



10-Minute Read:

“Repugnant to Ordinary Notions of Fairness”?

The Crime of Leaving Your House

By [Catherine Rose](#)

On a sunny afternoon in April 2020, a couple sit on the grass in Finsbury Park, North London. A police officer approaches them. A month later, they plead Not Guilty at Highbury Corner Magistrates’ Court to an offence of Leaving/Being Outside Home Without Reasonable Excuse, contrary to Regulations 9(1) and 6(1) of the [Health Protection \(Coronavirus, Restrictions\) \(England\) Regulations 2020](#) (as amended). Two months later, they attend court again for trial.

The Crown’s case is that the couple were having a picnic (not a reasonable excuse). The officer gives evidence that each had a tote bag in their possession, one containing houmous and the other containing Quinoa Chips. The couple give evidence that they were taking a short break from their 5km run (a reasonable excuse). They were wearing sports kit and were both a bit sweaty. The lay bench of magistrates finds the Crown’s version of events *slightly* more convincing than the defence case.

Are the couple convicted or acquitted? The answer depends on where the burden of proof lies, and on that point (as with so much else) the Regulations are eerily silent. History, however, provides us with three possible answers.

Burdens of Proof

- **(1) *The Golden Thread***: the prosecution bears the burden of proving all elements of the offence beyond reasonable doubt. Following this approach (dubbed the “golden thread” of English criminal law by Viscount Sankey LC in *Woolmington v DPP* [1935]

AC 462) the couple would be entitled to acquittal. But it is subject to exceptions, one of which is...

- **(2) The Reverse Burden:** pursuant to s.101 Magistrates' Court Act 1980, "*where the defendant [...] relies for his defence on any exception, exemption, proviso, excuse or qualification [...] the burden of proving [it] shall be on him*". Where the burden of proof is on a defendant, they must only prove their defence on the lower "balance of probabilities" rather than "beyond reasonable doubt". But even so, on the magistrates' analysis, our young lovers would be doomed, were it not for...
- **(3) The Evidential Burden:** with the Human Rights Act 1998 came an opportunity to challenge reverse burdens implied into statute by s.101 MCA 1980 on the basis of incompatibility with Article 6(2) ECHR ("*everyone charged with a criminal offence shall be presumed innocent until proved guilty according to the law*"). If a reverse burden is challenged and found to be incompatible with Article 6, it is ordinarily "read down" by the court to an evidential burden only (rather than a legal burden). Our couple having raised sufficient evidence of their defence so as to make it a live issue in the trial, the burden would shift back onto the Crown to disprove their defence beyond reasonable doubt. And thus, our couple would be saved.

So, the real question is: would an implied reverse burden within the Leaving/Being Outside Home Without Reasonable Excuse offence be compatible with Article 6?

Principles and Factors to be Considered

Lord Bingham in *Sheldrake v DPP* [2005] 1 AC 264 at [21] summarised the core principles of ECtHR jurisprudence, which include that:

- the fairness of the trial is the overriding concern, of which a fundamental part is the presumption of innocence;
- the ECHR allows for presumptions of law adverse to the defendant, provided they are reasonable and proportionate; and

- reasonableness and proportionality will be assessed “*on examination of all the facts and circumstances of the particular provision as applied in the particular case*”.

Although the determination of compatibility is therefore case-specific, some common factors arise from the numerous domestic cases on this point (the key authorities being *Lambert* [2002] 2 AC 545 and *Johnstone* [2003] 1 WLR 1736):

- a) whether *not* having the reverse burden would cause the prosecution real difficulties in prosecuting the offence;
- b) the extent to which the facts that would have to be proved by the defendant would be easily provable by him as matters within his own knowledge or to which he readily has access;
- c) the extent of the facts that would have to be proved by the defendant, and their importance relative to the matters that would have to be proved by the prosecution;
- d) the strength of the public interest in preventing the type of offending; and
- e) the maximum sentence for the offence (the more serious the punishment, the more compelling the reasons must be for placing a legal burden on the defendant).

Applying These Principles and Factors

Most of these factors (indeed, all of them save for (c)) weigh on the side of a reverse burden in the Leaving/Being Outside Home Without Reasonable Excuse offence being compatible with our couple’s Article 6 rights.

- Firstly, it goes without saying that the public interest in preventing the spread of Covid-19 is extremely high.
- Secondly, the maximum sentence is a fine which, although unlimited, is minor as far as the criminal law is concerned. For comparison, in *L v DPP* [2001] EWHC 882 (Admin), the High Court, in finding that the reverse burden for [Possession of a Blade in a Public Place](#) was compatible with Article 6, placed weight (although only a limited amount) on the relatively restricted maximum sentence of 4 years’ imprisonment.
- Finally, it will be easier for a defendant to prove that they had a reasonable excuse than for the Crown to disprove it. The reason for a defendant leaving or remaining

outside of their home is a matter within their own knowledge and which they can prove by giving evidence. The Crown, on the other hand, would be in the position of having to prove a negative (that the defendant had no reasonable excuse) – a task that could cause them real difficulties.

A court considering compatibility might therefore come to the conclusion that this interference with the presumption of innocence is reasonable and proportionate. But that would be to ignore the remaining factor, which weighs heavily against compatibility: (c) *the extent of the facts that would have to be proved by the defendant, and their importance relative to the matters that would have to be proved by the prosecution*. It will always be for the Crown to prove that the defendant was not at home, but this is unlikely to be the contentious issue in the vast majority of these cases. The verdict will turn on the question of reasonable excuse. Placing the burden of proving the only matter in issue on the defendant is a grave step.

Another way of thinking about this is: where does “*the essence of the offence*” lie? That was a question posed by the Court Appeal in the third appeal within *A-G’s Ref* (No. 1 of 2004) [2004] EWCA Crim 1025. The court considered the offence of [Unlawfully Evicting an Occupier](#), and the defence that the landlord had a reasonable belief that the occupier had ceased to reside at the premises. The essence of the offence, the court said, is the unlawful eviction. It is that which the public interest was concerned with preventing, and that which the Crown had to prove. The defence was available only if the defendant could bring himself within a narrow class of exception and it was reasonable to place the burden on him to do so.

Contrast this with the Leaving/Being Outside Home Without Reasonable Excuse offence. The essence of the offence is not in someone simply leaving or remaining outside their home; it is in that person not having a reasonable excuse for doing so. The blame, and the public interest in prevention, lies in the latter part of the offence. Further, the “reasonable excuse” in this offence is the very opposite of a “narrow class of exception”; it is what we all rely on every time we leave our homes during this lockdown period. If the onus should be on the Crown to prove the essence of the offending, then the Crown should have to prove that there is no reasonable excuse.

Were this not the case – if the essence of the offending was simply in leaving or remaining outside one’s home, and it was only that which the Crown had to prove – it is also arguable that the offence would be so wide, and potentially catch so much blameless activity, that there would be a real risk of unfair convictions. It would allow for the prosecution of anyone and everyone who leaves their home, without there being any other suspicion of wrongdoing.

Similar considerations were taken into account by Lord Bingham in *Sheldrake v DPP*, in relation the offence of [Belonging or Professing to Belong to a Proscribed Organisation](#), and the defence that the organisation was not proscribed at the time of the alleged offence, or that the defendant did not take part in any activities with the organisation. The court held that the breadth of the offence and the uncertain scope of the word “profess” were such that some of those liable to be convicted could be guilty of no blameworthy conduct that would properly attract criminal sanction. It would be such a clear breach of the presumption of innocence and carry a real risk of an unfair conviction if the defendant could only exonerate himself by establishing the defence, and it was the clear duty of the courts to protect an accused from this risk.

Lord Bingham also said at [9]: *“it is repugnant to ordinary notions of fairness for a prosecutor to accuse a defendant of crime and for the defendant to be then required to disprove the accusation on pain of conviction and punishment if he fails to do so. The closer a legislative provision approaches to that situation, the more objectionable it is likely to be.”* Were there a reverse burden in the offence of Leaving/Being Outside Home Without Reasonable Excuse, it would certainly be approaching that situation. It may even have arrived at it. Provided an individual was outside of their home, the Crown would have to do little more than point the finger, with the onus being on the defendant to carry the rest of the trial.

As a result, the courts may well find that the *importance of the facts/essence of the offence* factor is serious enough to outweigh the multiple factors in favour of compatibility. The burden would thereby be read down to an evidential one, and the couple in our example acquitted.

Ultimately, when it comes to questions of proportionality, two courts can often (reasonably) come to two different conclusions. A decision from a higher court is required for certainty. In the meantime, practitioners should be aware of the numerous authorities in this area and be prepared to address the court on where the burden should lie. The complexity of this issue may provide grounds to argue that it would be in the interests of justice for Legal Aid to be granted (on the basis that [a substantial question of law may be involved](#)), a Certificate for Counsel would be appropriate (on the basis that [the proceedings are unusually difficult](#)), and/or that the case should be heard by a District Judge.

Catherine's practice encompasses crime, extradition, consumer and trading standards work. She has experience beyond her call prosecuting and defending in the Crown Court and has conducted jury trials involving offences of violence, weapons, drugs and driving. Catherine has acted in numerous consumer and trading standards prosecutions using secondary legislation and local authority powers. She has a particular interest in the intersection of human rights and criminal law and has experience making rights-based submissions in the context of public order and extradition cases.

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