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Fighting back: defending the right to protest

Katie de Kauwe explains how Friends of the Earth is taking legal action to support the right to protest against fracking. This article was amended on 30 November 2023 to reflect updates from a Supreme Court Appeal.

The last few years have shone a light on the vital importance of the right to peaceful protest.

Movements such as the school climate strikes and other environmental protests are contributing to a massive transformation in climate change discussions around the world. In October 2018 the Intergovernmental Panel on Climate Change's report set out the catastrophic impacts for the world if global warming is not restricted to 1.5°C above pre-industrial levels.

On 3 May 2019 the UK parliament declared a national climate emergency. Shortly afterwards, it enacted a target to reach net zero greenhouse gas emissions by 2050. That response threw into stark relief just how important the right to protest is. It shows that government policy can be positively influenced by the actions of citizens.

So if protest can be a catalyst for making a better society, then surely the law should make space for it? We think so, and this is actually recognised in law, even when the protest might be disruptive or cause inconvenience to others to some degree.

In recent years we've seen a massive clamp down on peaceful protest, with a series of pieces of high-profile authoritarian legislation creating new protest offences, increasing police powers and punitive punishment. Much less well known is the huge growth in the use of wide-ranging civil injunctions taken out by both public authorities and private companies, including oil and gas companies. These have created a confusing parallel system of prohibitions on protest. We believe that these injunctions have a chilling effect on freedom of speech and the right to express dissent.

And in the context of a national climate emergency, resisting fracking and other fossil fuel industries and voicing dissent are absolutely imperative. We urgently need to move away from fossil fuels and to promote renewable sources of energy – not encourage the fossil fuel industry to continue or support the emergence of yet another fossil fuel project to complement or replace the others.

So Friends of the Earth has helped to fight these injunctions. In March 2019 we intervened in the Court of Appeal to support the legal challenge to INEOS' injunction brought by campaigners Joseph Corré and Joseph Boyd. We did this to stand up for the right to protest.

The power to say no

Fracking and other forms of onshore oil and gas extraction are highly controversial. According to a government survey published back in July 2019, only 15% of the public support fracking.

https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/817872/BEIS_Public

For the anti-fracking movement, protest has and continues to play a vital role in peacefully resisting fracking developments. Around Europe, numerous countries have said no to fracking due to dissent from local communities and campaigners. <https://www.theguardian.com/news/2018/feb/26/fracking-the-reality-the-risks-and-what-the-future-holds>

In the UK, fracking developments led to significant protests within the communities where they took place. The majority are peaceful, involving people motivated by good-faith beliefs to protect the environment and safeguard the rights of future generations. A particularly effective and inspiring group were the Nanas, a collective of women in Lancashire who worked tirelessly to oppose fracking at Preston New Road.

The oil and gas industry's response to these protests was disproportionate and draconian. Collectively, they've obtained five wide-ranging "persons unknown" injunctions prohibiting "unlawful" protest for sites across 10 counties.

Local communities fighting fracking developments epitomised the classic David and Goliath battle. Their adversaries were powerful corporations, with far greater financial resources and extensive professional and legal expertise to call on. David's sling shot defeated Goliath. But what happens if a crucial defence is taken away?

For local communities the right to peaceful protest, like David's sling shot, is a powerful weapon to fight fracking and other fossil fuel developments. Safeguarding it is therefore essential. A fracking moratorium was adopted in this country in November 2019, following sustained resistance from communities to this industry. Prime Minister Liz Truss lifted the ban briefly in 2022, but it was again reinstated following opposition from local communities. It's clear that without this community resistance, fracking in this country would not have been defeated. And it had to be defeated if we were ever to seriously tackle climate change.

Why the INEOS injunction had a chilling effect on protest

INEOS is a multinational petrochemicals company, with an estimated worth of £35 billion (reported in February 2019)<https://www.theguardian.com/business/2019/feb/17/brexiter-jim-ratcliffe-uk-richest-man-plans-save-4bn-pounds-tax-monaco-move>. Its principal shareholder is Sir Jim Ratcliffe, Britain's richest man. INEOS obtained an "anti-protest" injunction in the High Court in 2017 in relation to 8 of its sites.

The injunction was draconian, wide-ranging and unclear. It was brought against persons unknown, rather than against named individuals, so that it could be enforced against anyone in breach of its terms. Its effect: to deter citizens from exercising their democratic right to dissent. It extended far beyond unlawful protest, to include activities such as slow-walking – an established technique of protest which has been regularly deployed and facilitated by the police. Its vagueness and ambiguity made it unclear to citizens what conduct was prohibited. Yet breaching it risked imprisonment and asset seizure. A climate of fear was the inevitable consequence.

And it didn't stop there. INEOS' injunction was used as a template for similar orders subsequently granted to 4 other companies: Cuadrilla, IGas Energy, UK Oil & Gas (UKOG) and Angus Energy. An alarming pattern was emerging. Oil and gas companies were taking out wide-ranging, persons unknown "anti-protest" injunctions on a routine basis.

Yet public order issues are ordinarily dealt with by the criminal law and the criminal courts. The decision on whether to bring a prosecution rests with the Crown Prosecution Service (CPS), which must consider whether it's in the public interest. But obtaining one of these injunctions enables a private company to bring enforcement proceedings in the civil courts, without any such consideration, against anyone allegedly in breach.

The effect is a privatisation of public order matters with the CPS and police replaced by corporate lawyers and private security firms. And in these civil proceedings, both the costs risks for defendants, and the penalties for breach of an injunction are potentially much greater than for the corresponding criminal offence.

Our intervention in the Court of Appeal – a victory for civil liberties

The appeal brought by Corr e and Boyd against INEOS' injunction was heard in March 2019 in the Court of Appeal. The result was a tremendous victory for civil liberties. Through our intervention Represented by Henry Blaxland QC and Stephen Clark of Garden Court Chambers, and Michael Oswald of Bhatt Murphy Solicitors in the case we helped to reverse a dangerous trend, whereby claimants could obtain incredibly wide-ranging injunctions as a matter of course.

The judgment was a humiliating defeat for INEOS, which was left with its injunction in tatters.

The Court of Appeal recognised that the right to protest was protected under both the common law and Article 11 of the European Convention of Human Rights. It found that INEOS' injunction had been granted unlawfully and ordered extensive changes to safeguard citizens' right to express dissent.

Two key aspects of INEOS' injunction were completely knocked out:

- Persons unknown unlawfully causing loss to INEOS by “combining together” and protesting against INEOS’ suppliers and
- Persons unknown protesting on the public highway, using tactics such as slow walking.

Both of these aspects were hugely significant and have wide-ranging effects on protest.

The surviving elements of the injunction relate to private land only. Even here the Court was not satisfied.

The importance of the Human Rights Act

INEOS was ordered to go back to the High Court, so that the correct test under the Human Rights Act 1998 (HRA) could be applied to determine if its heavily reduced injunction could remain. And if so, for a time limit to be imposed for the life of the injunction.

All of this underscores the importance of the HRA. In recent times it has come under fire and some have called for it to be got rid of altogether. This case neatly demonstrates the practical importance of the HRA for safeguarding fundamental freedoms.

Using the ruling to challenge other anti-protest injunctions

The INEOS injunction is a stark example of how the law can be used by powerful economic interests to undermine citizens’ rights. Crucially the case shows that while the law can be used to restrict freedoms, it can also protect and safeguard them too.

Friends of the Earth believed that following the INEOS result, there were clear implications for other anti-protest injunctions.

Challenging Cuadrilla’s injunction

Following the INEOS victory, we sought to take Cuadrilla to court to challenge its injunction at the fracking site at Preston New Road, Lancashire and reduce its impact on peaceful protest.

We did this to defend the right of the community in Lancashire to peacefully voice their dissent to a fracking development which has been forced on them by central government. The community had said no to fracking, and the local authority rejected Cuadrilla’s application for planning permission to frack at its Preston New Road site. However, that decision was overturned by the Secretary of State, riding roughshod over local democracy in the process. But the community did not give up and continued to voice its resistance to fracking. In taking Cuadrilla to court over its draconian injunction, we stood shoulder to shoulder with them.

In May 2019 we sent a formal letter before action to Cuadrilla. We told the company that it needed to amend the injunction in the light of the INEOS result or face legal action. It refused. So in June 2019 we filed a court application to vary Cuadrilla’s injunction in the High Court in Manchester. We believed that key aspects of its injunction are unlawful on human rights grounds, just as they were for INEOS.

Frustratingly, it proved impossible for us to complete the legal action, as we were priced out of court. Cuadrilla threatened us with an £85,000 legal bill if we lost, and the High Court judge refused to grant us any cost protection. We therefore had to withdraw from the proceedings. This case was a stark

example of the significant cost risk that someone seeking to challenge these injunctions faces and the enormous inequality of arms, in terms of financial resources, that can often exist between private companies that obtain these injunctions, and people and groups seeking to challenge them.

Cuadrilla also took enforcement proceedings against 3 peaceful protestors, accusing them of breaching its injunction. In September 2019, the High Court found these people guilty of contempt of court. But it did also reduce the scope of Cuadrilla's injunction, following the application to vary made by the 3 protestors, who were in receipt of legal aid.

Supporting the Sussex and Surrey 6

It's notable that much of the opposition to fracking and other unconventional hydrocarbon extraction in this country has been led by women.

In 2018, we joined [6 brave Sussex and Surrey women](#) as defendants to challenge an anti-protest persons unknown injunction granted to UKOG. Together, we succeeded in persuading the High Court to cut its proposed injunction, so that it did not include prohibitions on "instructing or encouraging" protest or direct action. Even after this, we believed that it was still far too wide-ranging. So together, we filed an appeal to the Court of Appeal, but ultimately the case did not proceed to a hearing, as UKOG agreed to reduce the scope of its injunction following the Ineos ruling.

The "Sussex and Surrey 6", as they became known, continued to resist the UKOG anti-protest persons unknown injunction at a full trial at the High Court based on the current facts (as opposed to those in play when it was originally granted). In June 2021, the High Court granted a final injunction on a limited basis against 5 named individuals only, not against persons unknown.

Injunctions reach the Supreme Court

As well as being obtained against protesters, since 2015 persons unknown injunctions have increasingly been used to ban Gypsy and Travellers from stopping on large areas of land by various local authorities. The rate at which these so called "borough-wide" injunctions were being obtained was described as a "feeding frenzy" by one court. The nomadic Gypsy and Traveller communities face huge persecution, and their way of life has also been targeted by legislation in the Police Crime Sentencing and Courts Act 2022, which included new anti-protest laws, both of which Friends of the Earth opposed.

3 organisations representing Gypsy and Traveller communities (Friends Families and Travellers, London Gypsies and Travellers, and Derbyshire Gypsy Liaison Group) had been fighting the injunctions through the courts. They were given permission to appeal to the Supreme Court in a landmark case which, it was clear, could also have implications for anti-protest injunctions. Friends of the Earth and Liberty intervened to support the case.

In November 2023, the Supreme Court issued its judgment. It ruled that stringent conditions would need to be satisfied to justify the use of these injunctions in relation to "unauthorised encampments" by Gypsy and Traveller communities. However, the Court did not expressly extend these safeguards in the context of protest. Gypsy and Traveller communities face widespread discrimination and a chronic shortage of allocated sites for them to use. This case is therefore a welcome development in terms of the rights of Gypsy and Traveller communities, and we're proud to have been able to play a

supporting role in helping to bring this about.

It was however a disappointing result in terms of protest rights; far less guidance was given by the Supreme Court in this area. Private corporations and public authorities are likely to continue to seek these injunctions in this context. Read our [briefing on the judgment](#) to understand more.

Why does this matter?

Successful campaigning can only happen if people's right to participate in decision-making is recognised and respected. [Our protest guidance](#) contains information on key laws relating to protest, and tips on how to organise a protest. As a grassroots campaigning organisation, Friends of the Earth has a proud history of defending people's rights to information and freedom to protest. In October 2018 we intervened in the sentencing appeal of the [Frack Free Three](#), in which the Court of Appeal quashed the custodial sentences handed to three peaceful environmental protesters and released them from jail.

For many years, [our legal team](#) has played an active role in championing the right of citizens and communities to access environmental justice and to participate in decisions that affect them, our environment and the future of us all.