealing that one bullet entered his chest area and the second shot was at short range into the base of his neck below his skull. The firearm was not recovered. There was no evidence that Todd Smith had discharged a firearm. The time of death was sometime around 11 pm on 15 November. There were additional marks and injuries, including cuff marks to the wrists that had left bruising and scratch marks.

The Second Claimant, Mr David Smith, is the younger brother of Todd Smith. He was aged 17 when his brother was killed.

An initial police investigation, that led to two suspects but no charges, was inadequate and flawed and a complaint to that effect was upheld by what was then the Independent Police Complaints Commission in 2017.

An inquest, conducted in 2009, recorded a conclusion of unlawful killing. The inquest did not hear any information concerning who may be the person or persons responsible; nor what the motive or reasons were or may have been for the killing. A request was made by Justice for Todd Smith Campaign to the Attorney-General for a fresh inquest in 2018 on the grounds of insufficient enquiry, but this was refused on the grounds that there was no new evidence known to the Campaign to be available rendering it is necessary or desirable in the interests of justice that there should be a further inquest convened.

The renewed police investigation was formally closed at the end of 2019: the police indicating to the family and public in its press release that it had uncovered new evidence in 2019 but having referred the matter to the Crown Prosecution Service it had been decided that there was not sufficient prospect of conviction of any suspect at this time. No details have been made public of the details held by the police or any identities of any suspect. The police did indicate that they remained willing to review the matter “should circumstances change”.

Each year since Todd Smith died Ms Patel has organised a memorial event, on the date of Todd's death and commencing around lunchtime, to commemorate his life and also to seek to pressure the police to re-open enquiries. Other friends, and family, of Mr Smith, and supporters of the campaign, also attend annually. The usual number of attendees is in the region of 40-60 people. They would usually gather outside New Scotland Yard, and after some speeches and period displaying banners would process en masse some years to the Houses of Parliament and other years to outside Downing Street, before ending the event. On two occasions some of the supporters have chosen to go off to the Chinese Embassy and shout complaints and challenges, and try to climb some fences to get closer to the building. They were advised on each occasion to leave by the police, and eventually did so, though a supporter named Dale Thompson was issued with a formal warning for disorderly conduct at the 2018 event; and two arrests were made at the 2019 event for obstruction of the highway though no charges were laid.

Ms Patel has never been in any trouble with the police. She works as a carer in a nursing home. David Smith is unemployed. He has one caution for common assault as a youth in 1998, and one shoplifting conviction for which he was Conditionally Discharged by the Youth Court in 1999.

The alleged offences and policing of the same

As counsel knows, on 23 March 2020 the UK entered a national 'lockdown' in an attempt to prevent the spread of coronavirus COVID-19. Of relevance certain regulations were made, with changes to them introduced over time. The regulations made included the *Health Protection (Coronavirus, Restrictions) (England) (No. 4) Regulations* (S.I. 2020/1200) ("the Regulations") implemented on 5 November 2020. Regulation 9 thereof provided, in part, that:

9. — Participation in outdoor gatherings

(1) No person may participate in a gathering which—

- (a) takes place in a public outdoor place and consists of more than two people, or
- (b) takes place in any other outdoor place (including any outdoor part of a private dwelling) and consists of two or more people.

...

(3) Paragraph (1) does not apply if any of the exceptions set out in regulation 11 apply.

Regulation 11 provided that:

11. — Exceptions in relation to gatherings

(1) These are the exceptions referred to in regulations 8, 9 and 10.

Exception 1: same or linked households

...

Exception 2: gatherings necessary for certain purposes

(3) Exception 2 is that the gathering is reasonably necessary—

- (a) for work purposes or for the provision of voluntary or charitable services;
- (b) for the purposes of education or training;

- (c) to provide emergency assistance;
- (d) to enable one or more persons in the gathering to avoid injury or illness or to escape a risk of harm;
- (e) to provide care or assistance to a vulnerable person, including relevant personal care within the meaning of paragraph 7(3B) of Schedule 4 to the Safeguarding Vulnerable Groups Act 2006;
- (f) to facilitate a house move.

Exception 3: legal obligations and proceedings

(4) Exception 3 is that the person concerned is fulfilling a legal obligation or participating in legal proceedings.

Exception 4: criminal justice accommodation

...

Exception 5: support groups

- (6) Exception 5 is that—
- (a) the gathering—
 - (i) is of a support group,
 - (ii) consists of no more than 15 persons, and
 - (iii) takes place at premises other than a private dwelling, and
 - (b) it is reasonably necessary for members of the group to be physically present at the gathering.
- (7) In determining whether the limit in paragraph (6)(a)(ii) is complied with, no account is to be taken of any child who is below the age of five.
- (8) For the purposes of paragraph (6), "support group" means a group or one to one support which is organised by a business, a charitable, benevolent or philanthropic institution or a public body to provide mutual aid, therapy or any other form of support to its members or those who attend its meetings, for example those providing support—
- (a) to victims of crime (including domestic abuse);
 - (b) to those with, or recovering from, addictions (including alcohol, narcotics or other substance addictions) or addictive patterns of behaviour;
 - (c) to new parents;
 - (d) to those with, or caring for persons with, any long-term illness or terminal condition or who are vulnerable;
 - (e) to those facing issues related to their sexuality or identity including those living as lesbian, gay, bisexual or transgender;
 - (f) to those who have suffered bereavement;
 - (g) to vulnerable young people.

Exception 6: respite care

...

Exception 7: births and visiting persons receiving treatment etc

...

Exception 8: marriages and civil partnerships etc

...

Exception 9: visiting a dying person

...

Exception 10: funerals

(13) Exception 10 is that—

- (a) the gathering is for the purposes of a funeral,
- (b) the gathering consists of no more than 30 persons,
- (c) the gathering takes place at premises, other than a private dwelling, which—
 - (i) are operated by a business, a charitable, benevolent or philanthropic institution or a public body, or
 - (ii) are part of premises used for the operation of a business, a charitable, benevolent or philanthropic institution or a public body, and
- (d) the gathering organiser or manager takes the required precautions in relation to the gathering (see regulation 14).

Exception 11: commemorative event following a person's death

(14) Exception 11 is that—

- (a) the gathering is for the purposes of a commemorative event to celebrate the life of a person who has died (for example, scattering ashes or a stone setting ceremony),
- (b) the gathering consists of no more than 15 persons,
- (c) the gathering takes place at premises other than a private dwelling, and
- (d) the gathering organiser or manager takes the required precautions in relation to the gathering (see regulation 14).

Exception 12: elite sports

...

Exception 13: children

...

Exception 14: Remembrance Sunday and Armistice Day

(18) Exception 14 is that—

- (a) the gathering takes place—
 - (i) outdoors in a place which is not a private dwelling to commemorate Remembrance Sunday [or Armistice Day]⁴, or
 - (ii) in Westminster Abbey on 11th November 2020 to commemorate Armistice Day and the centenary of the burial of the Unknown Soldier;
- (b) the persons attending the gathering are limited to—
 - (i) persons there as part of their work,
 - (ii) persons providing voluntary services in connection with the event,
 - (iii) members of the armed forces,
 - (iv) veterans of the armed forces or their representatives or carers, and
 - (v) spectators who participate in the gathering alone or only with members of their household, linked household or their linked childcare household, and

(c) the gathering organiser or manager takes the required precautions in relation to the gathering (see regulation 14).

Regulation 14 read:

14.— The required precautions

(1) The gathering organiser or (as the case may be) the manager in relation to a gathering takes the required precautions for the purposes of this Part by meeting both of the following requirements.

(2) The first requirement is that the organiser or manager has carried out a risk assessment that would satisfy the requirements of regulation 3 of the Management of Health and Safety at Work Regulations 1999 (whether or not the organiser or manager is subject to those Regulations).

(3) The second requirement is that the organiser or manager has taken all reasonable measures to limit the risk of transmission of the coronavirus, taking into account—

(a) the risk assessment carried out under paragraph (2), and

(b) any guidance issued by the government which is relevant to the gathering.

Regulation 20 in part provided that:

20.— Offences and penalties

(1) A person commits an offence if, without reasonable excuse, the person—

(a) contravenes a restriction or requirement imposed under regulation.... 9....,

...

(2) An offence under this regulation is punishable on summary conviction by a fine.

Regulation 23 stated:

23.— Expiry

(1) These Regulations expire at the end of the period of 28 days beginning with the day on which they come into force.

(2) This regulation does not affect the validity of anything done pursuant to these Regulations before they expire.

The Regulations were revoked on 2 December by the *Health Protection (Coronavirus, Restrictions) (All Tiers) (England) Regulations* (SI 2020/1374) (the revocation having effect subject to savings specified in Sch.5 para.5(2)).

In relation to enforcement of the Regulations the Metropolitan Police adopted a policy that was proposed by the National Police Chiefs' Council and which included the approach that:

If there is a problem we want to resolve it by communicating clearly and encouraging people to behave responsibly.

We're following 'the 4 Es': Engage. Explain. Encourage. Enforce. First we will try to engage with someone, explain how we think they are breaking the rules, and encourage them to change their behaviour to reduce the risk to public safety and health.

If people still do not follow the rules the police can:

- *tell them to disperse*
- *tell parents to stop their children breaking the rules*
- *fine them*

If someone continues to ignore the instructions, the police can arrest them if they think it is proportionate and necessary.

Another offence of relevance to the case of Mr David Smith is provided for by section 89(2) of the Police Act 1996 in terms:

(2) Any person who resists or wilfully obstructs a constable in the execution of his duty, or a person assisting a constable in the execution of his duty, shall be guilty of an offence and liable on summary conviction to imprisonment for a term not exceeding one month or to a fine not exceeding level 3 on the standard scale, or to both.

Events that led to the proceedings before the Magistrates' Court

In October 2020 the Justice for Todd Smith Campaign executive members met over an internet video link to discuss the preparations for the annual event. David Smith was not present and is not a member of the committee. It was unanimously decided that in light of the restrictions the annual event would be cancelled. However in order to ensure that something marked the date and continued aims of the campaign, it was decided that Ms Nina Patel would meet with media organisations at the usual location outside New Scotland Yard, and that whilst they would not gather, two other members of the campaign would stand more than 2 metres apart. The meeting was not minuted. On social media platforms it was subsequently announced that the annual event was cancelled. There was great disappointment expressed, with some supporters suggesting they might turn up anyway.

Ms Patel was contacted by the Metropolitan police and asked if she was intending to hold her annual event, and warning her that that would breach the Regulations and was illegal. She responded to the police by email (to Civilian Officer Gray, who had emailed Ms Patel) and informed them:

“We have cancelled this year’s event. We did not want to breach the restrictions in the lockdown. Instead I will be meeting some journalists for a short interview and photograph or recording on the day. There will be two other people from the Campaign with me and we will socially distance. I will be doing that at the usual place and don’t see that this is anything that would be illegal, and I would appreciate it if you would spend more of your time actually investigating murderers rather than harassing us law-abiding and peaceful citizens”

In response on 12 November 2020 the police emailed Ms Patel and info@Justice4Todd.com and stated that the proposed event was illegal and prohibited by the Coronavirus regulations which do not allow gathering of 2 or more persons outdoors, and even social distancing would not mean that this is not a gathering. The police invited the recipients to meet with the Deputy

Commissioner to discuss the investigation and any concerns they have. Ms Patel, and the additional email address, did not reply.

On 15 November 2020 Ms Patel travelled by the London Underground and a short walk to meet two journalists outside New Scotland Yard. When she arrived, at midday, there were four people stood around, two carrying microphones, one with a large video-camera on his shoulder, and a woman stood some distance away from the others looking at her telephone and who wore a t-shirt with “Justice for Todd Smith” written on it. Ms Patel did not recognise any of them. She approached the persons she took to be the journalists and engaged in an interview with one and then another. Over the course of the 30 minutes or so that this went on a group of people gathered to watch, which contained a few faces that Ms Patel recognised, and some who appeared to be members of the public walking past who stopped out of interest. Most were stood apart from one another, and around half were wearing face masks. Some carried banners that bore references to the Campaign. There were also police officers stood around; a group of six in riot gear with shields, batons, and metal helmets with pull down plastic face pieces on her right side, outside the main doors to the Yard. On her left were three others, one of whom was wearing a hat that marked him out as a different higher rank than the others who wore normal police helmets, and the senior one was engaged in a discussion with a man known to Ms Patel to be David Smith, the brother of her ex-boyfriend Todd. The discussion appeared heated. She could not hear the content of the conversation.

Except for when speaking on camera to the journalists Ms Patel had a face mask on throughout the event. She greeted some of the people present whom she knew. One had a loud-hailer in his hand. After around 15 minutes Ms Patel made a speech (It is Ms Patel’s case that this was suggested to her at that time, but the police are unable to confirm or deny that). As she began people moved forward to congregate in her vicinity. She spoke for around 10 minutes, and during her remarks she was highly critical of the police investigation, the inquest conduct and outcome, and the lack of information from the Chinese Embassy and engagement with the police inquiry, and she thanked all the supporters of the campaign for attending and their continued support year-round. After she finished her address the gathering dispersed relatively quickly. She returned home alone. Sadly the interviews she gave were not broadcast, as other events consumed the news that day, but a very short written article appeared in the local newspaper the Southgate Chronicle the following week.

David Smith arrived at New Scotland Yard at 12.20pm. He was wearing a jacket emblazoned with the words “Justice for Todd Smith”, and held a large placard bearing the words “Fuck the Police – Failed to give justice to my brother – Rise Up”. On his arrival he saw a small group gathered to one side with a cameraman in their midst, and saw others stood about. He saw a man he knew as a longstanding friend of his brother’s, and attended the same school as David and Todd. He greeted him and began to speak to him, whilst holding the placard. Within a minute or two he was approached by a uniformed policeman who identified himself as Inspector Apples. The following exchange took place:

Apples: What’s this all about? Where’s your mask?

D. Smith: Are you joking? It's because you lot, the force you work for, have failed to bring to justice my brother's killers! And I don't wear a mask.

Apples: Okay, so I understand you are here for the Justice for Todd Smith Campaign, but why are you carrying that? [*indicates the placard*]

D. Smith: I can say what I want. That's the truth – you lot need to be taught a lesson or you will just continue your cover up of the truth

Apples: Okay, but you cannot be gathering here, and your sign is offensive...

D. Smith: Just leave me alone – you're a penguin in a uniform and I don't want to talk to you. I hope it all kicks off and you are the first one to get it.

Apples: Okay, thanks for your feedback, but it is really important that we all abide by the Covid rules isn't it, so we don't have more people becoming sick and dying, there's been over 100,000 deaths and we need to stay at home to protect the NHS and protect vulnerable people

D. Smith: Yes I am not arguing with that, but this is important too – and I will fight for it till I die

Apples: Yes, I know it's important, but you have other ways to make your point, so you are going to have to find some other way to make your point

D. Smith: I am making my point here and now

Apples: Well, then I am going to issue you a fixed-penalty notice because you are breaching the rules against gathering in a public place

D. Smith: Do whatever, you make me sick, you are scum

Apples: What is your name and address?

D. Smith: I don't have to tell you

Apples: Well, I am either going to give you a fixed penalty notice or I am going to arrest you so that you can be charged, and I won't give you a choice to pay the fixed penalty if that happens

D. Smith: Okay, so have a guess at my name then – I will give you three tries

Apples: If you don't give me your real name you will be arrested

D. Smith: You are a joke you are, a disgrace, you are a Nazi

Apples: Okay I am arresting you under the powers of section 24 of the Police and Criminal Evidence Act 1984 because I have reasonable grounds to suspect that you are committing an offence and I have reasonable grounds to believe that your arrest is necessary to enable your name to be ascertained.

D. Smith: This is ridiculous, you lot know who I am, and this is totally unfair

Mr Smith moved one pace to his right side, and Inspector Apples took two steps reached out and grabbed Mr Smith's arm, stopping him from moving any further. Mr Smith was taken away into police custody. He was searched in custody and his wallet contained his identification, which he confirmed to police was his.

The police estimated that there were between 15 and 20 people in total participating in the gathering. The officers recorded events by Body Worn Video cameras and CCTV was in operation throughout covering the area outside the police building. This footage has been viewed by all parties and is consistent with the above exposition of the facts (save where indicated above to be outwith the police footage).

Mr Smith was charged with the offences below and released. Ms Patel was asked to attend the police station at a later date, where she was also charged. Neither was interviewed in relation to the matter.

Mr David Smith is upset and angered at his arrest. He feels this was unnecessary and unprovoked, and the police were aggressive and unprofessional in their dealings with him. He feels it should have been handled much better and did not need to develop as it did. They were insensitive to his reasons for being there.

Our clients have raised concerns that the prosecution is unfair and a violation of their rights. They question whether the prosecution is lawful and whether it is right that they should face a prosecution when they feel they had no choice but to gather for the reasons they did.

The police charge sheets read:

Breach of COVID Regulations – Participate in gathering outdoors

On 15 November 2020 in London, without reasonable excuse, other than as permitted by the Regulations, NINA PATEL and DAVID SMITH, participated in a gathering in a public outdoor place, namely outside New Scotland Yard, which consisted of two or more people.

Contrary to regulations 9(1)(a) and 20(1)(a) and (2) of the *Health Protection (Coronavirus, Restrictions) (England) (No. 4) Regulations 2020*.

Obstruction of a Police Officer in the execution of his duty

On 15 November 2020 in London, without lawful excuse, DAVID SMITH, wilfully obstructed a constable, namely Inspector Apples, in the execution of his duty, namely by giving a false name.

Contrary to section 89(2) of the Police Act 1996

The CPS were not asked to authorise charge, but have taken over conduct of the proceedings and have decided to continue the prosecution, the reviewing lawyer stating that:

‘I am satisfied that the public interest is served by a prosecution. I have considered all of the circumstances including the reason for the gathering in question, and Article 10 and 11 of the ECHR. I am aware that the alleged breaches of the regulations took place during a global pandemic. There have been over 100,000 deaths within 28 days of a positive Covid 19 test in the UK alone. I am satisfied that the behaviour amounted to a deliberate breach of the regulations. I am satisfied that a prosecution is justified because of the seriousness of the offence, the level of culpability in question and the impact on the community. Prosecution, in this case, is a proportionate response to the alleged behaviour. I am satisfied that both the evidential test, and the public interest test are met.’

Proceedings at the Magistrates' Court are awaiting the outcome of this proposed judicial review challenge. The Court has decided, with the agreement of all parties, that the matter should be dealt with at the High Court and in its discretion declined to determine the issues raised in bar to continuation of the criminal proceedings. The Defendants have agreed that there is no issue in this case as to whether or not there is any alternative to bringing the proposed judicial review.

GROUND

Counsel is instructed to kindly identify and advance particular grounds of claim upon which the Court is to be asked to find that:

1. The arrest of the Second Claimant, Mr David Smith, was unlawful; and/or
2. The prosecution of the Claimants is a violation of their rights protected by the European Convention on Human Rights, as given effect in domestic law.

Counsel should please identify the Order that it is requested that the Court shall make if counsel's submissions are accepted.

Unusually, there is no requirement for counsel to deal with costs issues in this case. For reasons we need not go into it has been agreed that neither party shall seek an order for costs whatever the outcome.

28.8.21

Philip Rule, No5 Chambers ©

[end of moot problem]
